



1965

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CANADA  
**LAW REPORTS**

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**RAPPORTS JUDICIAIRES**  
DU CANADA

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**Exchequer Court of Canada**  
**Cour de l'Échiquier du Canada**

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**JUDGES**  
OF THE  
**EXCHEQUER COURT OF CANADA**

*During the period of these Reports:*

PRESIDENT:

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

PUISNE JUDGES:

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

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

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

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

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

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

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

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OF CANADA

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

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

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

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

The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961.

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

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

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The Honourable LUCIEN CARDIN

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The Honourable L. T. PENNELL

# JUGES

DE LA

## COUR DE L'ÉCHIQUIER DU CANADA

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

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L'HONORABLE WILBUR ROY JACKETT  
(nommé le 4 mai 1964)

JUGES PUÎNÉS:

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(nommé le 1<sup>er</sup> novembre 1951)

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(nommé le 12 mars 1962)

L'HONORABLE ANGUS ALEXANDER CATTANACH  
(nommé le 27 mars 1962)

L'HONORABLE HUGH FRANCIS GIBSON  
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L'honorable L. T. PENNELL

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## **CORRIGENDA**

**At page 252, footnote 6, the page number of the report cited should read 341.**

**At page 501 in the first line c. 203 should read c. 49.**

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TO THE  
SUPREME COURT OF CANADA

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**CASES**

DETERMINED BY THE

**EXCHEQUER COURT OF CANADA**

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE  
JURISDICTION

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**CAUSES**

ADJUGÉES PAR

**LA COUR DE L'ÉCHIQUIER DU CANADA**

EN SA JURIDICTION DE COUR  
DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

2

3

BETWEEN :

ROBERT C. WIAN ENTERPRISES, INC. . . APPLICANT;

AND

DAVID MADY, GEORGE MADY, )  
ALBERT MADY, NORMA MADY )  
and MICHAEL MADY trading under )  
the firm name or style of "BIG BOY )  
DRIVE-IN" and MADY'S BIG )  
BOY LIMITED . . . . . )

DEFENDANTS.

1963  
}  
Feb. 4-8  
1965  
}  
Jan. 11  
—

*Trade Marks—Registration—Expungement of registration—Validity of registration—Confusion of trade marks—Trade mark made known in Canada—User of trade mark not registered under Trade Marks Act by person other than plaintiff—Circulation of publications in the "ordinary course of commerce"—Trade mark made known by a person by advertising sponsored by someone else—Affidavit evidence that something is "well known in Canada"—Method of obtaining affidavit evidence that something is "well known in Canada"—Meaning of "well known in Canada"—Burden of proving no abandonment of trade mark—Requirement that registrant be satisfied he is entitled to use trade mark sought to be registered—Effect of lack of statement in application that applicant satisfied he is entitled to use trade mark sought to be registered—Trade Marks Act, S. of C. 1953, c. 49, ss. 2(n), (o) and (t), 5, 6(1) and (2), 16, 17(1), 18(1), 19, 29, 49, 56, 57 and 58(3).*

The plaintiff (applicant) seeks the expungement of the registration of two trade marks registered by the defendants "Big Boy Drive-In" registered as No. 103,521, and "Big Boy" registered as No. 105,286, the entries in the Register in the case of both trade marks showing that they have been used in Canada since April 12, 1955. The trade mark "Big Boy Drive-In" relates to services, namely, "The dispensing of various types of food and specifically a hamburger" and the trade mark "Big Boy" relates to wares, namely, "Hamburgers".

The grounds upon which the plaintiff seeks to have the registrations expunged are that the registrations are invalid because on the date of first user, accepted by the parties as being April 12, 1955, each of the two trade marks was confusing with a trade mark that had been previously made known in Canada "by any other person" within the meaning of s. 16(1)(a) of the *Trade Marks Act*, and that the defendants were not satisfied that they were entitled to use their trade marks in Canada as required by s. 29, para. (i) of the *Trade Marks Act*.

*Held:* That in order to show that the trade marks under consideration were, prior to April 12, 1955, made known in Canada by some other person, the plaintiff must establish that, (a) the trade marks were, prior to April 12, 1955, used by the plaintiff in the United States in association with wares or services, (b) that such wares or services were, prior to April 12, 1955, advertised in association with the trade marks in (i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of such wares or services, or (ii) radio broadcasts, as defined in the *Radio Act*, ordinarily received in Canada by potential dealers in or users of such wares or services, and (c) that such trade marks had, prior to April 12,

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- 1955, "become well known in Canada" by reason of "such . . . advertising".
2. That to bring itself within the exception under s. 16 of the *Trade Marks Act*, the plaintiff must establish that each trade mark attached was "confusing" with a trade mark that had been made known in Canada in the manner set out in s. 5 of the Act at the date on which the applicant for registration of the trade mark "first so used it".
  3. That in addition to having established that the trade marks had been "made known in Canada" by the plaintiff itself prior to April 12, 1955, within the meaning of those words as defined by s. 5 of the Act, the plaintiff must also have discharged the burden imposed upon it by s. 17(1) of the Act, of showing that it had not abandoned the confusing trade marks at the date of advertisement of the defendant's applications and it must have established that the trade marks attached were "confusing" with the trade marks so made known within the meaning of that word as defined by s. 6 of the Act.
  4. That regardless of the effect of United States legislation in relation to the facts of this case, user by some person other than the plaintiff of trade marks that are not registered under the Canadian *Trade Marks Act* cannot be regarded as user by the plaintiff of these trade marks for the purposes of s. 5 of the Act by virtue of s. 49 thereof.
  5. That the provisions of s. 49 of the *Trade Marks Act* cannot, by any strain placed on their words, be interpreted as applying to user that is not in accordance with a registration under that section in respect of a trade mark that is registered under the Canadian Act.
  6. That s. 49 of the *Trade Marks Act* has no application to user of a trade mark registered under United States law by a person other than the registered owner pursuant to some United States legislative scheme for letting persons other than owners of trade marks use them for distinguishing their goods or wares.
  7. That the plaintiff's attack on the defendants' registrations by virtue of the wording of s. 16 of the *Trade Marks Act* fails because the plaintiff has failed to establish "user" of its United States trade marks by it in the United States.
  8. That circulation of publications in the "ordinary course of commerce" is accomplished by putting the publications into the hands of members of the public either as subscribers or as persons purchasing from newsstands or other outlets that exist for getting such publications into the hands of the public.
  9. That the affidavit of Robert C. Wian, sworn on August 25, 1961, is rejected on the ground that the evidence contained therein is based on information and belief and not on personal knowledge and so is not admissible as this is not an interlocutory motion for the purposes of Rule 168 of the General Rules and Orders of this Court, and, even if it were, the evidence would be inadmissible because the affidavit does not give the grounds of belief.
  10. That it is doubtful whether s. 5 of the *Trade Marks Act* can be read as providing that a trade mark is deemed to be made known in Canada "by a person" by virtue of advertising distributed or published in Canada when that advertising was sponsored by some other person.
  11. That a thing may be regarded as known in Canada if it is known only in some part of Canada but it is not "well known" in Canada unless knowledge of it pervades the country to a substantial extent. A trade mark cannot be regarded as "well known in Canada" when knowledge of it is restricted to a local area in Canada, but it must be "well known"

across Canada "among potential dealers in or users of" the wares or services with which it is associated.

12. That the plaintiff has adduced no evidence to discharge the burden imposed upon it by s. 17 of the *Trade Marks Act* to establish that it had not abandoned its trade marks at the date of the advertisement of the defendants' applications for registrations of their trade marks under the Canadian Act.
13. That it cannot be argued by the plaintiff that the defendants could not have been satisfied that they were entitled to use the trade marks in Canada in association with the wares or services described in the applications; as required by s. 29, para. (i) of the *Trade Marks Act*, when the plaintiff has failed to establish that the registrations were otherwise invalid.
14. That there is no provision in the *Trade Marks Act* under which the failure of the defendants to include in their applications for registration of their trade marks a statement that they were satisfied that they were entitled to use the trade marks in Canada in association with the wares or services described in the applications, is a basis for finding that the registrations are nullities.

*Practice—Effect of United States formal judgment or Decree—Affidavits based on information and belief—Failure to state grounds of belief in affidavit based on information and belief—Value of affidavits obtained by suggestive questioning of deponents—Rule 168 of General Rules and Orders.*

*Held:* That the formal judgment or "Decree" made by a United States court in an action in which the plaintiff in these proceedings was a party and in which it obtained judgment against a third party on the United States trade mark registrations in issue in this case, affidavit evidence of which judgment was filed by the plaintiff, can have no evidentiary value or binding effect as between the plaintiff and the defendants because not only has the doctrine of *res judicata* no application where the parties are not the same but the evidence in the United States case may well have been quite different from the evidence in this case.

2. That there is some question of the value of affidavits filed by the plaintiff to establish that its trade marks had become well known in Canada prior to April 12, 1955, by reason of radio broadcasts ordinarily received in Canada, where they have been obtained as a result of questioning that suggested to the deponents the crucial date of April 1, 1955 concerning which their evidence was required.
3. That evidence of individuals as to whether something was "well known in Canada" at a specific time, can be relevant to the question to be decided only if it be shown (a) by what scheme or survey the persons to give evidence were chosen, and (b) by what method such persons were questioned as to their knowledge of the question.
4. That it is of the utmost importance that the evidence submitted to establish that something was "well known in Canada" at a specific time, be considered in the light of the methods that were employed in selecting the deponents so that the Court can assess whether or not they are in any way representative of the body of opinion or knowledge that is being assessed. It is equally important that it be established that the deponents were not induced to give their testimony by leading questions or other improper practices.
5. That the application is dismissed.

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APPLICATION to strike out a trade mark.

The action was tried by the Honourable Mr. Justice Cattanach at Ottawa.

*Christopher Robinson, Q.C., Donald Sim, Q.C. and James D. Kokonis* for the applicant.

*David Watson* for defendants.

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

CATTANACH J. now (January 11, 1965) delivered the following judgment:

Section 56 of the *Trade Marks Act*, c. 49 of the Statutes of Canada of 1953, confers on this Court jurisdiction, on the application of any person interested, to order that any entry in the register of trade marks kept under that Act be struck out on the ground that, at the date of such application, the entry does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark. Section 57 provides that such an application shall be made either by the filing of an originating notice of motion, by counter-claim, or by statement of claim in an action claiming additional relief under the Act. This proceeding was originally instituted on November 26, 1959, by filing a statement of claim claiming other relief under the Act in addition to an order expunging certain trade mark registrations. That statement of claim was amended in accordance with an order of President Thorson dated April 20, 1961 to limit the relief claimed to the claim for an order expunging the trade mark registrations and, on May 4, 1961, he made an order that the Statement of Claim "be deemed to be an originating notice of motion". A "Statement of Defence and Reply to Originating Notice of Motion" was filed on May 9, 1961. While, therefore, these proceedings must be regarded as having been originated by an originating notice of motion, as the issues are defined by documents entitled Statement of Claim and Statement of Defence, and as the parties are described therein as "Plaintiff" and "Defendants" respectively, I shall so refer to them in these reasons for judgment.

The entries in the Register that the plaintiff seeks to have expunged are No. 103,521 and No. 105,286. No. 103,521

shows the defendants David Mady, George Mady, Albert Mady, Norma Mady and Michael Mady, trading as Big Boy Drive-In of 356 Ouellette Avenue, Windsor, Ontario as registrants of the trade mark "Big Boy Drive-In" in respect of services, namely, "The dispensing of various types of food and specifically a hamburger" and shows that it has been "Used in Canada since April 12, 1955". No. 105,286 shows the same defendants as registrants of the trade mark "Big Boy" in respect of wares, namely, "Hamburgers" and shows that the trade mark has also been "Used in Canada since April 12, 1955".

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The principal ground upon which the plaintiff seeks to have the registrations of these trade marks expunged is that the registrations are invalid, by virtue of s-s(1) of s. 18 of the *Trade Marks Act* because the above named defendants were not the persons entitled to secure their registration under s-s(1) of s. 16 of that Act, which reads as follows:

16. (1) Any applicant who has filed an application in accordance with section 29 for registration of a trade mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with wares or services is entitled, subject to section 37, to secure its registration in respect of such wares or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

- (a) a trade mark that had been previously used in Canada or made known in Canada by any other person;
- (b) a trade mark in respect of which an application for registration had been previously filed in Canada by any other person; or
- (c) a trade name that had been previously used in Canada by any other person.

The sole ground upon which the plaintiff contends that the aforesaid defendants were not entitled to have their trade marks registered under s-s(1) of s. 16 is that, upon the date of first user, which is accepted by both parties as being April 12, 1955, each of their trade marks was "confusing" with a trade mark "that had been previously . . . made known in Canada by any other person" within the meaning of those words in para. (a) of that subsection. To succeed, therefore, the plaintiff must have established

- (a) that each of the defendants' trade marks was, on April 12, 1955, "confusing" with some other trade mark within the statutory meaning given to that word by s-s. (1) and (2) of s. 6 of the *Trade Marks Act*, and
- (b) that such other trade mark had, previous to April 12,

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1955, been "made known in Canada" by some other person within the statutory meaning given to that expression by s. 5 of the *Trade Marks Act*.

I propose to consider first what the plaintiff must have established to have shown that a trade mark was, previous to April 12, 1955, made known in Canada by some other person. Sections 5 and 17(1) of the *Trade Marks Act* read as follows:

5. A trade mark is deemed to be made known in Canada by a person only if it is used by such person in a country of the Union, other than Canada, in association with wares or services and

- (a) such wares are distributed in association with it in Canada, or
- (b) such wares or services are advertised in association with it in
  - (i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of such wares or services, or
  - (ii) radio broadcasts, as defined in the *Radio Act*, ordinarily received in Canada by potential dealers in or users of such wares or services,

and it has become well known in Canada by reason of such distribution or advertising.

17. (1) No application for registration of a trade mark that has been advertised in accordance with section 36 shall be refused and no registration of a trade mark shall be expunged or amended or held invalid on the ground of any previous use or making known of a confusing trade mark or trade name by a person other than the applicant for such registration or his predecessor in title, except at the instance of such other person or his successor in title, and the burden lies on such other person or his successor to establish that he had not abandoned such confusing trade mark or trade name at the date of advertisement of the applicant's application.

It is admitted by the defendants that the United States of America, the country in which the plaintiff claims to have established user of a trade mark is "a country of the Union" within the meaning of those words in s. 5 and the plaintiff does not make any claim to have brought itself under para.

- (a) of s. 5. Furthermore, having regard to s. 17, s-s(1), the plaintiff cannot rely on a "making known of a confusing trade mark" by any person other than itself. The plaintiff must therefore have established, on this branch of the case,
  - (a) that a trade mark was, previous to April 12, 1955, used by the plaintiff in the United States in association with wares or services,
  - (b) that such wares or services were, previous to April 12, 1955, advertised in association with that trade mark in
    - (i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of such wares or services, or

- (ii) radio broadcasts, as defined in the *Radio Act*, ordinarily received in Canada by potential dealers in or users of such wares or services, and
- (c) that such trade mark had, previous to April 12, 1955, "become well known in Canada" by reason of "such . . . advertising".

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If the plaintiff has not established all such facts, this attack on the registrations fails because s. 5 says that a trade mark is deemed to be made known in Canada by a person "only if" all three conditions have been satisfied and the plaintiff must, to bring itself within the exception under s. 16, establish that each trade mark attacked was "confusing" with a trade mark that had been so made known in Canada at the date on which the applicant for registration of the trade mark attacked "first so used it".

In addition to having established that a trade mark had been "made known in Canada" by the plaintiff itself previous to April 12, 1955, within the meaning of those words as defined by s. 5, the plaintiff must also have discharged the burden imposed upon it by s-s. (1) of s. 17, *supra*, of showing that it had not abandoned the confusing trade mark at the date of advertisement of the defendants' application and it must, as already indicated, have established that the trade marks attacked were "confusing" with the trade mark so made known within the meaning of that word as defined by s. 6 of the *Trade Marks Act* which reads in part:

6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

If the plaintiff has failed to bring itself within that part of s. 16 on which it relies, read with ss. 5, 6 and 17, the plaintiff relies, in the alternative, on another attack on the registrations, which, in that event, will also have to be considered.

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Having outlined in a general way some of the obstacles that the plaintiff must have overcome in order to succeed in its main attack on the defendant's registrations, I now propose to consider whether it has succeeded in doing so.

I shall first consider whether the plaintiff has established that trade marks, which it says were confusing with the defendants' trade marks, were, previous to April 12, 1955, "used" by the plaintiff in the United States in association with wares or services.

The trade marks on which the plaintiff relies as having been made known by it in Canada within the statutory meaning of those words in s. 5 are two trade marks in respect of which it has United States registrations. The first is United States registration No. 561, 430 registered January 30, 1950, being the word "Bob's" and the figure of a stout boy dressed in checkered overalls and holding up a hamburger from which a bite has been taken. It is registered for "Hamburger sandwiches". The second is United States registration No. 574,742 consisting of the words "Big Boy" registered on August 11, 1952. It is also registered for "Hamburger Sandwiches".

There is no evidence that either of these trade marks has been "used" by the plaintiff in the United States in respect of wares or services. An affidavit of the president of the plaintiff company shows that the plaintiff "adopted" these trade marks (he misdescribes No. 561,430 as including the words "Big Boy" rather than the word "Bob's") and says that the plaintiff licenses and "has continuously since its adoption of the trade marks . . . licensed restaurant owners in the United States to use the Plaintiff's trade marks" but nowhere does this affidavit, or any of the other affidavits constituting the material on which the proceedings were heard pursuant to s-s(3) of s. 58 of the *Trade Marks Act*, show any user of these trade marks by the plaintiff in the United States or elsewhere.

What the plaintiff does rely on as user by it of the trade marks in the United States is user of the trade marks, or one of them, by the operators of certain "drive-in" restaurants in the State of Michigan by a person other than the

plaintiff.<sup>1</sup> The plaintiff's case, on this alternative, is that such user was pursuant to a "Franchise Agreement" between the plaintiff and Fred Elias, Louis Elias and John Elias, co-partners doing business under the firm name and style of "Dixie Drive-In", that such user was in compliance with certain provisions in the United States law permitting user of a trade mark by some person other than the owner of the trade mark, that United States law conferred on such user the quality of being the same as user by the owner of the trade mark and that such user therefore acquired the character of user by the owner of the trade mark for the purposes of the Canadian *Trade Marks Act* by virtue of the "Registered User" provisions to be found in s. 49 of that Act.

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Much of the evidence suggests that the Michigan restaurants in question were operated by an incorporated company and not by the partnership "Dixie Drive-in". (See affidavit of Gabriel W. Kassaf and the cross-examination thereon). I do not find it possible on the evidence to find that the restaurants in question were operated by the partnership known as "Dixie Drive-in". For that reason, if that trade mark has not been registered by the plaintiff must fail. There are, moreover, other grounds for reaching the same conclusion.

The second ground for this conclusion is that, on the facts of this case, no user of a trade mark by a person other than the plaintiff can be regarded, for the purpose of s. 5 of the Canadian statute, as user by the plaintiff of that trade mark, if that trade mark has not been registered by the plaintiff under Canadian legislation.

To appreciate the plaintiff's argument, it is necessary to review certain provisions in the Canadian statute. Section 2(t) defines "trade mark" to mean, for present purposes, a mark that is used "by a person" for the purpose of distinguishing, or so as to distinguish, wares or services

<sup>1</sup> One argument of the defendants with which I do not propose to deal, because of the way in which I propose to dispose of the case, should be mentioned at this point. That argument is that neither the user or advertising relied on by the plaintiff is related to the plaintiff's trade mark "Big Boy" because it was, in fact, user and advertising of the trade mark "Elias Brothers Big Boy".

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manufactured, sold, . . . or performed "by him" from those manufactured, sold, . . . or performed "by others". This, indeed, as I understand it, is the public policy justification for trade mark law—the public are entitled to be protected from being deceived as to the source of the goods or services that it buys or obtains. So we find that s. 19 provides that registration of a trade mark, with certain immaterial exceptions, confers on the owner "the exclusive right" to its use throughout Canada. This character of a trade mark as being distinctive only of the goods of the owner of the trade mark so that it is a means whereby the public can have assurance that goods that they purchase are the goods of the person with whom they have dealt in the past, and in whom they have acquired confidence, is subject to a major exception engrafted on Canadian trade mark law for the first time in 1953 by s. 49 of the present statute. This section provides for registration of a person other than the owner of a registered trade mark as a "registered user", who thereupon becomes entitled to use the trade mark in accordance with the terms of the registration, which user is called "permitted user", and "permitted user" has, by virtue of s-s. (3) of s. 49, "the same effect for all the purposes of this Act as a use thereof by the registered owner". Registration of a registered user is accomplished pursuant to the joint application of the registered owner and the proposed registered user, who must show the Registrar, among other things, the relationship existing between them, the degree of control by the owner of the trade mark over the permitted user, the conditions or restrictions proposed with respect to the permitted user and the Registrar is authorized to approve a person as a registered user "if he is satisfied that . . . the use of the trade mark . . . by the proposed registered user would not be contrary to the public interest". It is not necessary for me to consider any of the many problems that may arise as to the precise character of the duty so imposed on the Registrar. Having regard to the inherent nature of trade marks as being a device to protect the public from deception, I am confident that the Registrar will feel bound to ensure that no proposed user is registered in favour of any person until he is satisfied that the "terms of his registration" are such that the public will not be deceived either as to the quality of the goods or services in respect

of which the permitted user is to be employed or as to the person with whom they are dealing, or as to the source of the goods or services that they are acquiring. I consider that it is important to have explored the nature of the legislative scheme contained in s. 49, at least to this extent, because of its relevance to the testing of the plaintiff's argument concerning the applicability of the United States legislation.

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I am of opinion that, regardless of the effect of the United States legislation in relation to the facts of this case, user by some person other than the plaintiff of trade marks that are not registered under the Canadian Act cannot be regarded as user by the plaintiff of these trade marks for the purposes of s. 5 of the Canadian Act by virtue of s. 49 thereof, the only provision to which my attention has been drawn in this connection.

The first three s-ss. of s. 49 of the *Trade Marks Act* read:

49. (1) A person other than the owner of a registered trade mark may be registered as a registered user thereof for all or any of the wares or services for which it is registered.

(2) The use of a registered trade mark by a registered user thereof in accordance with the terms of his registration as such in association with wares or services manufactured, sold, leased, hired or performed by him, or the use of a proposed trade mark as provided in subsection (2) of section 39 by a person approved as a registered user thereof, is in this section referred to as the "permitted use" of the trade mark.

(3) The permitted use of a trade mark has the same effect for all purposes of this Act as a use thereof by the registered owner.

By definition in s. 2(o) "registered trade mark" means a trade mark that is on the "register" and "register", by definition in s. 2(n) means the register kept under s. 26 of the Canadian Act. Subsection (1) of s. 49 therefore provides for registration of a person as "registered user" of a trade mark that is on the register kept under the Canadian *Trade Marks Act*. Subsection (2) of s. 49 says that the use of such a trade mark by a "registered user" in accordance with the terms of his registration is referred to in that section as "permitted user" and s-s(3) then provides that "permitted user" has the same effect "for all purposes of this Act"—i.e., the Canadian *Trade Marks Act*—as use by the registered owner. These carefully worked out provisions cannot, by any strain placed on their words, be interpreted as applying to user that is not in accordance with a registration under s. 49 in respect of a trade mark that is registered under the Canadian law. Section 49 has

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no application to user of a trade mark registered under United States law by a person other than the registered owner pursuant to some United States legislative scheme for letting persons other than owners of trade marks use them for distinguishing their goods or wares.

In the circumstances, I doubt that there is any need for me to refer to the United States law. There are, however, certain comments that I may usefully make. The provision in the United States law upon which the plaintiff relies for having use by a third person under a "Franchise Agreement" treated as use by the plaintiff for the purpose of s. 5 of the Canadian *Trade Marks Act* is s. 5 of the *United States Trademark Act*, 1946, United States Public Law 489, 79th Congress, Chapter 540, which reads as follows:

Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public.

None of the evidence concerning the United States law provides any assistance as to the effect of this statutory provision that, where a registered mark may be used legitimately by related companies, such use "shall inure to the benefit of the registrant", which are the words upon which the plaintiff is presumably relying. These words may well have a clear meaning in relation to the remainder of the United States law. I am certainly not prepared, without some evidence as to the effect of this part of United States law, to assume that they mean that such use shall be deemed to be user by the registrant, not merely as a drafting device within the context of the United States trade mark law, but as a matter of the exercise of any sovereign power that the United States Congress may have to deem something done within its territorial limits, to be for universal purposes, something that it is not.

In any event, I am not satisfied upon the evidence—both as to the facts of the case and as to the foreign law—that this is a case of "related companies" within the above United States statutory provision. That provision must apparently be read with s. 45 of the *United States Trademark Act*, 1946, which reads as follows:

The term "related company" means any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used.

There are three affidavits by United States lawyers, a large part of which I must disregard because such part expresses opinions as to the application of the United States law to the facts of this case—as the respective lawyers understand them—or deposes to facts on information and belief. As I understand the situation, these affidavits are admissible in so far as the deponents expound, as experts, the law of the United States, and in so far as they may state facts within the personal knowledge of the deponents. It is my function to make findings as to the facts of this case, to make findings as to the applicable United States law (which is a question of fact in these proceedings) and to apply the United States law to the facts. Furthermore, I should comment on the use made in these affidavits of a formal judgment or “Decree” made by a United States Court in an action in which the plaintiff in these proceedings was a party and in which it obtained a judgment against a third party on these same United States trade mark registrations. Such a judgment cannot, of course, have any evidentiary value or binding effect as between the plaintiff and the defendants. Not only has the doctrine of *res judicata* no application where the parties are not the same but the evidence in that case may well have been quite different from the evidence here. In any event, there is some indication that it is a consent “Decree”. Taking into account the considerations to which I have referred, I cannot, on the evidence, reach the conclusion that the plaintiff controls the operators of the Elias Drive-Ins “in respect of the nature and quality of the goods” in connection with which the United States trade marks are used under the Franchise Agreement. Not only is the provision in that agreement as to the character of the hamburgers to be sold under the agreement of the most superficial and unrestrictive character, but there is no provision for supervision or control and the evidence indicates that actual control concerning “nature and quality of the goods” is, practically speaking, non-existent.

For all the above reasons, I hold that the plaintiff has failed to establish “user” of its United States trade marks by it in the United States. That being so, its attack on the defendants’ Canadian registrations by virtue of the wording of s. 16 fails, for such user of its alleged “confusing” trade

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marks is one of the conditions precedent to the success of such attack. It may, nevertheless, be well to consider whether the plaintiff has succeeded in establishing the facts required to overcome the second hurdle in the way of its success on this attack. For that purpose, it is necessary to assume that the plaintiff did establish that the two trade marks of which it is the registrant under the United States law were "used" by the plaintiff in the United States previous to April 12, 1955, in association with hamburger sandwiches or indeed in respect of other goods or services, and, on that assumption, consider whether such wares or services were advertised previous to April 12, 1955, as required by s. 5 of the Canadian *Trade Marks Act*, in association with those trade marks in

- (a) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of such wares or services, or
- (b) radio broadcasts, as defined in the *Radio Act*, ordinarily received in Canada by potential dealers in or users of such wares or services.

As far as printed publications circulated in Canada in the ordinary course of commerce among potential dealers in or users of the plaintiff's wares or services are concerned, the evidence is meagre indeed. I reject any consideration of menus, napkins, bags, comic books and the like, which got into the hands of Canadians who patronized United States restaurants, on the ground that such articles were not publications circulated in Canada in the ordinary course of commerce. (In my view circulation of publications in the "ordinary course of commerce" is accomplished by putting the publications into the hands of members of the public either as subscribers or as persons purchasing from newsstands or other "outlets" that exist for getting such publications into the hands of the public.) I reject the evidence of circulation in Canada to be found in the affidavit of Robert C. Wian, sworn on August 25, 1961, on the ground that such evidence is based on information and belief and not on personal knowledge and so is not admissible as this is not an interlocutory motion for the purposes of Rule 168 of the General Rules and Orders of this Court. (It would not be admissible even on such a motion because the

affidavit does not give the grounds of belief.) I reject the evidence in Dick Johnson's affidavit of the distribution in Hamilton, Ontario of 300 copies of the November 1953 issue of the magazine "Cooking for Profit" because that was a distribution by United Gas & Fuel Company of Hamilton, Ontario, which fact, in my view, in the absence of further evidence, indicates that this was not a "circulation in the ordinary course of commerce", and because there is no evidence that this was a distribution among potential dealers in or users of hamburger sandwiches. Finally, I reject the evidence of the average Sunday circulation of the "Los Angeles Examiner" in Canada during the last nine months of 1952 because William Merritt's affidavit, by giving the source of his information, makes it clear that this information is not of his own knowledge and because there is no evidence that any of such publications contained any reference to the plaintiff's trade marks in relation to its wares. (I am left to surmise as to whether the "Sunday Pictorial Review of the Los Angeles Examiner" for June 8, 1952, referred to in Robert C. Wian's affidavit, is one of the publications referred to in Merritt's affidavit. In any event, evidence as to averages does not establish that this particular Sunday issue ever reached Canada.) There is, in my view, no satisfactory evidence that there was any advertisement of the plaintiff's wares in any publication that comes within s. 5(b)(i) of the *Trade Marks Act*.

With reference to radio and television broadcasts (it is common ground that television is included in radio as defined in the *Radio Act*), the defendants have not really challenged the plaintiff's claim that there was, in Detroit, some radio advertising of "Big Boy", or of trade marks of which the words "Big Boy" formed a part, in connection with hamburger sandwiches and other food products, that was received in Windsor previous to April 1, 1955. The evidence of what such advertising amounted to is, however, far from satisfactory. It seems clear from an examination of paras. 2 and 3 and the final sentence of para. 4 of the affidavit of Robert Baldrice, and the exhibits referred to in such parts of his affidavit, that none of the information contained therein is based on his personal knowledge and it must therefore be rejected as evidence. The second sentence of the fourth paragraph becomes meaningless in

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the absence of the first sentence therein. The last paragraph of his affidavit does not seem to add anything material. The first two sentences of that paragraph do not indicate that the advertising of Elias Brothers referred to therein has anything to do with "Big Boy" products and the last paragraph does little more than state the deponent's "belief" that what someone else says is "accurate". William H. Morgan's affidavit is also of dubious value as evidence in these proceedings. He states that "according to the records available to me", Elias Drive-Ins and Restaurants sponsored certain radio spot announcements during relevant periods and gives details of the announcements showing, among other things, a number of references to the "Big Boy" trade mark in relation to hamburgers and other food items. Apparently based on the same source of information, rather than his own knowledge, his affidavit also states that there was a similiar sponsorship of eight "TV" spot advertisements "from January, 1955 to December 24, 1955". On cross-examination, he swore that all eight "TV" advertisements took place in December 1955 and that prior to December 1955 "It was radio and strictly radio". On re-examination, he said that his own "personal knowledge" was restricted to the fact that "we paid this amount in December of '55 for eight TV spots". Subsequently, he re-attended for further cross-examination and, on further re-examination, put in documents purporting to be copies of records kept by "advertising agents" of which his personal knowledge, as it appeared from his evidence, was, to say the least, somewhat dubious. Having regard to the importance to the plaintiff's case of establishing that the advertising in question took place before April 12, 1955, and to the fact that no admissible evidence was led as part of the plaintiff's original case of the fact that such broadcasts did take place before that date, I am not inclined to place much credence on the evidence put in at this stage through a witness who appears to have had no personal knowledge of the crucial fact. I conclude, therefore, that there was, previous to April 12, 1955, radio advertising, by an operator of restaurants in Detroit and other Michigan places, of hamburgers and other kinds of food in association with the trade name "Big Boy" but that it has not been established that there was similar advertising on television before that time.

One thing is clear and that is that the plaintiff has never suggested that it, the plaintiff, had sponsored any such advertising by either radio or television that is ordinarily received in Canada, but rather it was sponsored by the Michigan interests. There is considerable doubt in my mind that s. 5 can be read as providing that a trade mark is deemed to be made known in Canada "by a person" by virtue of advertising distributed or published in Canada when that advertising was sponsored by some other person. If this is the result, there does not seem to be much point in the requirement, in s-s (1) of s. 17, that the attack on the registration must be made by the person by whom the mark had been made known. I need not, having regard to the fact that my conclusion with regard to the application of s. 5 is supported by several other grounds, come to any final conclusion on that question.

I come now to the third and final question with regard to the application of s. 5, namely: Has the plaintiff established that the plaintiff's trade mark "Big Boy" became "well known in Canada", previous to April 12, 1955, by reason of "such . . . advertising"—that is, such radio advertising.

In this connection, the plaintiff filed 54 affidavits by persons residing in Windsor. Of these, after cross-examination of the deponents, counsel for the plaintiff indicated that he did not rely on 17. Reference to these cross-examinations makes it clear that the deponents in these 17 affidavits swore to the truth of the contents of the affidavits without any regard to the particular words in the affidavits. Indeed, the affidavits seem to have been drafted by a lawyer having regard to his view of what evidence would support the plaintiff's case and it would seem that they were then put in the hands of a layman who distributed them to others in the hope that persons might be found who would subscribe to them, which hope was, strangely enough, realized. This sorry performance, taken with the answers given on the cross-examination of many deponents on whose affidavits the plaintiff does rely, is calculated to create a very strong anxiety concerning the reliability of evidence of this kind. It is not that there would appear to be any intent on the part of the deponents to mislead (all of those to whom I refer have quite candidly contradicted, under oral examination, the statements contained in their affidavits, until it

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was brought home to them that they were so contradicting themselves when they tended to try to go back to the statements in their affidavits) it is rather the willingness of so many members of the public to put their names, even under oath, to documents stating that which some person wants them to say without any regard to the relationship of the words used in the documents to their actual knowledge of the facts. In any event, deduction of this group of 17 affidavits from the total of 54 leaves 37 affidavits that the plaintiff relies upon on this branch of the case. The affidavits of 15 other deponents state that the deponents knew of "Big Boy" hamburgers in the United States prior to April 1, 1955, this date having been chosen, apparently, by the plaintiff's agents as being just before April 12, 1955, but attribute their knowledge exclusively to information received during personal visits to the United States or to some means other than advertising of the kind contemplated by s. 5. These 15 affidavits may also be deducted from the total to which consideration must be given in considering whether there is evidence to support the plaintiff's contention on this third question that arises under s. 5. If anything, they should be considered as weighing against the plaintiff on that question because they tend to show that, if the plaintiff's trade mark "Big Boy" was well known in Canada prior to April 12, 1955, it was so known, in a large part at least, by reason of persons living in Canada having seen the plaintiff's trade mark while in the United States rather than by reason of advertising that reached them in Canada. (This is borne out by an affidavit filed by the plaintiff showing that 1,000 Canadians each month patronized the Michigan Big Boy Drive-Ins.) I am left, therefore, with 22 affidavits that have to be considered. These affidavits bear dates during the latter part of 1961 and may be noted briefly as follows:

1. DORIS AKERMAN: states that "long before April 1955" she watched in Windsor television programmes from Detroit on which Elias Brothers advertised Big Boy Hamburgers and that "as of April 1, 1955", the trade mark "Big Boy" was well known to her to refer to hamburgers available in Elias Brothers Drive-In restaurants in Detroit. This deponent is an employee or agent of a Market Research concern and conducted

the survey as a result of which the other thirty-six deponents whose affidavits were relied upon were prevailed upon to sign affidavits. She obviously had an interest in the effectiveness of the evidence that she gathered. I do not think much weight can be put on this deponent's evidence.

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2. ALBERT ALOFS: states that "prior to April 1st, 1955", Big Boy hamburgers were well known to him to be sold in the United States by Elias Bros. in Detroit and that such familiarity arose by seeing, in Canada, television advertisements associated with the Elias operation "prior to April 1st, 1955". On cross-examination, on September 25, 1961, this deponent says he saw advertisements on television in relation to Big Boy "about three or four or five or six years ago" and at another point in his cross-examination, speaking of when he saw such advertisements, he says ". . . I wouldn't bet any money on it. I would say that I saw it before '55" and, later on, he said, "It's a hard thing for me to say. I believe I saw it before 1955 myself. If there is any proof that I am wrong—then I'm wrong". Still later in his cross-examination he said, "For the exact date, no, I'm not certain" and "I think in my own mind that I saw it before that date". This deponent does not persuade me that he remembers Big Boy television advertising before April 1, 1955.
3. DONALD ANDERSON: After referring to certain programmes on "T.V. from 1949 to 1952", on which a person ate a hamburger from Elias Brothers, and another programme of no specified date advertising Elias Brothers, this deponent says that he can remember when the Big Boy store appeared in Windsor and he thought at the time that it must have some connection with the United States Big Boy and that he had heard of Big Boy hamburgers either on radio or television "before the Windsor Big Boy opened". On cross-examination this deponent was unable to be more precise concerning the time when he heard Big Boy programmes than "from 1956 to 1958 or perhaps later" or "perhaps earlier". This deponent's evidence is of little, if any, support for the plaintiff's case.

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4. MARIE BARSONA: states that "prior to April 1955" she heard Big Boy hamburgers advertised over the radio by Elias Brothers of Detroit and "as of April 1955" Big Boy hamburgers therefore indicated to her hamburgers available at Elias Brothers Stores in Detroit. On cross-examination, this deponent seems sure that she knew of the Detroit Big Boy before 1955 by reason of having been in Detroit but could not be at all sure that she had heard radio advertising of it before that time although, on re-examination, her confidence in that recollection seems to have revived. This deponent's recollection of the time of the broadcasts is too vague to assist the plaintiff.
5. FRANK BENDER, SR.: states that he remembers hearing Elias Brothers Big Boy Hamburgers advertised on television over a spot news programme in 1954 and 1955 and that as a result of seeing this advertised on television he stopped on two occasions at their stores in Detroit, the first occasion being in the summer of 1954 or 1955. On cross-examination, this deponent did not seem to be too sure whether what he heard was radio or television and it does not seem to have been too clear in his mind whether it was during the summer of 1954 or 1955. This evidence does not help to establish that the plaintiff's trade marks were well known in Canada by reason of radio advertising before April 12, 1955.
6. THOMAS L. BRADLEY: deposes that he saw television advertising of Big Boy hamburgers, that he can remember the Mady Big Boy store opening in Windsor and that he had heard of Big Boy hamburgers through radio or television "before that time" but, on cross-examination in December 1961, he stated that he first heard such television advertising "about four years ago" and that he does not think that he heard it on radio. This evidence does not support the plaintiff's case.
7. GORDON CARRUTHERS: deposes that he can remember hearing television advertising of Big Boy hamburgers in 1952, 1953, 1954 and perhaps 1955. He also says that he thinks the same advertising was done over radio stations at the same time. This witness's evidence stood up under cross-examination.

- 8. VIOLET COOPER: deposes that Big Boy hamburgers were well known to her prior to April 1, 1955 "from having seen and visited Elias Brothers Drive-Ins selling Big Boy Hamburgers in the Detroit area". Her only reference to broadcasts is her evidence on re-examination, after having been cross-examined on her affidavit, when she stated that she heard it on broadcasts but cannot remember whether she might have gathered any knowledge regarding Big Boy from the radio before she visited it in 1954. This deponent's evidence is of no value to the plaintiff's case.
- 9. MRS. KATHERINE DELANEY: deposed that, prior to April 1, 1955, she was familiar with Big Boy hamburgers on sale in the Detroit area and that this familiarity arose from watching television advertising received by her in Windsor prior to April 1, 1955. On cross-examination, this lady was not too sure when she heard the advertising on radio and on "TV" but she thought it was in 1955 and on re-examination she indicated that she first heard it on radio in 1955 but she did not know the date. This evidence does not establish that radio advertising was heard in Canada before April 12, 1955.
- 10. PAUL FIELDS: deposes that he became aware of the name Big Boy hamburgers through purchasing them, on visits to Detroit, prior to April 1, 1955. While there are no references in his affidavit to radio or television advertising, there are references to television advertising in his cross-examination and re-examination but he does not know whether he saw it before 1955. His evidence does not bear on the point in issue.
- 11. NICHOLAS IFTINIUK: deposes that the name Big Boy hamburgers was familiar to him in the Detroit area prior to April 1, 1955 and that he was aware of Big Boy hamburgers and Big Boy Drive-In restaurants in the Detroit area for several years prior to April 1, 1955 by reason of having seen and patronized Big Boy Drive-In restaurants selling Big Boy hamburgers in this area. On cross-examination, he contradicted the statement that he patronized the restaurant. While there is no reference in this affidavit to this deponent having heard or seen any advertising and there was no

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such reference in his cross-examination, on re-examination, after confirming that the name "Big Boy Hamburgers" was familiar to him in the Detroit area prior to April 1, 1955, he was asked "And how were you aware of the existence of Big Boy Hamburgers in the Detroit area?" and he replied, "I think by advertising over the radio". This last answer is a statement, albeit by way of an afterthought, that a person in Windsor heard radio advertising of Big Boy prior to April 1, 1955.

12. HORACE D. JACOBS: deposes that, prior to April 1, 1955, Big Boy hamburgers were well known to him as referring to hamburgers available at Big Boy Drive-In restaurants in the Detroit area and that such knowledge arose as a result of watching television advertising received by him in Windsor prior to April 1, 1955. On cross-examination he said that his first viewing of the television advertising might have been anywhere from 1954 to 1956. Nevertheless, on re-examination, he indicated that there was nothing in his affidavit he would want to retract. I doubt that such evidence can have much, if any, weight in establishing that Big Boy had become well known in Canada by reason of television programmes seen before April 12, 1955.
13. OLGA KANUIK: deposes that she was a waitress, that, prior to April 1, 1955, she was familiar with the fact that Big Boy hamburgers were on sale in the Detroit area and that this familiarity arose through radio advertising heard in Windsor prior to April 1, 1955. On cross-examination, this deponent denied that she was a waitress, stated that she had told the person doing the survey that she first heard the name Big Boy "in the States", and had told her that she "had heard advertising on the television and radio". On cross-examination and re-examination, it became very clear that this deponent had not known and had never pretended to know, whether she first heard this advertising in 1954, 1955 or 1956. Her evidence is of no value except that she, and a sister, both say, according to her, that they first heard of Big Boy "in the States".
14. LILLIAN KOTT: deposes that "prior to April 1, 1955, she was familiar with the name Big Boy hamburgers in

the Detroit area and that she learned about them through television and radio advertising from Detroit stations received in Windsor prior to April 1, 1955" and also from seeing Big Boy Drive-In restaurants in the United States when on trips to Detroit. On cross-examination, she denied having seen advertisements of Elias Brothers Big Boy restaurants on television, she was not sure about having seen Big Boy hamburgers advertised on television but she was sure that she had heard advertisements of Big Boy Drive-Ins on radio; however, she could not be sure of the date—it could be from 1954 to 1956. On re-examination, she became persuaded that she should stick to the date in her affidavit but her recollection is obviously not very clear.

15. DENISE MARCOUX: deposes to having eaten Big Boy hamburgers in Detroit, to having heard of them on radio or television, but on cross-examination, it became quite clear that she could not be sure that she heard such advertising any earlier than 1956, which is not surprising when it is noted that, in November, 1961, she was only 20. Her evidence does not have any relevance to the state of affairs before April 12, 1955.
16. EDITH MARENLITTE: deposes that she remembers hearing Big Boy hamburgers advertised on the radio for years before the Big Boy store opened in Windsor. On cross-examination, the witness was very vague about the years she heard the advertising but seems to think it was in the neighbourhood of "'56 or '57, something like that". Her evidence is of no value on the question I am considering.
17. ALCIDE MENARD: deposes that the trade mark Big Boy as applied to hamburgers available at Elias Big Boy Drive-Ins in the Detroit area was well known to him prior to April 1, 1955 and that he became familiar with Big Boy hamburgers through watching advertising by Elias Stores on television programmes received by him in Windsor prior to April 1, 1955. On cross-examination, this witness was not sure of the time that he saw the television programmes and agreed that the words "prior to April 1, 1955" should be deleted from the second part of his affidavit. On re-examination, it became

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clear that this witness had got to know about the Detroit Big Boys back as far as November, 1953 through visiting Detroit.

18. DANNY PANCHUK: deposes that the name Big Boy hamburgers was well known to him as referring to hamburgers on sale in the Detroit area prior to April 1, 1955 and that his familiarity with the name Big Boy hamburgers arose from seeing the Big Boy stores advertising Big Boy hamburgers in Detroit prior to 1955 and also television advertising received by him in Canada prior to 1955. On cross-examination, this witness makes it quite clear that he could not remember when he heard either television or radio advertising of Big Boy. He said that it might be 1955, 1956 or 1957. He just did not know.
19. NORMAN S. PICKERING: deposes that he remembers hearing Big Boy hamburgers advertised over a radio station between the fall of 1954 and the spring of the year 1955 and that he can remember the year because he was working in Blenheim in a garage at the time and the radio was on all day. This witness's evidence is substantially unchanged by cross-examination.
20. VIRGINIA ROBINSON: deposes that she was, prior to April 1, 1955, aware of the existence of Big Boy hamburgers in the Detroit area and that she became aware of the existence of Big Boy hamburgers in that area through listening to and seeing in Windsor radio and television advertising sponsored by the Elias Company and broadcast on Detroit stations. On cross-examination, this deponent says that the reference to television advertising should be deleted from her affidavit and she agreed that she could not say definitely in what year she first heard it on radio. On re-examination, she decided that she could remember having heard the radio advertising in 1954 because that was the year her mother was sick.
21. LEO SOULLIERE: deposes that he became familiar with Big Boy hamburgers which were available in stores in the Detroit area before April 1, 1955 by watching television advertising by Detroit Big Boy stores in Windsor. On cross-examination, he agreed that the

woman who had first interviewed him had suggested the date in 1955 that went into his affidavit and on being asked if he was sure of the exact date he replied, "Not positive, no. I doubt if you would". However, he did remember a specific occasion when he ate a Big Boy hamburger at a drive-in in Detroit in March of 1954 and he thought that he did see it on television before that time, because that was what made him stop at one of the drive-ins.

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22. FRANCES SZARAN: deposed that Big Boy hamburgers meant to her hamburgers available at drive-ins in the Detroit area and that she became familiar with the name Big Boy hamburgers prior to April, 1955 by hearing them advertised on the radio on a Detroit station which she listened to in Windsor. Her evidence was not weakened on cross-examination.

On the crucial question as to whether the plaintiff's trade mark "Big Boy" had become well known in Canada, prior to April 12, 1955, by reason of radio broadcasts ordinarily received in Canada, all but eight of these affidavits are, in my view, of no evidentiary value. The remaining eight are those of Doris Akerman, Gordon Carruthers, Nicholas Iftiniuk, Lilliam Kott, Norman S. Pickering, Virginia Robinson, Leo Soulliere and Frances Szaran. Of these eight affidavits, all but those of Gordon Carruthers, Norman S. Pickering and Frances Szaran are, for the reasons that I have indicated, of dubious value. In addition, there is some question in my mind as to whether any attention can be paid to them having regard to the fact that, except for that of Doris Akerman, they were obtained as a result of questioning that suggested to the deponents the crucial date of April 1, 1955 concerning which their evidence was required. See *re Edward Hack*<sup>1</sup> per Morton J., at pages 108 *et seq.* For this reason, it does seem to me that this evidence is hardly worthy of having any weight attached to it. Furthermore, it should be noted, there was no pretence of complying with the minimum requirement for establishing what is necessary if this type of evidence is to be employed. In my view, the evidence of individuals on this kind of question—that is, whether something was "well known in

<sup>1</sup> (1941) 58 R.P.C. 91.

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Canada” at a specific time—can only be relevant to the question to be decided if it be shown

- (a) by what scheme or survey the persons to give evidence were chosen, and
- (b) by what method such persons were questioned as to their knowledge of the question.

It is of the utmost importance that the evidence of the respective deponents be considered in the light of the methods that were employed in selecting them so that the Court can assess whether or not they are in any way representative of the body of opinion or knowledge that is being assessed. It is equally important that it be established that the deponents were not induced to give their testimony by leading questions or other improper practices. See *Registrar of Trade Marks v. G. A. Hardie & Co. Ltd.*<sup>1</sup> per Kellock J. at page 501.

For the above reasons, I find that the plaintiff has failed to establish that its trade marks were “well known in Canada” prior to April 12, 1955 by reason of radio advertising.

Furthermore, I think I should say that there was really no attempt, in my view, to show that the plaintiff’s trade marks were “well known in Canada”. All that was attempted was to show that they were well known in Windsor, Ontario and surrounding territory. It was argued that, if they were well known in any part of Canada, they were “well known in Canada” within s. 5 of the *Trade Marks Act*. I cannot accept this view. A thing may be regarded as known in Canada if it is known only in some part of Canada but, in my view, it is not “well known” in Canada unless knowledge of it pervades the country to a substantial extent. When s. 5 speaks of a trade mark that is “well known in Canada by reason of . . . advertising”, it suggests to me such well known trade marks as “Coca-Cola”, “Esso”, Chevrolet” and “Frigidaire”, names that are seen in magazine advertising in homes in every part of the country, or are heard or seen on radio or on television in every part of the country. I do not think a trade mark can be regarded as “well known in

<sup>1</sup> [1949] S.C.R. 483.

Canada" when knowledge of it is restricted to a local area in Canada. In my view it must be "well known" across Canada "among potential dealers in or users of" the wares or services with which it is associated. In this connection I have to refer to *Registrar of Trade Marks v. G. A. Hardie & Co. Ltd.*<sup>1</sup> per Kellock J. at p. 500. The question there was whether it had been proved that a trade mark had been so used by any person "as to have become generally recognized by dealers in and/or users of the class of wares in association with which it had been used" so as to be registrable under s. 29 of the *Unfair Competition Act*, 1932, and Kellock J. said that the affidavits relied upon were quite insufficient to establish the "general" recognition required. He added "There must be hundreds of other laundries and there are many other hospitals throughout the country, none of which are so much as mentioned in the evidence."

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A final reason why, in my view, the plaintiff's principal attack on the defendants' Canadian registrations must fail is that it has adduced no evidence to discharge the burden imposed upon it by s. 17 of the *Trade Marks Act* to establish that it had not abandoned its trade marks at the date of the advertisement of the defendants' applications for registration of their trade marks under the Canadian Act.

In the circumstances, I need not consider whether the trade marks of the defendants' were confusing with the plaintiff's trade marks.

The plaintiff's alternative attack on the defendants' registrations is based on the requirement in para. (i) in s. 29, of the *Trade Marks Act* that an application for registration must contain "a statement that the applicant is satisfied that he is entitled to use the trade mark in Canada in association with the wares or services described in the application". There is no suggestion that the defendants' applications did not contain this statement. The argument is based on the assumption that the defendants were not in fact "satisfied" that they were entitled to use their trade marks in Canada and, that being so, their applications were not "in accordance with section 29" as required by s-s (1) of s. 16.

<sup>1</sup> [1949] S.C.R. 483.

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In the first place, I am of the view that this contention is not open to the plaintiff on the pleadings. There is no allegation in the Statement of Claim that the defendants were not "satisfied" as to their entitlement to use the trade marks they are registering and no evidence was led by either the plaintiff or the defendants directly related to that question.

Secondly, I cannot accept the submission that the defendants could not have been satisfied that they were entitled to use the trade marks in Canada in association with the wares or services described in the applications.<sup>1</sup> Indeed, I have difficulty in conceiving how this alternative contention can succeed when the plaintiff has failed to establish that the registrations are otherwise invalid. How can the defendants have been so obviously not entitled that the Court must infer that they were not "satisfied" that they were entitled when the plaintiff has been unable to show that they were not entitled?

Finally, with regard to this alternative contention, I am unable to find that there is any provision, in the very carefully worked out code of provisions in the *Trade Marks Act*, under which this is a basis for finding that a registration is a nullity.

This contention, in my view, also fails.

The application is dismissed with costs.

*Judgment accordingly.*

<sup>1</sup> Of course the defendants could not use the trade mark to pass their goods off as the goods of the plaintiff, but there is no reason why they could not so use the trade mark as not to be guilty of that tort.

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 MARIE BLANCHE BRETON ..... REQUÉRANTE,  
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 SA MAJESTÉ LA REINE ..... INTIMÉE.

*Couronne—Pétition de droit—Chute sur trottoir—Entretien de trottoir—Réparation de trottoir—Responsabilité de la Couronne—Blessures corporelles—Loi sur la responsabilité de la Couronne, S. du C. 1952-53, 1-2 Élis. II, ch. 30, art. 3(1)(b)—Charte de la Cité de Québec, S. de Q. 19 Geo. V, ch. 95, art. 417—Question de droit soumise.*

Victime d'une chute sur un trottoir apparemment dangereux la requérante poursuit en recouvrement des dommages subis et, au soutien de sa réclamation, allègue que le trottoir en question est soit la propriété de la Couronne, soit sous sa garde et à qui en incombe l'entretien et la réparation à titre de propriétaire du terrain vis-à-vis du trottoir. Elle ajoute que le fait causal de responsabilité est le résultat de la négligence fautive de l'intimée. Comme défense à l'action l'intimée plaide, en résumé, absence de lien de droit entr'elle et la requérante. A l'instruction les parties soumièrent, avec la permission de la Cour, la question de droit suivante:

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L'intimée dans la présente cause, à savoir Sa Majesté aux droits du Canada, est-elle assujettie aux dispositions de l'article 417 de la Charte de la Cité de Québec qui impose au propriétaire de chaque immeuble ou terrain vis-à-vis un trottoir, l'obligation d'entretenir et de réparer ledit trottoir? Ce dernier article édictant que:

417. Dans toutes les rues de la cité, les trottoirs doivent être faits, entretenus et réparés par le propriétaire de chaque immeuble ou terrain vis-à-vis duquel ils doivent être. Si tel propriétaire néglige de faire, refaire, entretenir ou réparer, selon le cas, les trottoirs, le chef de police lui donnera avis, par écrit, de faire ce qui est prescrit au sujet de ces trottoirs . . . Si, dans les huit jours suivant l'avis, les travaux requis auxdits trottoirs n'ont pas été faits, alors ces travaux seront faits par la corporation, qui peut s'en faire rembourser le coût par le propriétaire . . .

*Jugé:* Ce règlement décrète que, dans le territoire municipal de Québec, l'entretien convenable des trottoirs est une charge de la propriété riveraine. Corrolairement, la conclusion découlant du texte de l'art. 3(1)(b) de la *Loi sur la responsabilité de la Couronne*, S. du C. 1952-53, 1-2 Élis. II, ch. 30, qui se lit comme suit:

3. (1) La Couronne est responsable «in tort» des dommages dont elle serait responsable si elle était un particulier en état de majorité et capacité,

a) . . .

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

est que la Couronne assume en tout point cette responsabilité du propriétaire québécois. Cf. *Thérèse Deslauriers-Drago et Sa Majesté la Reine* [1963] Ex. C.R. 289, à la p. 290.

2° La réponse doit donc être affirmative à la question posée.

PÉTITION DE DROIT en recouvrement de dommages-intérêts subis à la suite d'une chute sur un trottoir.

La cause fut instruite devant l'Honorable Juge Dumoulin, à Québec.

*André Desmeules* pour la requérante.

*Gaspard Côté* pour l'intimée.

La question de droit est exposée dans les motifs de la décision que rend maintenant (12 janvier 1965) M. le JUGE DUMOULIN:

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Par sa pétition de droit, la requérante, une employée du ministère provincial des Terres et Forêts, à Québec, représente que, revenant de son travail, vers 5:00 heures de l'après-midi, le 9 août 1962, et après la traversée de la Grande-Allée «pour se rendre à un arrêt d'autobus» situé à l'angle sud-est de cette rue et de la Place Georges V, elle aurait fait une chute sur le trottoir et se serait infligée «une entorse grave à la cheville droite.»

Elle allègue ensuite, dans sa pétition amendée, au paragraphe 3, que:

3. Le trottoir à l'endroit de l'arrêt d'autobus est soit la propriété de l'intimée, soit sous la garde de cette dernière à qui en incombe l'entretien et la réfection en sa qualité de propriétaire du terrain situé vis-à-vis du dit trottoir.

Vient ensuite le paragraphe 5 qui explicite le fait causal de responsabilité «dû à la faute et négligence de l'intimée et plus précisément pour les raisons suivantes:

- a) Elle a négligé par l'entremise de ses préposés, de tenir le trottoir dont il s'agit en bon état d'entretien et de réparation;
- b) Elle a gardé ce trottoir dans un état qui le rendait dangereux pour ceux qui y circulaient.»

Comme suite immédiate de l'accident attribuable à cette négligence fautive, la réclamante postule, à titre de dommages-intérêts, un montant global de \$3,659.

Dans son plaidoyer de défense, l'intimée nie les reproches matériels formulés à son égard, et ajoute d'abondant que:

10. Elle n'avait aucune obligation, soit légale, soit contractuelle, de voir à l'entretien ou d'entretenir le trottoir sur lequel la requérante allègue s'être blessée, et les dommages que la requérante prétend avoir alors subis, par suite dudit accident, ne sont pas attribuables à un manquement à un devoir afférant à l'intimée.

D'où il s'ensuivrait que:

- 13. Il n'y a aucun lien de droit entre la requérante et l'intimée.

A l'audition, les parties, se prévalant de la Règle 149 (Règles et Ordonnances Générales de la Cour de l'Échiquier du Canada), soumirent la requête ci-après reproduite:

Par leurs procureurs soussignés, les parties en la présente instance demandent respectueusement à cette honorable Cour de décider les points de droit ci-après énumérés avant qu'il ne soit procédé à l'instruction de la présente instance.

- a) l'intimée dans la présente cause, à savoir Sa Majesté aux droits du Canada, est-elle assujettie aux dispositions de l'article 417 de la Charte de la Cité de Québec qui impose au propriétaire de chaque immeuble ou terrain vis-à-vis un trottoir, l'obligation d'entretenir et de réparer ledit trottoir?

b) Subsidièrement, au cas d'une réponse affirmative à la question (a), semblable obligation incombe-t-elle à l'Intimée, à savoir Sa Majesté aux droits du Canada, même si entre le trottoir dont il est fait état dans la pétition de droit de la requérante et la propriété de Sa Majesté vis-à-vis dudit trottoir, se trouvait, contiguë à celui-ci, une mince lisière de terrain appartenant à la corporation de la cité de Québec?

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Cette seconde soumission purement conjecturale aussi longtemps qu'une preuve objective ne l'eût accréditée, fut retirée par le procureur de l'intimée, M<sup>e</sup> Gaspard Côté, qui déclara s'en tenir uniquement à la première question.

La solution du problème ainsi posé ne me semble pas soulever de grandes difficultés.

Et d'abord, que dit la loi pertinente, en l'espèce l'article 3 (1) et (b), chapitre 30, du statut 1-2 Élisabeth II, qui a force astreignante depuis le 15 novembre 1954? Je cite:

3. (1) La Couronne est responsable «in tort» des dommages dont elle serait responsable si elle était un particulier en état de majorité et capacité,
- a) . . .
- b) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens.

Pour les fins de la discussion, il est irréfutablement acquis que l'une des propriétés du Gouvernement du Canada, dans la cité de Québec, le manège militaire et le spacieux quadrilatère qui couvre l'espace entre cet édifice et la ligne de rue, forment un ensemble immobilier «vis-à-vis» le trottoir de la Grande-Allée, côté sud-est, immeubles possédés et occupés par les préposés de l'intimée et soumis au contrôle de ceux-ci dans l'exécution normale de leurs devoirs.

Puisque l'application pratique de la *Loi sur la responsabilité de la Couronne en matière d'actes préjudiciables* consiste à imposer à l'État les mêmes obligations qu'à tout «particulier en état de majorité et de capacité», demandons-nous ce que serait en pareille occurrence l'obligation incombant au propriétaire québécois.

La Charte de la Cité de Québec forme une partie intégrante de la législation provinciale étant le statut 19 George V, chapitre 95, sanctionné le 4 avril 1929. L'art. 417 de cette loi de la Province de Québec, édicte que:

417. Dans toutes les rues de la cité, les trottoirs doivent être faits, entretenus et réparés par le propriétaire de chaque immeuble ou terrain vis-à-vis duquel ils doivent être. Si tel propriétaire néglige de faire, refaire, entretenir ou réparer, selon le cas, les trottoirs, le chef de police lui

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donnera avis, par écrit, de faire ce qui est prescrit au sujet de ces trottoirs . . . Si, dans les huit jours suivant l'avis, les travaux requis auxdits trottoirs n'ont pas été faits, alors ces travaux seront faits par la corporation, qui peut s'en faire rembourser le coût par le propriétaire . . .

L'intention qui ressort de cette rédaction assez fruste est que, dans le territoire municipal de Québec, l'entretien convenable des trottoirs est une charge de la propriété riveraine. Corollairement, la conclusion non moins nette découlant du texte plus limpide de l'art. 3(1)(b) de la Loi fédérale précitée, est que la Couronne assume en tout point cette responsabilité du propriétaire québécois dans les limites de la Cité.

La Cour doit donc répondre affirmativement à la question posée et décider que Sa Majesté la Reine aux droits du Canada est assujettie aux dispositions de l'art. 417 de la Charte de la Cité de Québec qui impose au propriétaire de chaque immeuble ou terrain vis-à-vis un trottoir, l'obligation de l'entretenir et de le réparer.

Cette loi, assez récente, sur la responsabilité de la Couronne (S.C. 1952-53, 1-2 Élisabeth II, c. 30) dont le contexte élimine toute disparité légale entre la Couronne et le sujet, a été savamment étudiée par l'honorable Juge Noël de notre Cour dans la cause *Thérèse Deslauriers-Drago et Sa Majesté la Reine*<sup>1</sup>, où il fut écrit, *inter alia*, que:

3. L'article 3(1)(b) de la *Loi sur la responsabilité de la Couronne* prévoit, par contre, une responsabilité directe «à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession, ou le contrôle des biens». Une réclamation non recevable contre la Couronne sous l'article 3(1)(a) pourrait l'être sous l'article 3(1)(b) par suite d'une responsabilité directe du maître représenté par son préposé . . .

Quant aux frais, ils seront à la discrétion du juge de l'instance principale.

*Jugement conforme.*

<sup>1</sup> [1963] R.C. de l'É. 289 à la page 290.

BETWEEN:

HARRY TOPPER ..... APPELLANT;

AND

THE MINISTER OF NATIONAL }  
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*Revenue—Income—Income tax—Deductibility of interest paid on money borrowed by taxpayer and lent to a limited company—Participation of taxpayer, through borrowed funds, in furtherance of real estate project—Income Tax Act, R.S.C. 1952, c 148, ss. 11(1)(c) and 12(1)(a)*

This is an appeal by the taxpayer from his reassessment for income tax for the taxation years 1954 to 1957 inclusive. The appellant, a resident of Toronto, Ontario and a fur dresser and presser by trade, formed with others in 1953 an investment company called Forest Hill Building Limited and, as a condition of acquiring a one-third interest in the common shares of the Company, he was required to lend certain sums of money to the Company for the purpose of financing construction of a proposed building. On five occasions between July 1954 and February 1955 the appellant borrowed a total of \$59,000 from his bank and immediately re-lent it to the Company. The appellant and the others associated with him in Forest Hill Building Limited were also associated in a like manner with respect to a similar company, 124 Richmond West Limited, incorporated in 1956, in which share participation was likewise conditional on the appellant lending certain sums of money to the Company. Although the appellant had also borrowed money at interest to lend to 124 Richmond West Limited, the Company at no time paid him any interest on the loans and yet there was a profit distributed to the shareholders on its liquidation.

For the taxation years under review the appellant had claimed as a deduction in calculating his taxable income the interest he had paid in each of the years to the bank for the said sum of \$59,000 he had borrowed and lent to Forest Hill Building Limited and on which he had received no interest from the Company.

Forest Hill Building Limited, in 1961, nearly a year after notices of reassessment of the appellant's income had been delivered, authorized payment of interest at the bank rate on the loans made to it by the appellant and others and this was at least six years after the loans were made, the payments being made retroactive to the dates of the loans.

*Held:* That the appellant's acquiescence in not receiving any interest on the money borrowed by him from the bank at interest for more than six years and then receiving interest from the Company only at the rate he was required to pay to the bank effectively disposes of his allegation that he had lent the money to the Company in the hope and expectation of receiving interest on the loans when the Company was in a position to pay interest out of revenue.

2 That if the urge for dividends really prompted the appellant to borrow money at interest and lend it to the Company, as alleged by him, the financial forbearance of the appellant for nearly a decade appears to be more consonant with an outright participation, through borrowed funds, in the furtherance of the real estate projects.

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3. That the enabling condition for availing oneself of the exception set out in s. 12(1)(a) of the *Income Tax Act* is that the "outlay or expense" be invested directly in the taxpayer's personal trade, business or calling, and not fused with the funds or working capital of a distinct legal body.
4. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Toronto.

*Wolfe D. Goodman* for appellant.

*S. Silver* and *D. G. H. Bowman* for respondent.

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

DUMOULIN J. now (January 13, 1965) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated June 28, 1963, respecting the income tax assessments of the appellant for taxation years 1954, 1955, 1956 and 1957.

Harry Topper, of the City of Toronto, pursues the trade of fur dresser and presser. In the statement of facts introductory of his appeal, at paragraph 1, he states that:

1. During the year 1953, the Appellant and others formed an investment company, Forest Hill Building Limited, herein called "the Company". As a condition of acquiring a one-third interest in the common shares of the Company, the Appellant was required to lend certain sums to the Company for purposes of financing construction of a proposed building.

In order to clarify the ratio linking loans and shares, Harry Topper testified to a respective proportion of forty percent of the funds advanced and one third of the shares issued; (loans, 40%; shares, 33%).

On five occasions, spreading between July 28, 1954, and February 23, 1955, the appellant borrowed a total of \$59,000 from the Toronto Dominion Bank "and immediately re-lent the said sums to Forest Hill Building Limited" (statement of facts, para. 2).

It should be noted that according to the evidence adduced by one Steven Polon, erstwhile President of the now defunct real estate enterprise whose corporate style was "124 Richmond West Limited", this company stood as a twin

venture to Forest Hill, both firms proposing to erect buildings in Toronto for investment purposes.

Polon also identified "the shareholders...beneficially interested in each of these companies as the Topper group, the Tannenbaum group and my own group", the former of the three consisting of "Victor and Harry Topper" and Mrs. Florence Topper, the latter's wife. (cf. transcript, at pages 9 and 10).

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Mrs. Florence Topper is not a party to this case, but a son, Victor Topper, also lodged, simultaneously with his father, appeal no. A-1620 of this Court's records for 1963; both issues being heard jointly, on similar facts and points of law, the sole difference relating to dates, amounts of money lent and bank interest paid.

Resuming the thread of the instant suit, Harry Topper's payments in respect of bank interest for the taxation period 1954 to 1957 inclusive reached a total of \$5,279.17.

As for the two companies, one, 124 Richmond West Ltd., now wound-up, obtained its incorporation January 8, 1956, the other, Forest Hill Building Ltd., December 28, 1953 (cf. transcript, pages 9 and 10).

The crucial explanations of the joint schemes are vouchsafed in paragraphs 1 and 2 of Part B of the appeal and may be summarized thus:

- 1 the monies borrowed from the Toronto-Dominion Bank were expected to produce income in the form of interest at six per cent per annum to be received from the two companies.
- 2 the loans to Forest Hill Building Limited and 124 Richmond West were a condition precedent to the acquisition of shares, which in turn would earn income "in the form of company dividends".

To these averments, the respondent, striking at the root of the matter, counters concisely that "... if the appellant did pay interest to a bank in the years in question, he was not entitled to deduct any such interest... as (it) was not interest on borrowed money used for the purposes of earning income within the meaning of paragraph (c) of subsection (1) of section 11 of the *Income Tax Act* (Reply to Notice of Appeal, para. 6).

Written briefs were filed by the litigants elaborating at greater length their contending viewpoints.

Counsel for the appellant, in the closing lines of his memorandum, submits this two fold conclusion:

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17 (a) . . . the evidence clearly indicates that the monies borrowed by the Messrs Topper from their bank were lent by them to Forest Hill Building Limited and 124 Richmond West Limited in the hope and expectation of receiving interest on these loans when these companies were in a position to pay interest out of revenues, and,

(b) that, in any event, even if the monies which they borrowed from the bank were lent to these companies without any hope or expectation of receiving interest on these loans (which is not admitted but expressly denied), the monies were nevertheless lent in the expectation that by doing so the Messrs. Topper would be enabled to earn dividends on their shares in these companies, and that, in either event, the Messrs Topper are entitled to deduct the Bank interest which they paid as "interest on borrowed money used for the purpose of earning income . . . from property", under section 11(1)(c) of the Income Tax Act.

The course of my review will be set along those lines, whose factual and legal appropriateness I shall attempt to probe.

The oral evidence indisputably established, in relation to the purported interest incentive, a sequence of rather untoward incidents. To begin with, it must be pointed out that Steven Polon, former President of 124 Richmond West Ltd., still is Secretary of Forest Hill Building. This executive's cross-examination on the interest topic is quite revealing, as the undergoing excerpts may prove. Mr. S. Silver, for respondent, is the examining counsel:

Q Mr Polon, my question was whether the company itself was a party to these arrangements (i.e. future payment of interest on eventual loans) at the time they were made?

A At the time they were made, there was no company

Q Forest Hill Building Limited wasn't in existence at the time?

A No

Q So, in fact, the company didn't agree to pay interest on these loans? That must follow, mustn't it?

A Yes, but the principals, of course, agreed and whatever the principals agreed to do naturally would necessarily follow (transcript, pp 28, 29, lines 23 to 33 and 2 to 6).

Nonetheless, this asserted effect did not trigger so instantaneous a "follow-up" on the part of the executive boards, chosen after both incorporations, of which Harry Topper was not a member.

Mr. Polon has this to say in the matter of 124 Richmond West Ltd.:

Q Was interest, in fact, ever paid by 124 Richmond West Limited?

A No, it wasn't (Transcript, p 25, lines 31 to 33 and repeated on p 32, lines 7 to 9)

This omission is all the harder to explain when coupled with a surplus bearing liquidation as told by Mr. Polon in these words:

After the property (owned by 124 Richmond West Ltd) was sold there was somewhat of a profit which was distributed in accordance with our arrangements and the company was wound up, actually, because it was a single purpose thing. (Transcript, page 26, lines 24-29).

I would subscribe to the respondent's apt comment recorded on pages 7 and 8 of his brief, from which I quote:

It is submitted that nothing could be a clearer indication that the parties to these loan transactions never contemplated the payment of interest Had the purpose of these loans been to earn income in the form of interest, it is submitted that they would have insisted on the payment of interest in priority to the distribution of profits. Their failure to do so and their acceptance of the presumably tax free capital gains distributed to them on the winding-up of the company confirm the Respondent's submission that the receipt of interest was not their purpose in making the loans

The twin venture, Forest Hill Building Limited, offers a somewhat different picture, but this could well be in appearance only. Harry Topper does not dispute the suggestion of respondent's counsel "that Forest Hill Building never set up an amount on its balance sheet or in its financial statement for the relevant years to indicate that it owed you interest."

On May 26, 1961, (cf. ex. A-2) a directors' meeting passed a resolution enacting that "... the Company (Forest Hill Building Ltd.) do pay interest at the rate of 6% per annum to those shareholders having made advances to the Company on the amounts so advanced, such interest to be calculated from the date the said advances were made."

It should not be overlooked, however, that this rather belated decision was arrived at nearly seven years after the initial advance, of July 28, 1954, and more than six years after the last loan, on February 23, 1955.

Did the departmental re-assessments, dated July 28, 1960, spur a failing intention, or possibly suggest a previously forgotten initiative? All such surmises may be entertained without, I trust, denoting an unduly skeptical mind.

A last link in this circumstantial chain seems no less intriguing. Exhibit A-2, the May 26, 1961, resolution authorizing eventual interest payment at a rate of six per cent, corresponds to a nicety with that due to the lending bank as Harry Topper readily admits. I quote from page 52 of the evidence, lines 9 to 28; Mr. Silver is cross-examining:

Q. Now, Mr. Polon had said that the interest was to be at the bank rate?

A Yes.

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Q. Would it be fair to say, Mr. Topper, that . . . the reason you set the rate of 6% was because you were merely trying to recover or recoup the interest you had paid to the bank?

A. This is about the case. I had paid around 6% to the bank.

And six lines below this witness agrees he was not particularly trying to make a profit "on the interest".

No better justification than the appellant's own acquiescence is required to waive aside the first of the appeal's two submissions, and hold that earning of interest on loans was not a prompting motive.

But, had it been a proven incentive, the appellant's claim would not derive therefrom any firmer support.

The Supreme Court of Canada dealt with a problem of this kind *in re: Canada Safeway Ltd. v. M.N.R.*<sup>1</sup>. One of the issues concerned the deductibility of interest accruing from bonds issued by the appellant for the taking over from the holding company of a subsidiary enterprise. Speaking for the majority of the Court, Honourable Mr. Justice Rand expressed himself as follows:

It is important to remember that in the absence of an express statutory allowance, interest payable on capital indebtedness is not deductible as an income expense. If a company has not the money capital to commence business, why should it be allowed to deduct the interest on borrowed money? The company setting up with its own contributed capital would, on such a principle, be entitled to interest on its capital before taxable income was reached, but the income statutes give no countenance to such a deduction . . . *What is aimed at by the section is an employment of the borrowed funds immediately within the company's business and not one that effects its purpose in such an indirect and remote manner.* (emphasis added).

The mere substitution of an individual, namely, Harry Topper, to the company in the precedent above, renders it fully applicable here.

Very few lines need be written to dispose of Harry Toppers' alternate submission (equally true in the case of Victor Topper) that the borrowed funds served the purpose of earning income in the form of dividends, periodically produced by company shares.

Once more, un rebutted facts run counter to this contention.

When the loans were extended to Forest Hill Building Ltd., the ultimate date being February 23, 1955, Harry Topper did not own one share of that company's capital

<sup>1</sup> [1957] S.C.R. 717 at 727.

stock, and neither he nor his son, Victor, became shareholders until their allotment, of 33 shares each, on June 17, 1956 (cf. ex. R-2, R-3, R-4).

Next, none of the two enterprises, neither Forest Hill Building nor 124 Richmond West Ltd., had, as yet, paid a dollar in dividend when Harry Topper gave evidence before this court, September 17, 1964, as appears in the transcript (page 53, lines 27 to 33):

Q. (By Mr. Silver) You never received a dividend from either Forest Hill Building Limited or 124 Richmond?

A. Not yet. The company isn't in a position to do it yet.

If an urge for dividends really prompted this deal, the taxpayer's patience must have been sorely tried after close to a decade of negative results. Such financial forbearance might appear more consonant with an outright participation, through borrowed funds, *in the furtherance* of two real estate projects.

At all events, a pertinent section, possibly more so than 11(1)(c), is, I believe, section 12, s-s (1)(a) prescribing that:

12. (1) In computing income, no deduction shall be made in respect of  
(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income *from property or a business of the taxpayer.* (italics not in text).

The enabling condition for availing oneself of the exception is that the "outlay or expense" be invested directly in the taxpayer's personal trade, business or calling, and not fused with the funds or working capital of a distinct legal body.

It is, I know, poor taste to presume quoting one's decisions; yet, since the parties at bar referred to a pronouncement of mine, I venture to take the liberty of so doing to emphasize the opinion just expressed.

In the matter of *Meyer Shuchat v. M.N.R.*<sup>1</sup> "the appellant borrowed money from the bank and reloaned it, interest free, to a company, S. & G. Furs, Inc., of which he was the controlling shareholder. He sought to deduct the interest paid to the bank in computing his personal income." (cf. Respondent's brief, page 14). The Court held that:

S. & G. Furs, Inc., is a company duly endowed with its own legal entity, completely separate from that of the appellant, and, therefore, had

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<sup>1</sup> [1963] C.T.C. 481 at 483.

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no financial connection whatever in law with Shuchat's personal income. If this assumption is exact, the money appellant borrowed from Canada Trust Company and subsequently passed on to S. & G. Furs, Inc, was not used for the purposes of earning his own personal income.

I can perceive of no significant differences between these two cases.

For these reasons, the appeal is dismissed with costs.

*Judgment accordingly.*

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BETWEEN :

VICTOR TOPPER .....APPELLANT;

AND

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

This is an appeal from a decision of the Tax Appeal Board, dated June 28, 1963, respecting the income tax assessments of the appellant for the taxation years 1955, 1956, 1957 and 1958.

At the outset of the hearing, both litigants requested and were granted leave to have this appeal tried and decided on the same evidence and according to the same texts of law and jurisprudence as the joint issue of *Harry Topper v. Minister of National Revenue*, bearing number A-1921 of the records of this Court for 1963, (*ante* p. 35).

Consequently, each of the findings of fact and law in the latter case will form an integral part of, and apply, to, *mutatis mutandis*, the instant one.

For parity of reasons this appeal is dismissed with costs.

*Judgment accordingly.*

BETWEEN :

RADIO IBERVILLE LIMITÉE . . . . . APPELLANT;

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AND

BOARD OF BROADCAST GOVERNORS . . RESPONDENT.

*Broadcasting—Radio Broadcasting—Appeal from order of Board of Broadcast Governors—Notice to licensee of alleged infraction—Opportunity to licensee of being heard re alleged infraction—Board’s power to order suspension of licence—Waiver by licensee of particular statutory requirement—Conclusion reached by Board in absence of admission or other material to support it—Power of Court on appeal from order of Board—Broadcasting Act, S of C. 1958, c. 22, ss. 12(5) and 15(1) and (3)—Radio (AM) Broadcasting Regulations, s. 4(1).*

Section 15(1) of the *Broadcasting Act* reads.

15. (1) Whenever in the opinion of the Board any licensee has violated or failed to comply with any condition to his licence as described in subsection (5) of section 12 or in subsection (1) of section 13, the Board may, after notice has been given to the licensee of the alleged violation or failure and an opportunity has been afforded to the licensee of being heard, order that the licence be suspended for a period not exceeding three months, but such order is not effective until the expiration of ten days after the making thereof.

On September 30, 1964 the Board of Broadcast Governors issued a notice to the appellant reciting that in its opinion the appellant had failed to comply with a condition of its licence under the *Radio Act* by failing to enter certain information in its program log of April 24, 1964, appointing a time and place at which the appellant would be heard with regard to the failures in question and notifying the appellant that the evidence of such failures might be examined at the offices of the Board. The president of the appellant company attended at the offices of the Board and on October 24 he wrote to the Board setting out his position with respect to the matters referred to in the notice. In the letter he admitted certain inaccuracies in the station’s program log during the week of April 19 to April 24 but did not admit all of the failures set out in the notice.

At the Board hearing the president of the appellant company made a statement in which he referred to his letter but he was not questioned by the members of the Board, and the Board never did consider the evidence referred to in the notice as in its opinion the interested party had acknowledged a violation of the Regulations.

By an order which recited that the Board was of the opinion that conditions of its licence in the several respects set out in the notice the Board suspended the appellant’s licence for one week.

On appeal from the order of the Board

*Held.* That under the provisions of s 15(1) of the *Broadcasting Act* the licensee is entitled to notice of any alleged violation or failure in respect to which the power of the Board is to be invoked and exercised and to a reasonable opportunity to present his answer or defence on the question of whether or not the alleged violation or failure has in fact occurred as well as to make representations as to the extent to which suspension of the licence would be warranted or appropriate in the particular circumstances.

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2. That the notice, by reciting that the Board was of opinion that the appellant had failed to comply with the terms of its licence, obscured what ought to have been one of its prime objects, viz., to tell the appellant that the matter of an alleged failure by it to comply with the terms of its licence would be considered at the time and place mentioned and that the appellant would have an opportunity to be heard on the question whether it had so failed or not.
3. That s. 15(1) of the *Broadcasting Act* requires that an "opportunity . . . of being heard" with reference to the question as to whether there has been a violation or failure to comply with any condition of the licence be "afforded" to the licensee and the "opportunity . . . of being heard" offered to the appellant by the notice of the Board under consideration was insufficient to comply with the statutory requirement.
4. That the power of the Board to order suspension arises only when the statutory requirements are fulfilled and while there is no doubt that it is open to the Board to exercise the power when the right of a licensee to insist on a particular requirement has been waived, either expressly or by necessary implication from his conduct, on the facts there had been no such waiver.
5. That the Board's decision with respect to the appellant's alleged failure to properly log its commercial spots and flash announcements as set out in the notice, which was not admitted by the appellant either in the letter or at the hearing is not sustainable in point of law as it is a conclusion reached in the absence of any admission or other material to support it, and this alone would invalidate the order of the Board under consideration since the suspension was presumably awarded in respect of both this failure and the failure with respect to logging programs.
6. That the Court's power under s. 15(3) of the *Broadcasting Act* to "alter . . . the order" cannot be exercised to substitute its own judgment of an appropriate suspension for the failure in respect of which the Board's opinion is sustainable, nor is there any provision for referring the matter back to the Board for the imposition of such suspension as it may regard as appropriate for that failure.
7. That the appeal is allowed and the order of the Board rescinded.

APPEAL from an order of the Board of Broadcast Governors.

The appeal was heard by the Honourable Mr. Justice Thurlow at Ottawa.

*P. E. Fortin, Q.C.* and *Brian A. Crane* for appellant.

*D. S. Maxwell, Q.C.* for respondent.

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

THURLOW J. now (January 19, 1965) delivered the following judgment:

This is an appeal pursuant to s. 15(3) of the *Broadcasting Act* S. of C. 1958, c. 22 from an order made by the Board of Broadcast Governors suspending for one week the appellant's licence under the *Radio Act* R.S.C. 1952, c. 233 to operate radio station CHRS. Such an appeal may be taken only on a question of law and the power of the court on such an appeal to "affirm, alter or rescind the order" is exercisable only for the purpose of giving effect to the court's judgment on such question of law.

The authority of the Board of Broadcast Governors to suspend a licence granted by the Minister of Transport under the *Radio Act* is contained in s. 15(1) of the *Broadcasting Act* which provides as follows:

15. (1) Whenever in the opinion of the Board any licensee has violated or failed to comply with any condition to his licence as described in subsection (5) of section 12 or in subsection (1) of section 13, the Board may, after notice has been given to the licensee of the alleged violation or failure and an opportunity has been afforded to the licensee of being heard, order that the licence be suspended for a period not exceeding three months, but such order is not effective until the expiration of ten days after the making thereof.

It will be observed that the power conferred by this subsection is exercisable only when the Board is of the opinion that the licensee has "violated" or "failed to comply with" a condition of his licence "after notice has been given to the licensee of the alleged violation or failure and an opportunity has been afforded to the licensee of being heard." In my opinion this means that the licensee is entitled to notice of any alleged violation or failure in respect to which the power of the Board is to be invoked and exercised and to a reasonable opportunity to present his answer or defence on the question of whether or not the alleged violation or failure has in fact occurred as well as to make representations as to the extent to which suspension of the licence would be warranted or appropriate in the particular circumstances.

The facts on which the appeal to this Court is to be determined are set out in an agreed statement of facts filed at the commencement of the hearing. This statement shows that the proceedings leading to the order under appeal began with a notice to the appellant issued by the Board over the signature of its chairman on September 30, 1964 entitled

"In the Matter of Radio Iberville Limitée

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## NOTICE OF HEARING"

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and reading as follows:

TAKE NOTICE THAT the Board of Broadcast Governors is of the opinion that Radio Iberville Limitée, licensee of radio station CHRS, has failed to comply with a condition of its licence as described in subsection (5) of Section 12 of the Broadcasting Act (7 Elizabeth chap. 22) in that the said licensee failed to enter in its program log of April 24, 1964, information concerning programs, commercial spots and flash announcements broadcast by station CHRS on that day, contrary to the provisions of subsection (1) of Section 4 of the Radio (A.M.) Broadcasting Regulations (SOR/64-49, enacted 15 January 1964);

AND TAKE NOTICE THAT the said Board pursuant to the provisions of Section 15 of the Broadcasting Act hereby sets Tuesday, the 3rd day of November, 1964, at the hour of 10:00 o'clock in the forenoon at Christ Church Cathedral Hall in the city of Ottawa in the Province of Ontario as the time and place at which Radio Iberville Limitée shall be heard pursuant to the provisions of subsection (1) of Section 15 of the Broadcasting Act with regard to the failure above stated;

AND FURTHER TAKE NOTICE THAT the evidence of such failure may be examined by the said licensee at the offices of the Board upon appointment made with the Secretary of the said Board.

Section 12(5) of the *Broadcasting Act* provides that:

Every licence issued before or after the coming into force of this Act is subject to the condition that the licensee will comply with the provisions of this Part and the regulations.

The relevant portions of the Regulation referred to in the notice read as follows:

4 (1) Each station shall maintain a program log, in a form acceptable to the Board, and shall cause to be entered therein each day the following information:

...

- (d) the title and brief description of each program broadcast, the name of the sponsor or sponsors, if any, the time at which the program began and ended and a notation whether the program was reproduced or was a live origination;
- (e) the time and duration of each commercial spot or flash announcement broadcast, the total commercial time in each sponsored program and the name of the sponsor of each such announcement and program;

It is agreed that prior to giving the notice the Board had not considered any evidence or reached any opinion with respect to the alleged failure of the appellant to comply with the conditions of its licence and it is also admitted that the Board intended to give the appellant an opportunity to explain or contradict by evidence and argument any evidence against it.

Following service of the notice on the appellant on October 7, 1964, Mr. Bernard Turcot who was both the

president of the appellant company and the general manager of its radio station visited the Board's office where certain tape recordings and the program log of the appellant's station were shown to him and on October 24 he wrote a five-page letter to the Board setting out his position with respect to the matters referred to in the notice as well as with respect to certain other matters which had also been brought to his attention and which may have indicated breaches by the appellant of the same and of some other regulations during the week of April 19 to April 24. With respect to the broadcasting of commercial spots and flash announcements by CHRS the letter raised a question of what was required to be entered in the appellant's log but contained no admission of any "failure" by the appellant to comply with the applicable regulation in the logging of such broadcasts for April 24, 1964. With respect to programs the letter admitted that the log entries with respect to two programs broadcast during the week of April 19 to 24 had been incorrect in that a program which had lasted from 2.30 p.m. to 4.00 p.m. was by inadvertence entered in the log as having lasted from 2.30 p.m. to 3.30 p.m. and a program which lasted from 6.00 p.m. to 7.00 p.m. was entered as having lasted from 6.00 p.m. to 6.30 p.m. The latter was also referred to as a daily program. The letter concluded with the following:

In resumé, the undersigned, in his actual official capacity of president and still majority shareholder of Radio-Iberville Limitée, declares that:

I recognize that, during the week of April 19th to 24th, 1964, in its logging and operation, radio station CHRS has violated, at least technically and without any intent of disrespect or disregard for the Board, some of the Board's radio regulations;

These violations occurred without the consent and knowledge of the undersigned, who took corrective measures as soon as learned of it;

Radio-Iberville Limitée and radio station CHRS, in as much as the undersigned will have control and responsibility of its operations, will abide by the decision that the Board will take concerning a possible suspension, after considering the foregoing explanations.

Respectfully yours,

"B. Turcot"

Bernard Turcot. (CHRS)

P.S. I will be present at the November 3rd public hearing and will be available for questioning, if the Board so desires.

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When the matter came before the Board on November 3, 1964, counsel for the Board stated that the item of business was "for a hearing under Section 15 of the Broadcasting Act that the licence of Station CHRS be suspended for a failure to comply with a condition of its licence, to wit, Section 4(1) of the Radio (AM) Broadcasting Regulations." He then read section 15 of the Act, the notice and an affidavit of service thereof, and after suggesting to the Board that both Mr. Turcot and a proposed purchaser of the shares of the appellant company be heard he invited Mr. Turcot to speak. Mr. Turcot thereupon stated that he was not present when the summons was served, that he had heard of the alleged violation through CBC newscasts, had subsequently met counsel for the Board at the Board's office and had later filed with the Board his letter of October 28 explaining "under what circumstances the alleged violation happened, and, right now, (would) limit (himself) to reading for the record the last page of that statement." He then read the portion thereof quoted above and stated he was available for questioning if the Board so desired. No questions were asked. Counsel for the proposed purchaser was then heard but made no admission beyond agreeing with Mr. Turcot. Counsel for the Board thereupon suggested that if the Board wished he would summarize what the offence was but the Board appears to have regarded that as unnecessary. That completed the hearing. On November 5 the Board convened in camera and decided that the appellant's licence should be suspended for one week and that the Board's order should issue on November 16. Neither at this meeting nor at the previous meetings mentioned in the agreed statement of facts was there any consideration by the Board of the tape recordings and station log as in the opinion of the Board the interested parties had acknowledged a violation of the regulations.

The order was issued on November 16 and reads as follows:

WHEREAS the Board of Broadcast Governors having reached the opinion that Radio Iberville Limitée, licensee of radio station CHRS had failed to comply with a condition of its licence, in that the said licensee failed to enter in the station's program log of April 24th, 1964, information concerning programs, commercial spot and flash announcements, as required by subsection (1) of Section 4 of the Radio (AM) Broadcasting Regulations (SOR/64-49, dated 15 January 1964);

AND WHEREAS the Board by Notice to the said licensee appointed the hour of ten o'clock in the forenoon on Tuesday the 3rd of November A.D. 1964 at Christ Church Cathedral Hall in the City of Ottawa, in the Province of Ontario, as the time and place for the said licensee to be heard;

AND WHEREAS the said licensee, by its representatives was heard by the Board at the said time and place with regard to the said failure;

NOW THEREFORE the Board of Broadcast Governors, pursuant to the provisions of Section 15 of the Broadcasting Act, orders that the licence issued to Radio Iberville Limitée for the operation of radio station CHRS be suspended for a period of one week.

On the appeal to this Court the first point taken on behalf of the appellant was that the notice did not comply with the statutory requirement that the appellant be given notice of the "alleged violation or failure" since it recited that the Board was of the opinion that a failure had occurred and even though the Board had not in fact reached such an opinion and in fact intended to hear the appellant on the question the purport of the notice was that the Board had already formed its opinion on the failure in question and proposed to hear the appellant only on the question of the suspension to be imposed therefor. The substance of this submission is I think that while the notice states that the appellant will be heard at the time and place mentioned therein the character of the "opportunity ... of being heard" that was afforded to the appellant by the notice of September 30, 1964, did not comply with the statutory requirement inasmuch as it did not afford the appellant an opportunity of being heard on the question whether it had failed to comply with a condition of its licence. In answer to this submission counsel for the Board pointed to certain expressions in the notice itself and in Mr. Turcot's letter of October 24 as well as in a letter written on October 20 by solicitors for the proposed purchaser as indicating both that the notice was not open to such a construction and that it was not so interpreted by the recipient. It is, however, a curious and, I think, not unimportant fact that such matters in the nature of a defence as were raised were put in a letter and sent to the Board before the hearing rather than reserved, as one would expect them to be, until the case against the appellant had been presented at the proposed hearing. In my opinion the utmost that can be said for the notice is that by reciting that the Board was of the opinion that the appellant had failed to comply with the terms of its licence it obscured

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what ought to have been one of its prime objects, viz., to tell the appellant that the matter of an alleged failure by it to comply with the terms of its licence would be considered at the time and place mentioned and that the appellant would have an opportunity to be heard on the question whether it had so failed or not. While it did not clearly state that the appellant would not be heard on the merits as to the alleged failure neither did it clearly convey that the appellant would be heard on that question. Nor is it shown either that the appellant was given notice at a later stage that it would be heard on the merits of whether or not the alleged failure had occurred or that it was given an opportunity to be heard on that question. Moreover, while there are expressions in the letters which I have mentioned which are open to the interpretation that the writers construed the notice as meaning that the appellant would be heard on the merits of the alleged failure the expressions in Mr. Turcot's letter, which is the only letter that I regard as being relevant, and his conduct throughout are in my opinion equally consistent with the view that he was under the impression that no such opportunity was being given.

In my opinion, section 15(1) requires that an "opportunity . . . of being heard" with reference to the question as to whether there has been a violation or failure to comply with any condition of the licence be "afforded" to the licensee and the "opportunity . . . of being heard" offered to the appellant by the notice of September 30, 1964 was insufficient to comply with the statutory requirement.

It was, however, urged by counsel for the Board that even if the notice was deficient in form any right of the appellant to insist on a proper notice had been waived. The appellant, it was said, had had notice that it would be heard and it stood by without objecting that it had not been given notice of a hearing on the merits of the alleged failure while the Board proceeded to a conclusion, that the appellant owed a duty to the Board to object if it considered that the Board did not have the right to proceed to a conclusion but that instead of raising any such objection the appellant in the last paragraph of Mr. Turcot's letter, which was read at the hearing, expressed willingness to abide the decision which the Board might take.

In my opinion there was no such duty on the appellant to object on pain of losing its rights if it failed to do so. The power of the Board to order suspension arises only when the statutory requirements are fulfilled and while I do not doubt that it is open to the Board to exercise the power when the right of a licensee to insist on a particular requirement has been waived, either expressly or by necessary implication from his conduct, mere failure to object by a person not shown to have been aware of the true position in circumstances such as I have described wherein no opportunity to be heard on the merits with respect to the imputed failure was ever offered to him, in my opinion constitutes neither waiver nor conduct from which waiver should be implied. Moreover, the expression of willingness to abide the decision of the Board is plainly limited to what the Board may properly decide and is also expressed as conditional on the Board "considering the foregoing explanations" and there is nothing in the case to suggest that the Board did so. I am accordingly of the opinion that the appellant did not waive its right to be afforded "an opportunity . . . of being heard" with reference to its "alleged failure" to comply with the condition to its licence and that the Board's order cannot be sustained.

There is, however, a further ground on which I propose to rest this judgment. Despite the fact that the failure to make entries in the log with respect to commercial spots and flash announcements broadcast on April 24, 1964, as set out in the notice, was not admitted either in Mr. Turcot's letter or at the hearing, and that no other material was considered by the Board, the order recites that the Board is of the opinion that the appellant has failed in this respect to comply with the condition of its licence. The Board's conclusion on this particular subject, which, it may be noted, arises under a different paragraph of the regulation from that relating to the logging of programs and is therefore a separate subject-matter, is therefore not sustainable in point of law as it is a conclusion reached in the absence of any admission or other material sufficient to support it. This in my opinion invalidates the order since the suspension was presumably awarded in respect of both this failure and the failure (if what occurred can be so described) to comply with Regulation 4(1)(d) with respect to the logging of programs.

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It was submitted that the Court might alter the order by striking out the reference to commercial spot and flash announcements but this, in my view, would not cure the defect. Having concluded that there was no basis for the opinion expressed in the first recital of the order that the appellant had failed to enter in its log information concerning "commercial spot and flash announcements", the Court could, I think, in the exercise of its power to "alter . . . the order", delete the recital of that opinion from the order. However, the foundation for the Board's order that the appellant's licence should be suspended for one week was its opinion that the appellant had failed to comply with a condition of its licence in that it had failed to enter in its log for April 24, 1964, information concerning "programmes, commercial spot and flash announcements", and the order for suspension of the appellant's licence does not purport to be the Board's order or to represent its judgment with respect to the supportable portion of its opinion alone. To amend the opinion of the Board as expressed in its order while leaving the suspension unaltered would thus in substance and in effect be to award a suspension for the supportable portion of the Board's opinion. In my opinion such a course is not open to the Court on this appeal. The Court's power under s. 15(3) of the *Broadcasting Act* to "alter . . . the order" cannot, in my view, be exercised to substitute its own judgment of an appropriate suspension for the failure in respect of which the Board's opinion is sustainable, nor is there any provision for referring the matter back to the Board for the imposition of such suspension as it may regard as appropriate for that failure. Accordingly, as the order for suspension of the appellant's licence for one week could be regarded neither as the order of the Board in respect of the sustainable portion of its opinion nor as the order of this Court, if the suggested deletion from the recital of the Board's opinion were made the fourth paragraph of the order would have to be deleted as well, leaving the order with no operative clause. The effect would be to rescind the order.

The appeal will therefore be allowed and the order of the Board suspending the appellant's licence will be rescinded. There will be no order as to costs.

*Judgment accordingly.*

BETWEEN :

THE MINISTER OF NATIONAL

REVENUE . . . . . APPELLANT;

AND

WILLIAM J. RYAN . . . . . RESPONDENT.

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} Sept. 14, 15  
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} Jan. 22

*Revenue—Income—Income tax—Profit-making scheme—Time when the four year limitation period for reassessment commences to run—Taxpayer unable to specify nature of payments received—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(4)(b) and 139(1)(e).*

The appellant, a life insurance agent in Toronto, Ontario, has been engaged consistently in mining stock ventures as far back as 1925 and down to the years 1955 and 1956, the years for which the respondent's income tax has been reassessed by the appellant, by adding to his taxable income for the two years a total of \$50,017.16 received by the respondent from one Bernard E. Smith in one payment on May 5, 1955 and two payments in February 1956.

The respondent was in 1953 a director of Chimo Gold Mines Limited, from the treasury of which he was allotted 90,000 vendors' shares, as a member of the promoters' group. In 1954 the respondent was authorized to negotiate the disposal of 1,000,000 shares of Black Bay Uranium Mines Limited, a subsidiary of Chimo Gold Mines Limited, which he did by selling them at \$1.00 per share to Bernard E. Smith, a wealthy New York investor, alleging that as a part of the transaction he was required to agree to purchase 10,000 of the shares at \$1.00 per share. The respondent was not a member of the syndicate that managed the affairs of Black Bay Uranium Mines Limited and there was no evidence that the respondent ever paid for any shares in that company.

In his Reply to the Notice of Appeal the respondent alleged that the payments he received from Bernard E. Smith constituted "a capital gain being the difference between the agreed purchase price and the price for which the 10,000 shares must have been resold or otherwise disposed of by the said Bernard E. Smith and associates.". On his examination for discovery the respondent said that he assumed the sums were payment for many favours he had done for Smith in the past. When the cheques were produced at trial, the respondent said he never was given any reason for obtaining them. Bernard E. Smith died in May 1961, more than three years after the respondent had notice of reassessment, yet he made no effort to determine from Smith before his death why the payments were made.

*Held:* That the payments were manifestly something else than gifts a permissible deduction enhanced by the fact that each of the three payments is for an odd amount.

- 2. That there is little doubt that the amount of \$50,017.16 received by the respondent in 1955 and 1956 resulted from a profit-making scheme of a promotional kind.
- 3. That the time limit of four years for reassessing the respondent's income tax did not start to run in this case until the day of receipt of each of the three cheques in question.
- 4. That the appeal is allowed.

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APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Toronto.

*W. Z. Estey, Q.C.* and *M. A. Mogan* for appellant.

*J. J. Urie, Q.C.* for respondent.

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

DUMOULIN J. now (January 22, 1965) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated February 20, 1961, with respect to income tax assessments for the respondent's taxation years 1955 and 1956<sup>1</sup>.

What would seem, at first reading, an involved affair, can be greatly simplified when subjected to careful consideration.

William J. Ryan, the respondent and cross-appellant, although pursuing the business of a life insurance agent in the city of Toronto, consistently engaged in mining stock ventures so far back as 1925 and down to the material years, 1955-1956.

He was, in 1953, a director of a local mining company, Chimo Gold Mines Limited, from whose treasury he received 90,000 "vendors' shares", according to his own expression, as a member of the promoters' group. (cf. exhibits A-3 and A-6, pp. 1 and 2).

Those shares, allotted to Ryan on April 14, 1953, were immediately put in escrow, and thereafter gradually released in blocks of varying quantities, from February 18, 1954, to December 29, 1955, when a balance of 24,660 was discharged.

Chimo Gold Mines Ltd., sometime in 1954, floated on the mining market a subsidiary under the name and style of Black Bay Uranium Mines Limited, the parent body retaining 2,000,000 shares.

Ryan was authorized to negotiate the disposal of one million shares of this issue, a task he successfully achieved, in the fall of 1954, when, pursuant to his endeavours, a wealthy New York investor, one Bernard E. Smith, acquired that large lot of stock at a price of \$1.00 a unit.

<sup>1</sup> (1956) 26 Tax A.B.C. 373.

In his evidence, W. J. Ryan said that Smith's son, then present, insisted he should, as a token of good faith, buy a ten thousand slice of this million shares at the stipulated price of one dollar apiece, a request to which the respondent assented.

An underwriters' syndicate, comprising the brokerage firm of Draper-Dobie, Harry William Knight, Frederick Joseph Crawford, these two Toronto brokers, and the New York financier, Bernard E. Smith, attended to the management and speculative destinies of Black Bay Uranium; Smith holding, personally, a 50% overall interest.

Sufficient evidence, that of Ryan himself, unhesitatingly corroborated by Messrs. H. W. Knight and F. J. Crawford, eliminates the respondent from any membership in that syndicate.

We now reach the start of the several complexities requiring solutions.

To begin with, the 10,000 shares of Black Bay Uranium, above mentioned, supposedly bought by W. J. Ryan at Smith Junior's urging, were not paid for by the former, who never had to comply with this obligation.

Under such circumstances, it does seem odd that the respondent became the recipient of a cheque, dated May 5, 1955, in a sum of \$11,581.12 (cf. ex. R-5, p. 2, distribution of March 15, 1955), and of two others on February 8 and 9, 1956, respectively for amounts of \$25,377.70 (viz. R-5, p. 6) and \$13,058.34, this last also admitted by Ryan but untraced.

The sum total of what, so far, bears all the characteristics of a triple windfall, is \$50,017.16.

Needless to say, the income tax people fervently hoped that the fortunate beneficiary of such amounts would oblige with the requisite explanations, the more so since his tax returns for the pertinent years omitted all allusion to this sudden flow of wealth.

As that hope went unsatisfied, the Minister of National Revenue, on February 12, 1958, re-assessed the respondent's income for the 1955 taxation year, adding thereto ". . . the sum of \$11,581.12 as the Respondent's share of the profits made during the 1955 taxation year on the underwriting of one million shares of Black Bay Uranium Limited".

The same day of 1958, Ryan was re-assessed by the addition of \$25,377.70 to his 1956 reported income, and, on

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January 26, 1960, by the inclusion of \$13,058.34 again for the 1956 taxation year, "... on the underwriting of the same one million shares of Black Bay Uranium Limited".

Customary objections filed by the taxpayer were as customarily rejected under the assumptions that (cf. Notice of Appeal, para. 3 (a)):

3. (a) The Respondent had a 5% interest in a partnership or syndicate which underwrote one million shares of Black Bay Uranium Limited; and because, as stated in para. 8:

8. The Appellant says that the Respondent's share of the income or profit of the partnership or syndicate which underwrote the one million shares of Black Bay Uranium Limited is income from a business.

Alternatively, if respondent was not a member of a partnership or syndicate then, the appellant argues those amounts were received "... by the Respondent for services rendered to the partnership or syndicate, and hence, are income ... within the provisions of Section 3 and 4 of the *Income Tax Act.*" (cf. Notice of Appeal, para. 10).

At this point it is imperative to inquire into Ryan's own view or rather views of the matter, since these were manifold and conflicting.

In para. 9 of his Reply to the Notice of Appeal, filed on November 14, 1961, he declares accepting:

... the sums hereinbefore set out which he received from or through the said Bernard E. Smith as a capital gain being the difference between the agreed purchase price and the price for which the said shares must have been resold or otherwise disposed by the said Bernard E. Smith and associates.

On June 26, 1964, Ryan, examined on Discovery, struck a different note. Asked by appellant's counsel, Mr. W. Z. Estey, Q.C., to motivate the payment of those considerable amounts, Ryan replied:

A. I have just told you: over the years I did Mr. Smith a number of favours by putting him in touch with mining deals where I know he made a lot of money.

Q. And you assume that is the reason you received this payment?

A. I assume that, because I don't know. I haven't had a chance to talk to him. As I say, if this thing had been brought up when I could have had him here as a witness, the thing could be cleared up, but the Government has been delaying it and delaying it. (cf. transcript, pp. 30-31)

At page 32, Mr. Estey's question to the witness reads:

Q. I can't cross-examine you and I don't intend to do so indirectly, but I would like you to tell me, or perhaps to make clear to me, just what your allegation is with regard to the \$50,000. To be

specific, I want to know if you received the \$50,000 as a result of the prior association with Bernard Smith that you have described, or did you receive it as a result of the agreement with Smith to buy the 10,000 shares?

A. I don't know; all I can do is presume.

Q. What do you presume?

A. I presume he may have wanted to do something for me for past favours, as well as this one. This was a favour to him as well. And the fact that he isn't here, there never was a chance to discuss this with him. That is the best I can do.

These answers were read to the witness during his cross-examination at trial and he agreed "that his replies then were and still are true", with the comment that he considered those \$50,017.16 "as capital payments and therefore exempted from income tax and from mention in his annual income returns". Yet, as the cheques aforementioned were produced, Ryan told the Court he never was given any reason for obtaining them nor could he find any, save the conjecture that Bernard E. Smith "intended rewarding him for his agreement to purchase a block of 10,000 Black Bay Uranium shares".

It does appear difficult to reconcile the alternating suggestions of a reward for services rendered, or the payment of capital profit on resale by Bernard E. Smith of the Black Bay Uranium shares for which Ryan did not pay a dollar, or with Ryan's initial declaration that he could think of no motivation whatever for Smith's astonishingly generous gestures. But, more peculiar still was Ryan's complete and persisting aloofness in the matter, he not taking the elementary steps of inquiring from Smith or from Draper-Dobie and Frederick J. Crawford, under what pretence the cheques were issued to him. Moreover, Ryan waived aside the timeless prejudice that a gift calls for a few words of appreciation; and the receipt of cheques for large amounts, even though normally due, for some form of acknowledgement. The respondent never wrote a word to Smith, never called him over the phone and, as already noted, did not seek from him or anyone else an explanatory word; he kept both his peace and the money.

On September 25, 1964, the appeal having been argued on the 14th, the respondent's counsel filed a written argument which, at last, appears to suggest a more plausible

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consideration. On pages 4 and 5 of respondent's memorandum, we read this long but, I believe, all-inclusive statement:

The explanation as to why he received the money arises, it is submitted, by virtue of the fact that he agreed to purchase 10,000 shares of Black Bay Uranium Mines Limited at a price of \$1.00 a share. In view of the quick turn-over of shares, he was never called upon to complete the purchase and, further, in view of the immense profits made by members of the syndicate so quickly and by Mr. Smith in particular, as well as for past favours rendered to Mr. Smith, he was given a share of the profits of Smith out of the syndicate. It was not an "introduction fee" as described by Knight nor did it arise as a result of a contractual obligation between Smith and Ryan. Substantiation of this fact is found in that Smith at no time apparently claimed as an expense the payment to Ryan, and Ryan received no T4 slip indicating payment of the fee or salary from Smith. Apparently the payments were made on the instructions of Smith by Draper, Dobie & Co Ltd. which was the firm representing the syndicate. There is no question that the first two payments, at least, were out of Black Bay Uranium Mines Limited profits, and in particular Smith's share thereof. It would appear equally clear, in view of the evidence submitted above, that the third cheque also came from those profits.

In a more practical vein, though, it would have been of some use to the respondent to get in touch with Bernard E. Smith in New York and elicit from him either in the form of an affidavit or otherwise, the purport of those payments, especially after February 12, 1958, when respondent had been the object of departmental re-assessments which he meant to contest.

Bernard E. Smith, who died only in May of 1961, was, in February 1958 and after, within easy reach of Toronto. Subsequent to the Black Bay Uranium deal, Ryan and Smith had just a casual few minutes' interview in Toronto, during the spring of 1955, and, strangely enough, no mention was made of the fortune paid to the former by the latter.

An immediate appreciation of the Black Bay mining stock, triggered, in the fall of 1954, by a rumor of uranium deposits on the company's property, boosting its shares to a "high" of \$3.80 by June 20, 1955 (cf. ex. A-8), might suggest the plausible surmise that Smith's threefold instalments to the respondent simply acknowledged some private, unwritten agreement, whereby he undertook to let Ryan have a percentage of the eventual profits. This assumption is enhanced by the equivalence of a 5% ratio to the amounts distributed on March 15, 1955, viz. \$231,662.51, paid to Ryan: \$11,581.12 (cf. ex. R-5, p. 2), and a 7.3%

one on February 8, 1956, \$348,943.70, paid to Ryan: \$25,377.70 (cf. ex. R-5, p. 6). The third cheque of February 9, 1956, is unaccounted for and most likely came from Smith's profits on the sale of the selfsame shares.

A grateful and exceptionally generous speculator could, possibly, have materialized, in donations of lump sums, his gratitude for valuable so-called "tips". But, then, how can one reasonably account for some hundred dollars and, more so, for those few cents conjoined with such figures as eleven thousand (\$11,381.12), thirteen thousand (\$13,058.34) and twenty-five thousand dollars (\$25,377.70). Manifestly, these distributions are something else than gifts.

*Nemo præsumentur donare*, observed the Roman Jurists many centuries ago, a psychological dictum no less accurate today than in the distant past. There is little doubt that the amount of \$50,017.16 received by the respondent in 1955 and 1956 resulted from a profit-seeking scheme of a promotional kind, therefore statutorily assessable, in accordance with s. 139 (1) (e) of the Act.

Conversely, of course, in transactions such as these, taxability of income usually entails deductibility of losses pertinent thereto, and this is where another hitch develops, the appellant challenging the qualification attached to the deficits by the respondent.

The ministerial contention is concisely related at page 17 of a brief, dated October 13, 1964; I quote those few lines:

The position of the Appellant is, however, simply that in each of the taxation years 1955 and 1956, the Taxpayer must include in his taxable income the payments received from Ben Smith by way of the three cheques amounting to \$50,017.16, for both years, and may not set off against this income losses on investments.

We shall see, shortly, that this prohibition is aimed at the large holdings of Chimo Gold Mines shares standing in the taxpayer's name, at the material time and issued to him April 14, 1953, in the guise of "vendor's shares".

Exhibit R-1, signed March 18, 1964, some five years after ex. A-2 of July 29, 1959, the taxpayer's first report of his transactions, should not, I believe, for that reason alone, be declared totally unreliable. On its first page, the recapitulation of losses for the 1956-1957 period amounts to \$114,434.03. Nowhere have I found any claim against the respondent for 1957 and, accordingly, the loss of \$31,531.96

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attributed to that year should be deleted, leaving an outstanding deficit of \$82,902.07 for 1956.

The first item of this collective deficit would consist of a \$42,725 loss incurred in shares of Chimo Gold Mines Ltd. On page 9 of ex. R-1, listing allegedly the security transactions of William J. Ryan for the year ended December 31, 1956, he is reported as having sold 10,000 Chimo shares for \$11,275 as against a market price ("M.V."), at December 31, 1955, of \$18,400, a loss of \$7,125.

A diligent survey of that belatedly drawn-up document reveals more wishful thinking than worthwhile information and requires a good deal of pruning down. We must revert to the 90,000 Chimo Gold Mines vendor's shares granted on April 14, 1953, to W. J. Ryan (cf. ex. A-3). No evidence, oral or written, shows the price, if any, at which this allotment was consented to the respondent, so that I am unable to ascertain whether or not a market value of \$18,400 for 10,000 shares as of December 31, 1955, and a selling rate, at unspecified dates in 1956, of \$11,275 for an equal quantity of stock really represents a loss (cf. R-1, p. 9), more especially as Ryan's auditor and brother, Lawrence Ryan, in his "Replies to particulars by M.N.R.", ex. A-3, filed at the hearing of the case, writes that:

3. It would appear to me that this 10,000 shares was part of the 90,000 shares acquired by the Respondent Ryan on April 14, 1953.

As for the ensuing entry, listing 40,000 Chimo Gold Mines shares, it is interesting to note that not one of these was sold in that year, 1956. The loss of \$35,600, appearing on the financial report, ex. R-1, is simply arrived at by deducting from the market value obtaining on December 31, 1955, \$73,600, the December 31, 1956 market value of \$38,000, in relation to a block of 40,000 shares.

An accountancy practice of this nature is altogether too easy and cannot be seriously entertained. The proper time to determine the result of transactions in these shares will come up if and when they are disposed of.

I possess no better evidence regarding Trojan Explorations Ltd., in which the taxpayer may presumably have made a regular investment, and, so far, investment gains are free of income tax and losses from identical sources may not be set off against income. Therefore, the alleged

loss of \$39,726.08, appearing on pages 9 and 10 of ex. R-1, should not be considered.

The respondent contended in Court, and renews these objections in his written memorandums, that appellant was estopped from re-assessing the income for the material years by s. 46(4)(b) of the *Income Tax Act*, restricting to “. . . 4 years from the day of an original assessment in any other case” (when no misrepresentation or fraud is alleged) the Minister’s power to do so. His submission that the amounts paid to him, May 5, 1955, and February 8 and 9, 1956, represent profits earned during the 1954 and 1955 taxation years might deserve consideration if those monetary distributions consisted in regular dividends or stock transactions by the taxpayer himself, instead of some undivulged but discernible scheme for profit-sharing of a venture in the nature of trade. Unable or unwilling to give a satisfactory account of his dealings with Bernard E. Smith, and most likely without legal recourse against the man, the time limit foreseen in the Act should run, in Ryan’s case, from the day each cheque was received.

Even so, were his argument approved in principle, it would be pointless in fact, since the ultimate deadline applying to the \$13,058.34 instalment of February 9, 1956, for which a re-assessment notice issued January 26, 1960, would be February 8 of the latter year.

The respondent’s cross-appeal, directed against the Tax Appeal Board’s finding that he was a trader, seems substantiated by evidence before this Court, but was of slight importance and went uncontested. It will be allowed without costs.

For all reasons above, the present appeal is allowed with costs in favour of the appellant.

*Judgment accordingly.*

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BETWEEN:  
 FREDERIC D. BARTON ..... PLAINTIFF;  
 AND  
 RADIATOR SPECIALTY COMPANY }  
 OF CANADA, LIMITED ..... } DEFENDANT.

*Patents—Infringement—Validity—Commercial success of patented product—Product merely a collocation by blending into one product two known substances—Two known substances combined into one product which is not a new substance and result of use of which is no better than result of separate use of each substance—Lack of inventiveness—Obviousness.*

In this action the plaintiff alleged infringement by the defendant of Canadian Patent No. 501,547 dated April 20, 1954, for an invention entitled "Stop-Leak Preparation", and the defendant counterclaims for a declaration that the patent is invalid, on the grounds of lack of inventiveness, anticipation or lack of novelty, obviousness, inutility, false suggestion and insufficient disclosure, ambiguity in the specification and that the claims are too broad.

The stop-leak preparation described in the plaintiff's patent consists essentially of ginger root flour and soluble oil or a mixture of rhizone flour and soluble oil.

The evidence established that for many years prior to the date of issue of the plaintiff's patent, soluble oil had been widely used commercially to prevent the formation of iron oxide rust in engine cooling systems and to inhibit radiator core corrosion, ginger flour had been used as a stop-leak in internal combustion engine cooling systems, and there had been widespread knowledge and use of an oil carrier for various stop-leak products included in which was the ingredient powdered ginger or ginger flour.

*Held:* That the considerable commercial success achieved by the plaintiff in marketing his product to which the patent in suit relates has resulted from the considerable ingenuity and skill with which he has marketed the product and the technique of selling his products as a three-way application for firstly, stopping leaks in radiators and cooling systems of internal combustion engines, secondly, as a water pump lubricant for such engines and thirdly, as a rust inhibitor, but this has nothing to do with the subject of a valid patent.

2. That there is no invention in the plaintiff's product, which is a mere collocation by blending into one product two known substances, namely, ginger root flour and soluble oil, and that the two substances combined into one product, which is not a new substance, do not produce a better result than if each substance is used separately.
3. That all the claims in the plaintiff's patent are not inventive and that they and the whole patent are invalid.
4. That the action is dismissed.

ACTION for infringement of a patent.

The action was tried by the Honourable Mr. Justice Gibson at Ottawa.

*Samuel Weir, Q.C., W. R. Meredith, Q.C. and D. F. S. Coate* for plaintiff.

*A. S. Pattillo, Q.C., W. L. Hayhurst and D. J. Wright* for defendant.

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

GIBSON J. now (February 17, 1965) delivered the following judgment:

This is an action in which the plaintiff claims an injunction and other relief in respect of alleged infringement of Canadian Patent No. 501,547 dated April 20, 1954, for an invention entitled "Stop-Leak Preparation"; and in which the defendant counterclaims for a declaration that the said patent is invalid, and other relief.

This action came on for trial and was argued before Cameron, J., before his retirement. Thorson, P., as he then was, made an order on February 13, 1964, for a new trial on the existing evidence and argument. I have retried this action on that evidence and argument pursuant to that order and I now deliver judgment accordingly.

The product of the plaintiff which is the subject of the patent in issue in this action is a stop-leak preparation used primarily for the purpose of putting in the cooling system of internal combustion engines, in motor cars and trucks, to stop leaks.

It is the claim of the plaintiff that this product will stop not only external leaks in such cooling systems which occur in radiators, but also internal leaks in such cooling systems that is in cars in which liquid from such cooling systems seeps through the walls of the cylinders into the combustion chambers, or seeps into the oiling system of such engines.

The modern motor car and truck engine now runs much better and therefore more efficiently because of the discovery that the boiling point of the liquid in the cooling system of such could be raised by pressurizing the cooling system. But this had the disability of increasing the propensity of such cooling systems to leak, primarily through so-called pin-hole leaks in the radiators of such, but also

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though the water pumps and cylinder walls, etc., in the manner above mentioned.

The water pump leaking problem was solved by the development and use of sealed water pumps. And it is the allegation of the plaintiff that these other small, and difficult to eliminate leaks in such cooling systems were stopped by the use of his product which he developed, marketed and patented after World War II. Such marketing and patenting was done in the United States and Canada.

The product of the plaintiff is known as "Bar's Leaks".

The defendant made and put on the market a product which it calls "M. P. cooling system conditioner".

It is the allegation of the plaintiff that this product of the defendant is practically identical to his product and that as a consequence its manufacture and sale infringes the said patent of the plaintiff.

The specifications and claims of the plaintiff's patent are quite brief, *viz.*:

#### SPECIFICATIONS

My invention relates to stop-leak preparations, and more particularly to that type of stop-leak preparation employed in the cooling system of engines and has particular reference to the cooling system of automotive vehicles though not necessarily limited thereto.

Those prior art stop-leak preparations, of which I am aware, function on the theory of forming a film or coating over the leak while in the process of being circulated around the cooling system, and while such preparations can be relied on to produce quick results in the desired direction, the film or coating thus formed, remains directly exposed to the wearing action of the circulating water in the system and the abrasive action of any rust or grit which may be circulating around with the water.

Among the objects of my invention are:

- (1) To provide a novel and improved stop-leak preparation;
- (2) To provide a novel and improved stop-leak preparation which shall produce a more durable seal;
- (3) To provide a novel and improved stop-leak preparation having lubricating qualities beneficial to the water pump in a cooling system;
- (4) To provide a novel and improved stop-leak preparation capable of sealing cracks in radiator and engine blocks and seal leaks around those connections;
- (5) To provide a novel and improved stop-leak preparation which possesses the additional factor of inhibiting the formation of rust, thus maintaining a clean cooling system;
- (6) To provide a novel and improved stop-leak preparation which will not congeal on exposure to the atmosphere;
- (7) To provide a novel and improved stop-leak preparation which blends well with known anti-freeze solutions;

(8) To provide a novel and improved stop-leak preparation having no deteriorating action on the rubber or metal;

(9) To provide a novel and improved stop-leak preparation which will not deteriorate with time;

(10) To provide a novel and improved stop-leak preparation which may be readily prepared from cheap and well-known ingredients;

(11) To provide a novel and improved stop-leak preparation which will not form sludgy deposits.

Additional objects of my invention will be brought out in the following description of a preferred embodiment of the same.

My invention is based upon the discovery that plant roots, including rhizomes, when suitably prepared, have properties rendering them exceedingly effective in the stopping of leaks. In the preparation of my stop-leak preparation, the root is ground to the consistency of flour, preferably one which will pass through a 50 mesh screen, that is a screen presenting 2,500 openings per square inch of surface, following which, the root flour is mixed with oil and preferably an oil of the type known as soluble cutting oil.

A soluble oil, as defined in the Chemical and Engineering Dictionary (P 114), published by the Chemical Publishing Co. of New York, Inc., of New York City, is an oil having an emulsifier, with or without an auxiliary solvent dissolved in it, to make it dispersible in water. Soluble oil is conventionally employed in machine shop practice where it is known as cutting oil.

The relative proportions of the root flour to oil is not critical, though I prefer to employ approximately 2 pounds of the flour to each gallon of oil, and in using the same as a stop-leak preparation, it is added to the cooling system of an engine in the approximate ratio of 1½ ounces of the preparation for each gallon of water in the system.

From the view-point of cost, I have found ginger root flour to be preferred, though from the view-point of effectiveness as a stop-leak ingredient, other roots such as Orris, Tumeric, Blood root, Licorice, Poke and Sarsaparilla have comparable qualities.

As a suitable cutting oil for use with the root flour, I prefer to employ an oil marketed by the Texas Oil Co. under the designation "810 Soluble Oil C" and said by such company to contain 9% oil soluble sodium sulphates, the sulphonic acids being derived from petroleum, and I prefer such oil because of its non-drying character.

What the action is, is not apparent to me at this time, but I have noticed that the ginger root flour when mixed with the soluble oil, settled down into a more compact and dense mass than when mixed directly with water. In comparative tests on this basis, employing equal amounts by weight of the ginger root flour, the flour in the oil, settled out into a compact mass which measured approximately 80% of the volume occupied by the material settling out of the water mixture.

It is conceivable, therefore, that what actually happens, is that the ginger root flour, by reason of its small particle size, is carried into the leaks however small, by the water, and gradually packs itself in, forming a dense and compact seal. Further evidence in support of this resides in the fact that complete stoppage of a leak is not instantaneous nor is such result realized within the brief period of time in which prior art film forming type of stop-leak preparations function. Once the leak is stopped however, its durability is much more permanent.

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Inasmuch as my stop-leak preparation does not rely on exposure to air for its effectiveness in plugging leaks, the preparation will not only stop seepage and leaks in the radiator and hose connections of an automotive cooling system which are exposed to the atmosphere, but also such leaks as may exist around the combustion chambers of an engine, such as cracked engine blocks, deficient head gaskets, etc., and is particularly effective in such situations in that the intense heat of combustion seems to convert the preparation of components thereof at the point of leak, into insoluble carbides to form a permanent seal.

Aside from the sealing properties of my stop-leak preparation, the mixture aids in lubrication of the water pump usually incorporated in a cooling system, and further functions as a rust inhibitor, thus maintaining the cooling system clean and free of rust, sediment and sludge.

While the root flour and soluble cutting oil constitute the essential ingredients of my stop-leak preparation, it is contemplated that other ingredients capable of effecting a beneficial function in conjunction therewith, may be incorporated in the preparation. Thus, I have found, for example, that crushed or ground nut shells such as almond shells, when circulated through the cooling system of an engine, have the ability to exert a mild scouring action on the walls of the cooling system, sufficient to maintain said walls clean and without deleterious effect on the cooling system.

#### *Claims*

1. A non-aqueous stop-leak preparation for the cooling system of an engine consisting essentially of ginger root flour and soluble oil.
2. A non-aqueous stop-leak preparation for the cooling system of an engine, consisting essentially of ginger root flour and soluble oil in proportions roughly of two pounds of ginger root flour to a gallon of soluble oil.
3. A non-aqueous stop-leak preparation for the cooling system of an engine, comprising a mixture of a rhizome flour and soluble oil.

The essential issues in this action are those of validity and infringement and the defendant firstly alleged that there was no infringement and secondly, in its plea of invalidity and counterclaim for revocation of the patent, relies on the following objections, namely, that no inventive step was involved, that there had been anticipation or lack of novelty, obviousness, inutility, false suggestion and insufficient disclosure, ambiguity in the specification, and that the claims were too broad.

The plaintiff's product is sold both in bottle form and also in pellet or pill form and is made by mixing ginger root flour with soluble oil. The matter of whether it is commercial ginger or spent ginger is a matter of indifference because it is the starch and the fiber roots in the ginger which are the two ingredients which are of value for the purpose of this product and according to the evidence there is not much difference between commercial ginger and

spent ginger because in spent ginger the starch and fiber roots have not been removed.

When mixed, the soluble oil is absorbed into the ginger and what happens is a physical reaction and not a chemical reaction in that no new material is formed.

The soluble oil referred to is in essence a petroleum oil which has had added to it an emulsifying agent either by having it dissolved in it or by adding such to it separately and mixed in it so that it becomes dissolved in the oil.

A soluble oil is dispersable in water because it contains such an emulsifier. Ordinary, or what might be referred to as straight oil, without an emulsifier when mixed with water will not disperse. Instead, there will be two separate layers, a layer of oil and a layer of water.

A soluble oil which contains an emulsifier when mixed with water forms an emulsion, but the soluble oil is not dissolved in water, but instead is dispersed in it only and when dispersed in it, it appears to be dissolved.

Both plaintiff and defendant adduced evidence in support of their respective contentions and as usual there was a dispute as between the experts as to a number of matters. But on reading the whole of the evidence, I have come to the conclusion that it is only necessary to consider one ground of the defence raised by the defendant in this action.

I am of opinion that the evidence clearly establishes that soluble oil has been used widely by many people commercially for many years prior to the date of issue of the plaintiff's patent to prevent the formation of iron oxide rust from the iron parts of radiators in cooling systems in internal combustion engines and also for the purpose of retarding the corrosion of radiator cores. At all material times this was well known, and indeed the plaintiff has used soluble oil for such purpose for many years.

I am also of opinion that the evidence establishes that ginger flour for many years prior to the date of the plaintiff's patent had been used as a stop-leak in the cooling system of internal combustion engines used in motor cars and trucks. Indeed a number of other persons had successfully obtained patents in respect to such stop-leak products using ginger flour.

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There was also for many years prior to the date of issue of the plaintiff's patent wide-spread knowledge and use of a liquid carrier, very commonly an oil, for various stop-leak products included in which was the ingredient powdered ginger or ginger flour.

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The evidence also establishes that there is no property in soluble oil which by itself would assist in stopping leaks in the cooling systems of internal combustion engines.

There is also no question that the plaintiff has enjoyed a considerable measure of economic success in the marketing of his product. But this I find on the evidence is due to the very considerable ingenuity and skill he employed in selling and merchandising his products. At one point in the evidence, he aptly describes the secret of his success when he says, and I quote, "So my progress continued, only by this time we had added to our sales story or medicine show, the practice of stating that we have stopped and can stop internal leaks against compression because the compression was not released from these cylinders."

The plaintiff by his skilful selling and merchandising techniques has been successful in selling his product to every major car manufacturer except Chrysler Corporation, to various oil companies for distribution through their service stations, and to many wholesale auto parts distributors throughout Canada and also the United States.

The secret of his success it is correct to infer was probably due to his merchandising technique of selling his product as a three-way application for firstly, stopping leaks in radiators and cooling systems of internal combustion engines, and secondly, as a water pump lubricant for such engines, and thirdly, as a rust inhibitor.

In that way he led the field in sales of products in this line and outstripped his competitors so much so that the defendant among others sought to emulate this merchandising idea of the plaintiff and did by combining its separate products into one product in the same manner as the plaintiff had done. Prior to that the defendant had sold separate products for each of the applications referred to above.

But this merchandising genius and the company's sales promotion, I find, has nothing whatever to do with the subject of a valid patent.

It is, therefore, clear that in this case there is no invention in the plaintiff's product, but that, on the contrary, it is a mere collocation by blending into one product two known substances, namely, ginger root flour and soluble oil, which are used for overcoming different difficulties, and that both combined in the one product (which is not a new substance) do not produce a better result than if each substance was used separately. The combining in one product makes it more convenient for the public, and, therefore, more desirable.

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I therefore find that all the claims in the plaintiff's patent numbered 501,547 are not inventive and that they and the whole patent are invalid.

The action, accordingly, is dismissed with costs, and the counterclaim is allowed without costs, and in part only, in that it is declared that the said patent and claims are cancelled and set aside.

*Judgment accordingly.*

BETWEEN:

GUARANTY TRUST COMPANY OF  
 CANADA in the capacity of Execu-  
 tor of the Will of DOROTHY ELGIN  
 TOWLE, deceased . . . . .

APPELLANT;

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AND

THE MINISTER OF NATIONAL  
 REVENUE . . . . .

RESPONDENT.

*Revenue—Estate Tax—Exemption from estate tax—Testamentary gift to medical alumni association—Absolute and indefeasible gift—Charitable gift and charitable trust—Requirement that donee's property be used exclusively for charitable purposes—Purposes and objects of donee—Effect of object of donee being other than charitable—Association for advancement of education—Estate Tax Act, S. of C. 1958, c. 29, s. 7(1)(d).*

Dorothy Elgin Towle died testate on July 11, 1961. Article III(g) of her will required the Trustee to pay the residue of the estate "to the Medical Alumnae Association of the University of Toronto to establish a student loan fund to be known as the 'Robert Elgin Towle Loan Fund' to be supervised and managed by the said Medical Alumnae

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Association for the purpose of loaning funds to women medical students of the University of Toronto who are in need of financial assistance during their course in medicine . . .". The question to be determined is whether or not the gift of the residue of the estate was exempt from estate tax by virtue of s 7(1)(d) of the *Estate Tax Act*, as being an absolute gift to a charitable organization.

On the appeal from the assessment of the respondent in which he included the amount of the gift in the taxable value of the estate it was common ground that the appellant had the burden of showing (a) that the gift was absolute; (b) that the Medical Alumni Association was, at the time of the deceased's death, a charitable organization; (c) that, at the time of the deceased's death the Medical Alumni Association was an organization all or substantially all of the resources of which were devoted to charitable activities; and (d) that no part of the resources of the Medical Alumni Association was payable to or otherwise available for the benefit of any member.

The evidence established that by far the greatest part of the Association's effort, during recent years at least, was the operation of scholarship, bursary and loan funds for medical students at the University of Toronto, making of gifts to be spent by the Dean of Medicine and the President of the University and other activities designed to supplement the work of the Faculty of Medicine. However, it was also established that the Association engaged in activities designed to encourage and cultivate good-fellowship among the members of the Association.

*Held:* That since the parties have agreed that the monies in question are received by the Medical Alumni Association in trust for charitable purposes, there was no "absolute" gift to the Association, and certainly therefore no "absolute" gift to the Association within the meaning of s. 7(1)(d) of the *Estate Tax Act*.

- 2 That the purpose of s 7(1)(d) of the *Estate Tax Act* is to provide a means whereby gifts for charitable purposes can be made so as not to attract estate tax but Parliament has not seen fit, in the *Estate Tax Act*, to provide an exemption for charitable trusts.
- 3 That the first requirement is that the organization to which the gift is made be so constituted that its property must be used "exclusively" for charitable purposes and the second requirement is that the gift must be made to that organization absolutely and indefeasibly so that the subject matter of the gift will become its property.
- 4 That it is clear from the purposes and objects as set out in its Letters Patent that the Medical Alumni Association was not "constituted" exclusively for charitable purposes.
- 5 That one of the principal objects of the Medical Alumni Association is "to encourage and cultivate good-fellowship among the members of the Association" and this is a "distinct object" and not merely a reference to an "extraneous activity" that is only a means to some other end. This object is clearly not a charitable object and the organization is not, therefore, an organization "constituted" exclusively for charitable purposes.
6. That it is questionable whether an association carrying on activities that support and promote the well-being of an educational institution can itself be said to be an association for the advancement of education.
7. That the appellant has failed to show that all or substantially all of the resources of the Medical Alumni Association were devoted to charitable

activities carried on by it or to the making of gifts to other organizations constituted for charitable purposes and this follows almost automatically from the finding that the Association's purposes are not exclusively charitable.

8 That the appeal is dismissed.

APPEAL under the *Estate Tax Act*.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

*J. T. DesBrisay* and *W. P. Butler* for appellant.

*G. W. Ainslie* and *D. G. H. Bowman* for respondent.

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

CATTANACH J. now (February 18, 1965) delivered the following judgment:

This is an appeal under the *Estate Tax Act* from the assessment in respect of the estate of Dorothy Elgin Towle who died testate on July 11, 1961.

The only question to be determined is whether or not a gift made by the deceased's will was, in effect, exempt from estate tax by virtue of paragraph (d) of subsection (1) of section 7 of the *Estate Tax Act*, chapter 29 of the Statutes of 1958 as amended by chapter 29 of the Statutes of 1960.

The gift in question was provided for by paragraph (g) of article III of the deceased's will which required the Trustee under the deceased's will to pay the residue of the estate "to the Medical Alumnae Association of the University of Toronto to establish a student loan fund to be known as the 'Robert Elgin Towle Loan Fund' to be supervised and managed by the said Medical Alumnae Association for the purpose of loaning funds to women medical students of the University of Toronto who are in need of financial assistance during their course in medicine. . .". The parties are in agreement that the reference in the will to the "Medical Alumnae Association" should be read as a reference to the "Medical Alumni Association".

The question is whether this gift is such that the value thereof is deductible in computing "the aggregate taxable value of the property passing on the death" of the deceased by virtue of subsection (1) of section 7 of the *Estate Tax Act*, the relevant part of which, as amended by chapter 29 of the Statutes of 1960, reads as follows:

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7. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:

\* \* \*

(d) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to

(i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada all or substantially all of the resources of which were so devoted, and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or

\* \* \*

According to an allegation in the respondent's Reply to the Notice of Appeal, which was not questioned by the appellant, the respondent, in assessing the amount of the tax payable, made the following assumptions:

- (a) that the gift of the balance of the residue of the Estate of Dorothy Elgin Towle to the Medical Alumni Association of the University of Toronto, was not an absolute gift but was a gift to that organization subject to certain trusts declared in paragraph (g) of the Third Clause of the Last Will and Testament of Dorothy Elgin Towle;
- (b) that at the time of the making of the gift and at the time of the death of Dorothy Elgin Towle, the Medical Alumni Association of the University of Toronto was not an organization constituted exclusively for charitable purposes;
- (c) that at the time of the making of the gift and at the time of the death of Dorothy Elgin Towle, all of the resources of the Medical Alumni Association of the University of Toronto were not devoted to charitable activities carried on or to be carried on by it, or to the making of gifts to such other organizations in Canada, all or substantially all of the resources of which were so devoted or to any donee described in subparagraph (ii) of paragraph (d) of subsection (1) of Section 7 of the Estate Tax Act, and;
- (d) that the Medical Alumni Association of the University of Toronto, at the time of the death of Dorothy Elgin Towle, had not passed any by-law pursuant to subsection (1) of Section 115 of The Corporations Act, R S O. 1950, c. 71, and that the resources of the Medical Alumni Association of the University of Toronto were otherwise available for the benefit of the Members of that Association.

It was common ground on the argument of the appeal that the appellant had the burden of showing

- (a) that the gift in question was an absolute gift to the Medical Alumni Association within the meaning of paragraph (d) of subsection (1) of section 7;

- (b) that the Medical Alumni Association, at the time of the deceased's death, was an organization constituted exclusively for charitable purposes within the meaning of sub-paragraph (i) of the said paragraph (d);
- (c) that, at the time of the deceased's death, the Medical Alumni Association was an organization all or substantially all of the resources of which were devoted to charitable activities within the meaning of sub-paragraph (i) of the said paragraph (d); and
- (d) that no part of the resources of the Medical Alumni Association was payable to or otherwise available for the benefit of any member.

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If the appellant is unsuccessful in respect of any one of these four requirements, the appeal necessarily fails.

The Medical Alumni Association was incorporated pursuant to the laws of the Province of Ontario by Letters Patent dated April 28, 1947 for the following purposes and objects:

- (a) TO maintain and promote the interest of the graduates in medicine of the University of Toronto in their Alma Mater;
- (b) TO encourage and cultivate good-fellowship among the members of the Association;
- (c) TO promote and enlarge the usefulness and influence of the Provincial University;
- (d) TO consider and make recommendations on matters pertaining to the welfare of the Faculty of Medicine of the University of Toronto;
- (e) Generally to promote the science and art of medicine;
- (f) TO administer and invest funds received from life members of the Association and any other funds and bequests of which the Association may from time to time have custody and to apply and disburse the moneys so administered in accordance with the provisions and conditions relating to the same; and
- (g) TO do all such other things as are incidental or conducive to the attainment of the above objects;"

The by-laws of the Association provide that

Membership of the Association shall consist of all graduates in the Faculty of Medicine of the University of Toronto—including graduates admitted by reason of graduation from Trinity University, Victoria University and the Toronto School of Medicine.

A great deal of evidence was adduced at the trial concerning the actual operation of the Medical Alumni Association during recent years.

It is sufficient to summarize such evidence in general terms. The Association had a small salaried staff which

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worked in premises put at the disposal of the Association by the University of Toronto without charge. The Association held its annual meeting in conjunction with an annual dinner. The staff published a magazine for the members and supplied services to the members of the various graduating years to encourage them to have reunion meetings. The staff carried on the usual activities designed to induce members to pay their annual fees and to subscribe to the funds administered by the Association. It was manifest, however, that by far the greatest part of the Association's effort, during recent years in any event, was the operation of scholarship, bursary and loan funds for medical students at the University of Toronto, making of gifts to be spent by the Dean of the Faculty of Medicine and the President of the University to be expended in their official capacities and other activities designed to supplement the work of the Faculty of Medicine at the University of Toronto. However, there is no evidence upon which I can make a finding that the carrying on of activities such as those referred to in the immediately preceding sentence constitutes the exclusive object of the Association and that the other activities of the Association are merely subsidiary and incidental thereto. While such activities may have tended to overshadow, at times, in the minds of the officers of the Association, the activities that were designed, for example, "to encourage and cultivate good-fellowship among the members of the Association", these latter activities, and probably others, in my view, never ceased to have their place as principal reasons for the existence of the Association.

I have come to the conclusion that the appeal must be rejected because the appellant has failed to satisfy the burden imposed upon it in respect of at least three of the four headings referred to above.

Dealing first with the question whether the direction in the testatrix's will to pay the residue of her estate to the Medical Alumni Association to establish a student loan fund for the purpose of loaning funds to women medical students, created an absolute gift to the Association within the introductory portion of paragraph (d) of subsection (1) of section 7 of the *Estate Tax Act*, I am relieved of the necessity of deciding the character of the monies in the hands of the Association by agreement between the parties.

in effect, that the monies are received by the Association in trust for charitable purposes. That being so, I am of the opinion that there was no "gift" to the Association, and certainly therefore no "absolute" gift to the Association within the meaning of paragraph (d). The purpose of the said paragraph (d) is to provide a means whereby gifts for charitable purposes can be made so as not to attract estate tax but Parliament has not seen fit, in the *Estate Tax Act*, to provide an exemption for charitable trusts. (Compare *Minister of National Revenue v. Trusts and Guarantee Company, Limited*<sup>1</sup> at page 149 and 150). What Parliament has done by paragraph (d) of subsection (1) of section 7 is to provide an exemption for an absolute and indefeasible gift made to an organization constituted exclusively for charitable purposes. The first requirement is, therefore, that the organization to which the gift is made be so constituted that its property must be used "exclusively" for charitable purposes and the second requirement is that the gift must be made to that organization absolutely and indefeasibly so that the subject matter of the gift will become its property. In this context, it appears clear to me that Parliament must have intended to exclude gifts made to such an organization in trust for some other person or class of persons. If the exemption extends to charitable trusts, it extends to trusts for private purposes. Parliament could not have possibly intended that a gift for private purposes such, for example, as a gift to an educational institution to be held in trust for the education of its president's children would fall within the exempting provisions. (Compare *Oppenheim v. Tobacco Securities Trust Co. Ltd.*<sup>2</sup> per Lord Simonds at page 306).

In the second place, I am of the opinion that the Medical Alumni Association was not, at the relevant time, "an organization constituted exclusively for charitable purposes" within the meaning of those words in paragraph (d) of subsection (1) of section 7 of the *Estate Tax Act*. I am of the opinion that this question must be determined by reference to the constating instruments of the Association which in this case, is primarily its Letters Patent. (Compare *Tennant Plays, Ltd. v. Inland Revenue Commissioners*<sup>3</sup>; *Institution of Mechanical Engineers v. Cane*<sup>4</sup>

<sup>1</sup> [1940] A.C. 138.

<sup>2</sup> [1951] A.C. 297.

<sup>3</sup> [1948] 1 All E.R. 506.

<sup>4</sup> [1960] 3 All E.R. 715.

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per Viscount Simonds at page 718, Lord Radcliffe at page 725 and Lord Tucker at page 727). In my view it is clear from the purposes and objects as set out in its Letters Patent that this Association was not "constituted" exclusively for charitable purposes. For example, one of the principal objects of this Alumni Association, in my view, is "to encourage and cultivate good-fellowship among the members of the Association". This is a "distinct object" and is not merely a reference to an "extraneous activity" that is only a means to some other end. (Compare *Metropolitan Borough of Battersea v. The British Iron and Steel Research Association*<sup>1</sup> per Jenkins J., at page 453). This object is clearly not a charitable object. The organization is not, therefore, an organization "constituted" exclusively for charitable purposes.

Alternatively, I reach the same conclusion if I determine the purposes of the organization by considering the Letters Patent in the light of the evidence concerning the manner in which the activities of the organization have actually been carried on. Notwithstanding, the great emphasis that is placed by the Alumni Association on activities which are designed to support and promote the well-being of the University of Toronto and particularly its Faculty of Medicine, I cannot conclude that this Alumni Association is constituted for such purposes to the exclusion of encouraging and cultivating good-fellowship among its members and probably other non-charitable purposes. I cannot, therefore, conclude that the Association is constituted exclusively for charitable purposes. In any event, there is a question in my mind as to whether an association carrying on activities that, in its view, support and promote the well-being of an educational institution, can itself be said to be an association for the advancement of education. (Compare *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association*<sup>2</sup>.) However this is a question concerning which I do not think there is any need for me to form an opinion.

The third ground upon which I find that the appellant has failed to establish its right to the exemption under paragraph (d) of subsection (1) of section 7 is that it has failed to show that all or substantially all of resources of the association were devoted to charitable activities carried on by it or to the making of gifts to other organizations consti-

<sup>1</sup> [1949] 1 K.B. 434.

<sup>2</sup> [1953] A.C. 380.

tuted for charitable purposes. This finding follows almost automatically from the finding that the Association's purposes are not exclusively charitable. A substantial part of the Association's revenues are devoted to paying its employees, operating its offices and publishing its magazine. In my view, a substantial part of the functions of the employees and of the magazine are in relation to purposes that are not charitable.

I make no finding with reference to the fourth ground urged against the exemption claimed by the appellant.

The appeal is dismissed with costs.

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BETWEEN:

FALCONBRIDGE NICKEL MINES }  
 LIMITED .....

APPELLANT;

AND

THE MINISTER OF NATIONAL }  
 REVENUE .....

RESPONDENT.

1963  
 Nov. 25-28  
 1965  
 Feb. 18

*Revenue—Income—Income tax—Expenses incurred for prospecting, exploration and development in searching for minerals—Deductibility of exploration expenses incurred by corporation whose chief business is that of mining or exploring for minerals—Deductibility of expenses incurred for exploration on property not owned by taxpayer—Deductibility of exploration expenses where taxpayer has benefitted from such expenditures—Deductibility of exploration expenses incurred by taxpayer as principal and as agent—“Shares of capital stock” and “right to purchase shares of capital stock”—Meaning of “undertake”—Income Tax Act, R.S.C. 1952, c. 148, s. 58(3) and s. 83A(7) as enacted by S. of C. 1955, c. 54, s. 22(1); S. of C. 1949 (2nd Session) c. 25, s. 53(4); S. of C. 1952, c. 29, s. 34.*

This is an appeal from the assessments of the appellant under the *Income Tax Act* for its 1950, 1951 and 1952 taxation years. The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario and during the taxation years in question its chief business was that of mining or exploring for minerals, and it was actively engaged in prospecting and exploring for minerals by means of qualified persons and incurred expenses for such purposes.

In assessing the appellant's income for the taxation years in question, the respondent disallowed the deduction of twelve amounts totalling \$413,641.11 expended by the appellant on prospecting, exploration and development in searching for minerals pursuant to seven agreements entered into with different companies and individuals with respect to land owned by those companies and individuals.

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*Held:* That where a statutory provision speaks of an agreement under which a corporation "undertook" to incur expenses, there is no doubt that the statute is speaking of a legally enforceable agreement to incur those expenses.

2. That the expenses referred to in s. 53(4) of c. 25, S. of C. 1949 (2nd Session) are what might be referred to as "pre-production" expenses and are therefore expenses of a capital nature which would not ordinarily be deductible in the computation of income.
- 3 That there is no requirement that the expenses referred to in s. 53(4) of c. 25, S. of C. 1949 (2nd Session) must have been incurred by the taxpayer for exploration on his own property.
- 4 That there is no requirement that the taxpayer claiming deduction of expenses under s 53(4) shall not have benefitted directly or indirectly from incurring the expenses. They are deductible if expended on the taxpayer's own property, even if his property appreciates in value as a result, and they are likewise deductible if expended on another's property under an agreement whereby the taxpayer is to have certain rights in the future in respect of the property, should the results of such expenditures be beneficial.
- 5 That s. 53(4) requires that the expenditures be incurred by the taxpayer on his own account—that is, as a principal and not merely as an agent or contractor for somebody else.
- 6 That an exploration company cannot be said to be carrying on an exploration programme on its own behalf when it is carrying it on under a contract under which it is to be reimbursed for the total expenses of the programme as such or under which it carries on the programme as a means of obtaining a credit for the amount of the expenses against an amount which it would otherwise have to pay in cash.
7. That an obligation in an agreement is not any the less a legal obligation because, by virtue of a provision in the agreement, the obligations of one of the parties thereto may be terminated by giving thirty days' notice.
8. That a comparison of the words in paras. (a) and (c) of s. 83A(7) of the *Income Tax Act* shows that the statute makes a contrast between (a) a corporation that owned or controlled the mineral rights, and (b) a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights, and between (c) the shares of capital stock of a corporation and (d) a right to purchase shares of the capital stock of a corporation.
9. That the appeals are allowed in part.

#### APPEALS under the *Income Tax Act*.

The appeals were heard by the Honourable Mr. Justice Cattanach at Toronto.

*Allan Findlay* and *A. S. Kingsmill* for appellant.

*G. W. Ainslie* and *T. Z. Boles* for respondent.

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

CATTANACH J. now (February 18, 1965) delivered the following judgment:

These are appeals from the assessments of the appellant under the *Income Tax Act* for its 1950, 1951 and 1952 taxation years.

At the outset of the hearing of these appeals, counsel for the respondent requested that paragraph 8 of the respondent's reply to the Notice of Appeal respecting the assessment for the appellant's 1950 taxation year be deleted since he did not propose to argue or rely on the defence raised thereby. Accordingly I ordered that the said paragraph 8 be stricken from the reply.

By agreement between the parties the appellant withdrew its claim for depletion allowances in respect of a mine under s. 11(1)(b) of the *Income Tax Act*, and s. 1202 of the Regulations thereunder, for its 1951 and 1952 taxation years. The appellant's Notices of Appeal for the 1951 and 1952 taxation years and the respondent's Replies thereto were amended accordingly.

The Minister conceded at the hearing that he had been in error in deducting certain amounts of interest paid on borrowed capital for the purpose of computing profit as a base for determining depletion allowance and consented to judgment that the appeal from the assessment of the respondent for its 1952 taxation year be allowed and that the matter be referred back to the Minister in order that the profit be re-calculated and the amount of the depletion allowance to which the appellant is entitled be redetermined.

The remaining issues in the three appeals are of the same general character, although the amounts differ and there are differences in circumstances. Each issue involves a consideration of s-s. (4) of s. 53 of c. 25 of the Statutes of 1949 (Second Session), which reads as follows:

(4) A corporation whose chief business is that of mining or exploring for minerals may deduct, in computing its income for the purpose of the said Act for the year of expenditure, an amount equal to all prospecting, exploration and development expenses incurred by it, directly or indirectly, in searching for minerals during the calendar years 1950 to 1952 inclusive, if the corporation files certified statement of such expenditures and satisfies the Minister that it has been actively engaged in prospecting and exploring for minerals by means of qualified persons and has incurred the expenditure for such purposes.

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(This subsection was replaced for 1952 by a new subsection, which is not materially different for present purposes and need not be reproduced at this point. See s. 34 of c. 29 of 1952).

The remaining issues also involve consideration of s-s. (7) of s. 83A of the *Income Tax Act* as enacted by s. 22(1) of c. 54, Statutes of Canada 1955, reading as follows:

83A. (7) For the purposes of this section and section 53 of chapter 25 of the statutes of 1949 (Second Session), it is hereby declared that expenses incurred by a corporation, association, partnership or syndicate on or in respect of exploring or drilling for petroleum or natural gas in Canada or in searching for minerals in Canada do not and never did include expenses so incurred by that corporation, association, partnership or syndicate pursuant to an agreement under which it undertook to incur those expenses in consideration for

- (a) shares of the capital stock of a corporation that owned or controlled the mineral rights,
- (b) an option to purchase shares of the capital stock of a corporation that owned or controlled the mineral rights,
- (c) a right to purchase shares of the capital stock of a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights.

The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario with its head office in the City of Toronto in that province and during the taxation years in question the chief business of the appellant was that of mining or exploring for minerals. During those years, it was actively engaged in prospecting and exploring for minerals by means of qualified persons and incurred expenses for such purposes.

With reference to only two of the amounts in dispute, of which there are twelve, did the respondent argue that the expenditures did not satisfy all the requirements contained in s-s. (4) of s. 53. The two items in respect of which the respondent contends that the requirements of s-s. (4) of s. 53, read by itself, have not been satisfied, are the items covering expenses amounting to \$247,243.88 in 1951 and to \$56,047.26 in 1952. The respondent's submission in this connection is based upon a plea that the expenses were incurred by the appellant "for and on behalf of Gullbridge Mines Limited and not on its own behalf and that the appellant was reimbursed therefor." Reliance was placed on the decision of Cameron J. in *Okalta Oils Limited v. Minister of National Revenue*<sup>1</sup>.

<sup>1</sup> [1959] Ex. C.R. 66.

Before considering the first of these twelve amounts, it should be noted that s-s. (7) of s. 83A declares, in effect, *inter alia*, that expenses of the kind described in s-s. (4) of s. 53 that have been incurred by a corporation "do not and never did" fall within the beneficial provisions of s-s (4) of s. 53 if they are expenses incurred by the corporation pursuant to an agreement

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- (a) under which the corporation "undertook to incur those expenses", and
- (b) under which the consideration for such undertaking belongs to one of the classes of things described in paragraphs (a), (b) and (c) of s-s. (7) of s. 83A.

It follows that the respondent could only have validly disallowed an expense which otherwise was entitled to the beneficial provisions of s-s. (4) of s. 53

- (a) if that expense was incurred by the corporation pursuant to an undertaking in an agreement, and
- (b) if the consideration for the undertaking fell within one of the classes described in s-s. (7) of s. 83A.

If it appears, in connection with any one of the amounts in issue, that one of these two requirements is not met, the respondent erred in ruling that the amount did not fall within the provisions of s-s. (4) of s. 53 by virtue of s-s. (7) of s. 83A.

The first amount in issue is an amount of \$10,512.05 that was expended by the appellant in respect of properties which are the subject matter of an agreement entered into by the appellant with Newfoundland Gull Lake Mines Limited on August 17, 1950. (That company is hereinafter referred to as "Gull Lake" and that agreement is hereinafter referred to as the "Gull Lake agreement".) The principal features of that agreement are as follows:

- (a) the appellant agreed to pay to Gull Lake \$2,500 in consideration for which Gull Lake granted to the appellant an exclusive right or option to purchase certain mining claims;
- (b) the parties agreed that the appellant should have a right for a period of sixty days to make an examination of such mining claims;
- (c) it was agreed that as long as the option granted to the appellant remained in force the appellant would be entitled to exclusive possession of the mining claim;

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- (d) it was agreed that, "if on or before the sixty day period", the appellant should notify Gull Lake that it wished to proceed with the agreement, the appellant would cause a new company to be incorporated;
- (e) it was agreed that, upon the incorporation of the new company, Gull Lake and the appellant would transfer the mining claims to the new company and, as consideration for the transfer, the new company would allot to Gull Lake 500,000 of its Class "A" shares and would allot to the appellant such number of its Class "B" shares as could be purchased, at five cents per share, by a payment equal to \$2,500 plus the amount that the appellant had expended in connection with the examination of the mining claims; and
- (f) it was agreed that, forthwith after the incorporation of the new company, the parties would cause the new company to enter into an agreement with the appellant under which the appellant would subscribe for shares in the new company on a specified basis and the new company would grant to the appellant an exclusive right or option to purchase a specified number of its Class "B" shares.

The sum of \$10,512.05, being the first of the amounts in issue, is the amount of expenses incurred by the appellant in exploration work on the claims which are the subject matter of the Gull Lake agreement after the agreement came into force and before the incorporation of the new company contemplated by the agreement.

The first question is whether these expenses in the amount of \$10,512.05 were incurred by the appellant "pursuant to an agreement under which it undertook to incur those expenses" within the meaning of those words in s-s. (7) of s. 83A.

The only agreement which was in force at the time the expenditures in question were made and which has any relevance to the expenditures is the Gull Lake agreement of August 17, 1950 and the only provisions in that agreement relating to the expenditures are paragraphs 2, 3 and 5 thereof, which read as follows:

2. Forthwith upon this agreement being approved by the shareholders of Gull Lake as hereinafter provided, Falconbridge shall have the right for a period of sixty (60) days thereafter to make an examination of the said mining claims by its engineers in the usual manner in which mining

properties are examined, with the right to take and remove such quantities of ore as may be required for assay and sampling purposes.

3. It is understood and agreed that this is an option only and nothing herein contained shall be deemed to obligate or bind Falconbridge to cause such examination to be made, to expend any moneys or to perform any other act other than the payment of any moneys required to be paid by Falconbridge under the provisions of Clause 1 hereof.

5 Gull Lake covenants and agrees that so long as the option hereby granted remains in force Falconbridge shall be entitled to exclusive possession of the said mining claims as and from the date of the approval of this agreement by the shareholders of Gull Lake as hereinafter provided.

In my view, this was not an agreement by which the appellant "undertook" to incur the expenses in question if the word "undertook", as used in s-s. (7) of s. 83A, implies, as I think it does, a legal liability enforceable by legal action. The word "undertook" or "undertake" has various senses depending upon the context in which it is used. If it be said that a businessman "undertook" a particular business operation, the word "undertook" indicates only that he embarked upon that operation. If it be said that a solicitor gave an "undertaking" to another solicitor, one does not think primarily in terms of an obligation enforceable by action in the Court. Where, however, a statutory provision speaks, as s-s. (7) of s. 83A does, of an agreement under which a corporation "undertook" to incur expenses, there is no doubt in my mind that the statute is speaking of a legally enforceable agreement to incur those expenses. Such conclusion is reinforced by the presence of the words "in consideration for..." It seems clear to me that the respondent's argument is in effect that the Court should read the words "pursuant to an agreement under which it undertook to incur those expenses", where those words appear in s-s. (7), as though they read "as authorized by an agreement under which it was authorized to incur those expenses" or "as contemplated by an agreement which contemplated that it would incur those expenses".

For the above reasons, I am of the view that s-s. (7) of s. 83A does not apply to the amount of \$10,512.05, which is the first of the twelve amounts in dispute. It is unnecessary, therefore, to deal with the appellant's further argument that, in any event, the expenditures were not incurred in consideration of one of the classes of matters described in paras. (a), (b) and (c) of s-s. (7) of s. 83A.

The second of the amounts in dispute is an amount of \$4,953.73 being the amount of expenditures incurred by the

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appellant in the 1950 taxation year after the incorporation of the new company contemplated by the Gull Lake agreement of August 17, 1950. This new company was incorporated with the name of Gullbridge Mines Limited on November 14, 1960 and the expenditures in question were incurred between that date and the end of that year. It would appear that these expenditures were not made pursuant to, or contemplated by, any agreement. What I have said with reference to the first item therefore applies with even greater force to the second item<sup>1</sup>.

The third amount in dispute is an amount of \$247,243.88 which is an amount of expenditures incurred by the appellant in respect of the properties which were the subject matter of the Gull Lake agreement of August 17, 1950 after those properties had been transferred to Gullbridge Mines Limited, the new company contemplated by the August 17, 1950 agreement, and after the appellant had entered into an agreement with that new company as contemplated by the original agreement. The appellant entered into the agreement with the new company on December 27, 1950. (That agreement is hereinafter referred to as the "Gullbridge agreement" and the new company is hereinafter referred to as "Gullbridge".)

The principal features of the Gullbridge agreement are as follows:

- (a) the appellant subscribed for shares in the new company in the total amount of \$15,000.05;
- (b) Gullbridge granted to the appellant an option to purchase all or any part of 2,059,638 of its Class "B" shares in accordance with a schedule under which a specified number of shares could be purchased at a specified price on or before a specified date and, if that option were exercised, a further number of shares could be purchased before a specified date at a specified price and, if that option were exercised,

<sup>1</sup> The evidence is that the appellant was permitted to apply this expenditure in the sum of \$4,953.73 against the purchase price of shares of Gullbridge purchased under the agreement which it made with that company after these expenditures were incurred. However, not only did the respondent not argue that the expenditures in question were not made by the appellant on its own behalf but it is probable that they were so made although Gullbridge did, for some unexplained reason, give the appellant credit for this amount as though the expenditures had been made on behalf of Gullbridge. This is not an amount, such as are the ninth and tenth amounts where, in my view, the facts established to bring the amounts under s-s. (7) of s. 83A operate to take them out from under s-s. (4) of s. 53.

a further number of shares could be purchased before a specified date at a specified price, and so on. There were, in effect, seven separate options totalling 2,059,-638 shares, each option being conditional upon the appellant having exercised all previous options.

Against the background of this scheme of options, is to be read para. 4 of the Gullbridge agreement, the paragraph of that agreement under which the appellant incurred these expenses in the amount of \$247,243.88. Para. 4 reads as follows:

4. The parties hereto agree that instead of the Optionee taking up and paying for shares the Optionee may expend the moneys required to keep this option in force on diamond drilling and on other exploration, development and mining work on the said mining claims and the Optionor hereby grants to the Optionee the exclusive right to take immediate possession of the said mining claims and as long as this agreement remains in force, the exclusive right by its servants, agents and workmen to carry on thereon and thereunder such exploration, development and mining work as the Optionee shall think fit and to take and remove therefrom such quantity of ore and minerals as it may deem necessary or advisable for assay and test purposes and the Optionee shall be reimbursed for all expenditures made by it on behalf of the Optionor, such reimbursement being in the form of shares of the Optionor issued in accordance with the terms of this agreement.

This item of \$247,243.88 represents expenditures that the respondent contends were not incurred by the appellant on its own behalf. The respondent contends therefore that this amount does not qualify under s-s. (4) of s. 53.

In considering whether or not s-s. (4) of s. 53 has application to expenditures of the kind that are represented by this third item in the sum of \$247,243.88, it is important to consider the ambit of s-s. (4) of s. 53. In the first place, it is to be noted that the expenses referred to in s-s. (4) are what might be referred to as "pre-production" expenses and are therefore expenses of a capital nature which would not ordinarily be deductible in the computation of income. In the second place, it is to be noted that there is no requirement in s-s. (4) that the taxpayer by whom the expenses are incurred shall have incurred them for exploration on his own property. Having regard to the obvious objective of the legislation to induce companies to extend their exploration programmes, there would appear to be no reason for imposing such a limitation. In the third place, it is to be noted that there is no requirement that the taxpayer claiming the deduction shall not have benefitted directly or indirectly

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from incurring the expenses. Presumably, if the exploration expenses were incurred in relation to the taxpayer's own property, and if the results have been fruitful, the capital value of his property will have gone up substantially as a result of the expenditures, but, nevertheless, s-s. (4) appears to authorize their deduction. By the same token, if an exploration company carries on (*in*) an exploration programme on property belonging to somebody else under an agreement whereby, in the event of the programme having proved to be fruitful, the exploration company is to have certain rights in the future in respect of the property—e.g., the right to be a partner in the operation of the property or the right to purchase the property on specified terms—he would nevertheless appear to be entitled to make the deductions contemplated by s-s. (4). That this is the effect of s-s. (4), when read by itself, appears to be confirmed by the declaratory provision contained in s-s. (7) of s. 83A which expressly removes from the operation of s-s. (4) of s. 53 expenses incurred under an agreement pursuant to an undertaking in consideration for certain types of rights specified therein.

On the other hand, s-s. (4) of s. 53 does require that the expenditures must have been “incurred” by the taxpayer before the taxpayer can deduct them under that subsection. I think it must follow from this that the expenditures must have been incurred by the taxpayer on its own account—that is, as a principal and not merely as an agent or a contractor for somebody else. Compare *Okalta Oils Limited v. Minister of National Revenue, supra*.

Superficially, it might seem that there is little, if any, difference between

- (a) an arrangement under which an exploration company agrees to carry on an exploration programme on property belonging to somebody else as agent or contractor on behalf of the owner, and
- (b) an arrangement under which an exploration company agrees with the owner of property, for a consideration, to carry on an exploration programme on its own behalf on property belonging to somebody else.

Practically, there might, depending on the terms of the agreements, be little or no difference. Legally, however, there are

two quite different arrangements. In the first, the exploration company does what it does as agent of the owner of the property. Compare *Montreal v. Montreal Locomotive Works*,<sup>1</sup> per Lord Wright at pp. 162-3 and pages 167-8. In the second, the exploration programme is its own, and, in relation to third parties, it alone is responsible. Expenses incurred in carrying out the programme under the first kind of arrangement would be incurred by the owner of the property for the purposes of s-s. (4) of s. 53 while expenses incurred in carrying out the programme under the second kind of arrangement would be incurred by the exploration company for the purposes of that subsection.

Without reviewing the various tests as to when a programme is being carried on as a contractor on behalf of a principal and when it is being carried on as a principal on his own behalf—compare *Montreal v. Montreal Locomotive, supra*, at p. 169—for the purposes of this case, it is sufficient to say that in my view an exploration company cannot be said to be carrying on such a programme on its own behalf when it is carrying it on under a contract under which it is to be reimbursed for the total expenses of the programme as such or under which it carries on the programme as a means of obtaining a credit for the amount of the expenses against an amount which it would otherwise have to pay in cash.

One view of paragraph 4 of the Gullbridge agreement might be that the appellant had, as an alternative to exercising its option to take up shares in Gullbridge at any of the various stages of the option schedule, the right, on its own behalf, to carry on diamond drilling and other operations on the Gullbridge property, and that, to the extent that it so expended money, it would not have to take up shares in order to keep the balance of the option schedule in force. On this view of the matter, para. 4 of the Gullbridge agreement would appear to contemplate the possibility that the appellant would prefer to carry on the exploration on its own behalf and at its own expense rather than subscribe to Gullbridge's capital so that the exploration could be carried on on behalf of Gullbridge and at Gullbridge's expense. On this view of the matter, also, the concluding words of para. 4, of the Gullbridge agreement whereby it was provided that

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<sup>1</sup> [1947] 1 D.L.R. 161.

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the appellant should be reimbursed "for all expenditures made by it on behalf of the optionor", could not conceivably have any application to amounts that would be expended by the appellant on its own behalf.

As I understood the appellant's argument, however, the appellant took the position that the concluding words of para. 4 of the Gullbridge agreement, did not apply in respect of the exploration work carried on by the appellant under the first part of that paragraph but that the expenses so incurred were nevertheless to be credited against the purchase price of shares that the appellant was to receive under para. 2 of the Gullbridge agreement as though it had exercised the option in the ordinary way. I further understood that the appellant did receive shares in respect of all the work carried on by the appellant under para. 4 of the Gullbridge Agreement<sup>1</sup>. That being so, the appellant appears to have taken the position, at the time that it took the shares and during the course of the argument of this appeal, that the work done by it under para. 4 was done as a mode of paying for shares that it was acquiring from Gullbridge. If the work was done by the appellant for Gullbridge in lieu of making a cash payment to Gullbridge, I am of the opinion that the expenses of doing the work cannot be regarded as having been "incurred" by the appellant so as to come within the words "incurred by it" in s-s (4) of s. 53. For this reason, I am of the opinion that this third item of \$247,243.88 was properly disallowed by the Minister as not falling within s-s (4) of s. 53.

The fourth item in dispute is the sum of \$56,047.26 incurred in the 1952 taxation year in respect of the properties that had been transferred to Gullbridge. What has been said with reference to the third item of \$247,243.88 applies equally with respect to this item of \$56,047.26.

The fifth item is an amount of \$20,435.41 incurred by the appellant in respect of exploration expenses on properties which were the subject matter of an agreement between the appellant and Rambler Mines Limited dated October

<sup>1</sup> To be absolutely accurate, it is to be noted that a small part of the amount of \$247,243.88 expended by the appellant was credited against the purchase price of shares that the appellant was bound to purchase under another clause of the Gullbridge agreement. As far as this aspect of the case is concerned, the result is the same and there is no point in complicating these reasons further by dealing specially with such amount.

21, 1950. (That company is hereinafter referred to as "Rambler" and the agreement is hereinafter referred to as the "Rambler agreement".) This agreement is, for all practical purposes, of the same general character as the Gull Lake agreement of August 17, 1950 and no useful purpose would be served by making the same examination of it as has been made of the Gull Lake agreement. Certain special features of the Rambler agreement will be referred to as they become relevant. The amount of \$20,435.41 represents exploration expenses incurred in 1950 on mining properties which are the subject matter of the Rambler agreement before a new company contemplated by the Rambler agreement had been incorporated. What I have said with reference to the first item in dispute applies, with necessary changes concerning details, to this fifth item of \$20,435.41.

The sixth item is an amount of \$15,125.57 being the exploration expenses incurred on the Rambler properties in 1951 before any agreement was made with the new company contemplated by the Rambler agreement. What has been said with reference to the second items in dispute applies equally to this sixth item of \$15,125.57.

The seventh item is an amount of \$13,765.73 being an amount expended during the year 1951 by the appellant under an agreement entered into on February 16, 1951 between the appellant and Rambridge Mines Limited, the new company contemplated by the Rambler agreement. (The new company is hereinafter referred to as "Rambridge" and the agreement with it is hereinafter referred to as the "Rambridge agreement".) By para. 2 of the Rambridge agreement, the appellant undertook to make expenditures in respect of exploration in certain defined amounts or, alternatively, to advance such amounts to Rambridge for its corporate purposes.

While the appellant could have satisfied this obligation by making advances to Rambridge instead of expending the money on exploration work, nevertheless, I have difficulty escaping the view that these expenditures were made pursuant to an agreement under which the appellant undertook to incur those expenses within the meaning of the corresponding words in s-s. (7) of s. 83A. I doubt that it was any the less an undertaking because the liability could be avoided under the terms of the agreement by

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electing to do something else. Clearly, it is not any the less a legal obligation because, by virtue of a provision in the agreement, the appellant was entitled to bring its obligations to an end by giving thirty days' notice.

I need come to no firm conclusion on the question discussed in the immediately preceding paragraph as I have not been able to satisfy myself that the consideration for such undertaking to incur expenses, if it was an undertaking, was something that falls within one of the classes described in paras. (a), (b) and (c) of s-s. (7). An examination of the Rambridge agreement itself does not disclose that the appellant was to receive any consideration in the form of "shares" or "an option" to purchase shares or "a right" to purchase shares. (Compare the wording of paras. (a), (b) and (c) of s-s. (7) of s. 83A.) However, it must be recognized that the real bargain was made at the time that the Rambler agreement was entered into. It was provided by the Rambler agreement that, if the appellant gave notice of its desire to proceed with that agreement, a new company would be formed which new company would acquire the mining claims that were the subject matter of the Rambler agreement and, in consideration therefor, the new company would issue its shares, 40 percent to Rambler and 60 percent to the appellant. The Rambler agreement provided, however, that such shares would not be available to the appellant unless and until it performed what it was to agree to do by an agreement which it was to enter into with the new company. The net effect was that the appellant would, by such agreement with the new company, agree to carry out the exploration work in question. Undoubtedly, therefore, the real consideration for its agreeing to incur the exploration expenses on the mining claims that were to be placed in the hands of the new company was the agreement that it would receive 60 percent of the shares of the new company. The consideration was therefore "shares of the capital stock of a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights" and was not "a right to purchase" such shares within para. (c) of s-s. (7) or "shares of the capital stock of a corporation that owned or controlled the mineral rights" within para. (a). A comparison of the words of para. (a) and the words of para. (c) in s-s. (7) shows, in my view,

that the statute makes a contrast, which cannot be ignored, between

- (a) a corporation that owned or controlled the mineral rights, and
- (b) a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights, and between
- (c) shares of the capital stock of a corporation, and
- (d) a right to purchase shares of the capital stock of a corporation.

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For the purposes of the Rambler agreement, Rambler was the corporation that owned the mineral rights within para. (a) and the company to be incorporated, which turned out to be Rambridge, was the corporation that was to be formed for the purpose of acquiring the mineral rights. The consideration was "shares" in Rambridge not "shares" in Rambler and not a "right to purchase shares" in Rambridge. Where under an agreement shares are the consideration, the person who makes the expenditure is entitled to the shares by virtue of the agreement. When the consideration, under an agreement, is a "right" to purchase, he acquires the "right" by virtue of the agreement and he must exercise his right to purchase by some form of notice or election and must pay a purchase price. The difference between a "share" and a "right" to purchase a share is fundamental and is one that is made by every person involved in company finance. Here the appellant was entitled to "shares" in Rambridge and that is a consideration that did not fall under para. (a) or (c) of s-s. (7) of s. 83A.

I therefore conclude that this seventh item of \$13,765.73 does not fall within s-s. (7) of s. 83A and that the appellant should have been allowed to deduct it under s-s. (4) of s. 53.

The eighth item in dispute is the sum of \$13,677.68 being an amount expended by the appellant in 1952 on the Rambler property. This amount is in exactly the same position as the seventh item and what I have said with reference to the seventh item therefore applies equally to this eighth item.

The ninth item in dispute is an amount of \$6,991.89 expended in respect of certain mining properties that were the subject matter of an agreement between the appellant

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and Jawtam Key Gold Zones (Rambler) Limited dated June 16, 1952, which amount is, for practical purposes, in the same position from the point of view of s-s. (7) of s. 83A as the first item in dispute, and the remarks that I have made with reference to the first item may be taken as applicable thereto *mutatis mutandis*.

The tenth item is an amount of \$6,221 and is also an amount expended on the properties referred to in the Jawtam agreement. This amount differs only from the ninth amount in that the appellant's "option to purchase" the properties in question was, under the agreement, conditioned upon its making the expenditures in question. The appellant was, however, under no legal obligation to make the expenditures and the remarks that I made with reference to the first item may be taken as applicable also to the tenth item *mutatis mutandis*.

The eleventh item in dispute is an amount of \$15,063.77 expended pursuant to an agreement entered into on March 27, 1951 by the appellant with Stanmore Mining and Smelting Limited and a number of other persons each of whom owned mineral claims in the same area. Under this agreement, each of the persons owning mineral claims agreed to transfer those claims to a company to be formed for the specified amounts of shares in that company.

Paragraph 5 of the agreement reads as follows:

5. Falconbridge shall be entitled to act as sole managers of the Company's property for a minimum period of three years to decide the policy of exploration and development and be entitled to receive shares for the first Ten Thousand (\$10,000 00) Dollars advanced to the new Company at ten (10¢) cents per share and to receive for the next Forty Thousand (\$40,000.00) Dollars shares at twenty-five (25¢) cents per share and thereafter to receive for further advances shares at such price or prices as may from time to time be decided by the directors and Falconbridge agrees to expend the aforesaid total of Fifty Thousand (\$50,000.00) Dollars for the purposes of the Company and on exploration work to be commenced as soon as weather conditions permit and to continue the same until the whole of the said sum of \$50,000 00 is expended, and thereafter to expend such further sums as in its judgment is considered justified. As for such moneys as are expended in addition to the said Fifty Thousand (\$50,000.00) Dollars, the same shall be offered pro rata to the shareholders in the proposed company, provided, however, that in the event of any of such shareholders not purchasing and paying for such shares then the same shall be offered to Falconbridge its nominee or nominees, for the same price and on the same terms, prior to seeking sale to any other person or persons, firm or corporation.

The appellant and the respondent each put its case in respect of this item on the basis that, if it were not for s-s. (7) of s. 83A, amounts expended by the appellant pursuant to para. (5) would have been entitled to the benefit of s-s. (4) of s. 53 as enacted by s. 34 of c. 29 of the Statutes of 1952, which subsection is applicable to the year 1952. That subsection reads as follows:

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(4) A corporation whose principal business is mining or exploring for minerals may deduct, in computing its income for the purpose of *The Income Tax Act* for a taxation year, the lesser of

- (a) the aggregate of the prospecting, exploration and development expenses incurred by it, directly or indirectly, in searching for minerals in Canada,
  - (i) during the taxation year, and
  - (ii) during previous taxation years, to the extent that they were not deductible in computing income for a previous taxation year, or
- (b) of that aggregate an amount equal to its income for the taxation year
  - (i) if no deduction were allowed under paragraph (b) of subsection (1) of section 11 of the said Act, and
  - (ii) if no deduction were allowed under this subsection, minus the deduction allowed by section 27 of the said Act,

if the corporation has filed certified statements of such expenditures and has satisfied the Minister that it has been actively engaged in prospecting and exploring for minerals in Canada by means of qualified persons and has incurred the expenditures for such purposes.

The appellant conceded that the first \$50,000 expended under para. 5 of the Stanmore agreement fell within the declaratory provision contained in s-s. (7) of s. 83A but contended that the remaining \$15,063.77, the eleventh item in dispute, did not fall within the said s-s. (7). The respondent took the position that the \$15,063.77 item also fell within the declaratory provision in s-s. (7).

To determine the issue so raised requires a careful consideration of para. 5 of the Stanmore agreement, which paragraph appears to leave some things to the imagination. As a result of the best consideration that I have been able to give to para. 5, I have been constrained to the view that amounts expended by the appellant under that paragraph cannot be regarded as amounts expended by it on its own behalf and cannot, therefore, be regarded as "expenses incurred by it" within s-s. (4) of s. 53. This brings me to the result contended for by the respondent by different reasoning than that upon which the respondent relied.

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The following are the various stages by which I came to the view that I hold as to the effect of para. 5 of the Stanmore agreement:

- (1) Paragraph 5 first provides that "Falconbridge shall be entitled to act as sole managers of the Company's property... to decide the policy of exploration and development..." It follows that whatever Falconbridge, i.e., the appellant, did in its role of "managers of the Company's property" it did as agent of the company—i.e., the new company contemplated by the agreement—and not on its own behalf.
- (2) The next provision in the agreement is that "Falconbridge shall... be entitled to receive shares for the first Ten Thousand... Dollars advanced to the new Company at ten... cents per share and to receive for the next Forty Thousand... Dollars shares at twenty-five... cents per share and thereafter to receive for further advances shares at such price or prices as may from time to time be decided..." It is a necessary implication of this part of the paragraph that Falconbridge is to make "advances" to the new company and is entitled to receive shares for those advances. It may be that what was contemplated was "advances" in the ordinary sense of loaning money or it may have been contemplated that the "advances" would be monies expended by the appellant on behalf of the new company. I cannot escape the conclusion, however, that paragraph 5 contemplated the appellant putting up money to be used by the new company and that Falconbridge was to be entitled to receive shares in consideration for such money.
- (3) The next relevant part of paragraph 5 reads: "Falconbridge agrees to expend the aforesaid total of Fifty Thousand... Dollars for the purposes of the Company and on exploration work... and thereafter to expend such further sums as in its judgment is considered justified". When the appellant agreed to expend money which it was to put into the company's coffers or at the company's disposal and for which it was to receive shares, and when the appellant had already been authorized to act as "sole managers of the Company's property", to me, the result is inescapable

that the appellant was agreeing to make such expenditures of the company's money in its capacity as manager of the company's property and that any expenditure made pursuant to such agreement was an expenditure of the new company and cannot therefore be regarded as an expenditure incurred by the appellant for the purposes of subsection (4) of section 53.

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In the result, therefore, I am of the opinion that the Minister did not err in disallowing the appellant's claim in respect of this eleventh item of \$15,063.77.

The twelfth item in dispute is the sum of \$3,603.14 being an amount expended on mining claims which are the subject matter of an agreement entered into on July 29, 1952 between the appellant and John Stanley Brodie and Trevor Wyman Page. I see no relevant difference between the factors determining the character of these expenditures for present purposes and those determining the character of the expenditures making up the first item in dispute, and what I have said with reference to the first item may therefore be taken as applying *mutatis mutandis* to the twelfth item.

At the conclusion of the trial I allowed certain amendments to the pleadings, the effect of which was to allow the Minister to contend that the deductibility of three items should be dealt with by the judgment of this Court notwithstanding the fact that the Minister had, by notification under s-s. (3) of s. 58 of the *Income Tax Act*, agreed to allow their deduction. It was understood at the time that I allowed these amendments to the pleadings that the question as to whether the Court has jurisdiction on an appeal by the taxpayer to disallow deductions that the Minister had previously allowed, would have to be determined before the Minister could succeed in respect of these items. As, in the result, I have come to the conclusion that the three items in question are deductible, it is not necessary for me to deal with this question of jurisdiction.

The result is therefore that the appellant succeeds in respect of the first amount in dispute in the sum of \$10,512.05; the second amount in dispute in the sum of \$4,953.73; the fifth amount in dispute in the sum of \$20,435.41; the sixth amount in dispute in the sum of

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\$15,125.57; the seventh amount in dispute in the sum of \$13,765.73; the eighth amount in dispute in the sum of \$13,677.68; the ninth amount in dispute in the sum of \$6,991.89; the tenth amount in dispute in the sum of \$6,221.00; and the twelfth amount in dispute in the sum of \$3,603.14. The appeals will therefore be allowed with costs and the assessments will be referred back to the Minister for an adjustment of the figures in accordance with the conclusions set out in this paragraph and in the fourth paragraph of this judgment.

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BETWEEN:  
 THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;  
 AND  
 ALDERSHOT SHOPPING PLAZA }  
 LIMITED ..... } RESPONDENT.

*Revenue—Income—Income tax—Land purchased for shopping centre and subsequently sold at profit—Land purchased for shopping centre to be retained and rented—Sole purpose of taxpayer when land purchased—Conditions in agreement to purchase land inconsistent with speculative intention—Short existence of taxpayer insufficient to put it into business of dealing in shopping centres—Agreement of purchase and sale a capital asset, as was the land which was the subject of the agreement—Income Tax Act, R.S.C. 1962, c. 148, ss. 3, 4 and 139(1)(e).*

The Minister of National Revenue appeals from the decision of the Tax Appeal Board allowing the appeal of the respondent from the assessment as income of the respondent for the taxation year 1961 of the sum of \$55,018 08 realized as profit on the sale of land as being income from an adventure or concern in the nature of trade.

The evidence established that one Facey, who had acquired considerable experience in the construction industry and in the development of shopping centres, became aware that Dominion Stores Limited was anxious to have a shopping centre erected on land owned by it contiguous to one of its supermarkets located in the Village of Aldershot near Hamilton, Ontario. Facey was convinced that the site was suitable for such a development and lacking sufficient capital himself, he enlisted the participation of several other individuals to help finance the project and, with them, procured the incorporation of the respondent company. On August 12, 1960 an agreement for sale was executed by Dominion Stores Limited and a trustee for the respondent company which had not yet been formed and it was a term of the agreement that should the purchaser be

unable to obtain the necessary permits for the erection of the proposed shopping centre and the approval of the vendor of the site plan, before the closing date, it might, at its option, either complete the purchase or terminate the agreement, in which latter event it would lose its deposit of \$1,000. After considerable preliminary work had been done, and expense incurred for printing and distribution of brochures, for engineers', architects', surveyors', and solicitors' fee, for office rent and for secretarial help, and some progress had been made in leasing space in the proposed shopping centre, Dominion Stores Limited informed Facey that Tower Marts of Canada Limited had decided to establish a large departmental discount store in the area and was particularly anxious to have the respondent's site. There was evidence that Tower Marts of Canada Limited was, in fact, negotiating for available property just across the highway from the respondent's site. Faced with this dilemma the respondent agreed to sell part of its site to Tower Marts of Canada Limited and in so doing realized as profit the sum of \$55,018.08, which is in issue.

- Held:* That the respondent, when it entered into the agreement of purchase and sale with Dominion Stores Limited had for its sole purpose the erection of a shopping centre on the land to be acquired and to derive rental income therefrom.
2. That the fact that the respondent had not completed the mortgage financing and other arrangements for its shopping centre at the time it sold to Tower Marts of Canada Limited does not warrant an inference that it had, from the beginning, contemplated resale of the property, inasmuch as such sale occurred before, in the ordinary course of events, such arrangements would have been made.
  3. That although the proposed first mortgage on the property was to contain a provision for partial discharge, such provision is consistent with the erection of the shopping centre in stages and allowed the respondent to dispose of such part of the land as might be unnecessary for its shopping centre. If the land was capital in the hands of the respondent then the surplus over its requirements would also be capital.
  4. That the conditions imposed by the provisions in the agreement with Dominion Stores Limited were designed to ensure that a shopping centre would be built and are inconsistent with speculation in the lands for any other purpose.
  5. That the short existence of the respondent was not sufficient to put it into the business of dealing in shopping centres.
  6. That the provision in the agreement of purchase and sale giving the purchaser the option of completing the purchase or terminating the agreement in the event it did not obtain the necessary permits and approvals, is not a condition precedent to the respondent's obligation to buy the property.
  7. That the agreement for sale between Dominion Stores Limited and the respondent constituted a capital asset rather than a revenue asset and there is no valid reason for not considering the land which was the subject of the agreement for sale to be in the same category.
  8. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

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The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

*D. J. Wright and J. E. Shéppard* for appellant.

*David Vanek, Q.C. and Irving Goodman* for respondent.

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

CATTANACH J. now (January 15, 1965) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board<sup>1</sup> dated January 31, 1964, whereby an appeal, by the respondent against its income tax assessment for its taxation year 1961 was allowed and the pertinent assessment was ordered vacated.

The respondent, in assessing the appellant for its 1961 taxation year, added to the appellant's income for that year an amount of \$55,018.08 realized as profit on the sale of land as being income from an adventure or concern in the nature of trade. The respondent, on whom the onus lies, does not dispute the accuracy of the amount of profit so realized, but does contend that such gain does not constitute taxable income, but was rather a "capital gain". The respondent says that it had been incorporated for the sole purpose of erecting and carrying on the business of a shopping centre to obtain rental income therefrom; that real property was acquired for the sole purpose of securing an advantageous site for the proposed shopping centre; that definite and unequivocal steps were taken towards that end; that a well established competitor had subsequently decided to locate in the identical area and subjected the respondent to irresistible pressure to sell the site to it. Accordingly the respondent says that it was frustrated in its project of developing a shopping centre and had no alternative but to sell to its competitor and that the transaction was, therefore, not an adventure or concern in the nature of trade.

The question for determination is, therefore, whether, in the light of all the surrounding circumstances, the transaction in question is "an adventure in the nature of trade" and the profit therefrom is income from a business for the purposes of the *Income Tax Act* under ss. 3, 4 and 139(1) (e)

<sup>1</sup> 34 Tax A.B.C. 429.

thereof, or whether the sale of the real property was the realization of a capital asset and the proceeds of such realization were, therefore, capital and not income within the meaning of the *Income Tax Act*.

The prime motivation of the proposal to erect a shopping centre was Allan E. Facey who was also the principal witness for the respondent. Mr. Facey had considerable experience in the construction trade, having been 14 years with a well known construction company, his function being to estimate building costs. Latterly he spent 7 years as general manager of a company engaged in the development of properties such as office buildings and shopping centres. In the course of his employment he was responsible for the supervision of the construction of three neighbourhood shopping centres which entailed engaging architects and consulting engineers, arranging for sanitary sewers, lighting of parking lots and the like. From his association with the trade he became aware that Dominion Stores Limited, which operated a number of grocery supermarkets, (hereinafter referred to as Dominion) was particularly anxious to have a shopping centre erected contiguous to one of its existing supermarkets located in the Village of Aldershot, which was on a main highway in close proximity to the metropolitan area of Hamilton, Ontario. A brief and superficial investigation of the site convinced Mr. Facey that it offered eminently suitable prospects for the construction of a successful shopping centre. He, therefore, saw an opportunity for setting out a potentially prosperous project on his own behalf, in a field for which his experience best suited him.

While Mr. Facey had little capital of his own, which included a possible loan of about \$25,000 to \$30,000 from his late father's estate which he valued at \$300,000, nevertheless he could not carry the project on his own. Accordingly, he enlisted the participation of James Bitove, a former schoolmate who operated a number of coffee shops, John Bitove, brother of James, Bruce Kinsella, (John Bitove and Kinsella were shareholders of a company known as Kinsella Design Associates Limited, which company was engaged in the design and manufacture of store fronts and fixtures) and David Fine a chartered accountant. Later Nicholas Bitove, the father of James and John, who was

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retired but possessed some means, was induced to join the project.

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These persons were instrumental in obtaining the incorporation of the respondent company under the name of Aldershot Shopping Plaza Limited, pursuant to the laws of the Province of Ontario by letters patent dated September 28, 1960 for the following objects:

TO purchase, lease, take in exchange or otherwise acquire lands or interests therein together with any buildings or structures that may be on the said lands or any of them and to hold, enjoy, manage, improve and assist in improving such lands and to construct, develop and operate shopping centres in all their aspects;

Prior to the incorporation of the respondent, the participants, with the exception of Nicholas Bitove who joined the project at a later time, met to consider the project in July or August of 1960. They had before them an analysis of the site, prepared for another party, and the benefit of Mr. Facey's examination of the site and his experience. They decided that the site was a promising one. It is true there was a sewer problem but it seemed capable of solution. It was estimated that the cost of the project would be \$1,200,000 inclusive of the cost of the land which was \$240,000. The construction of the building and other improvements would be approximately \$1,000,000. The building would contain 35 stores, the rental of which would yield an estimated 15 percent return on the monies expended. It was anticipated that financing of construction would be by means of a first mortgage in the amount of \$750,000. Secondary financing was also contemplated as necessary and any balance remaining, when the amount of the secondary financing available was known, would be put up proportionately by the participants. The participation in the project was to be one-sixth each by James Bitove, John Bitove, David Fine and Allan Facey and two-sixths by Bruce Kinsella. A mortgage broker was consulted who was optimistic about obtaining a first mortgage in the required amount predicated upon the successful negotiation of leases for the premises before construction began. However, no steps appear to have been taken to obtain secondary financing although several possible sources were mentioned by Mr. Facey with whom he had had previous dealings.

The preliminary financing was in the amount of \$15,000. James Bitove, John Bitove, Fine and Facey each put up

\$1,000 and Kinsella put up \$2,000, making a total of \$6,000. The remaining \$9,000 was put up by Kinsella Design Associates Ltd., and was advanced as required.

An offer to purchase was submitted to Dominion, (which incidentally had been attempting to dispose of the land for between five and seven years, to someone who would build a shopping centre on it) by Kinsella Design Associates Limited which was acceptable to Dominion.

Accordingly, on August 12, 1960 Dominion entered into an agreement for sale with Kinsella Design Associates Limited as trustee for a company to be formed, being the respondent herein. This agreement provided for the sale of the land owned by Dominion contiguous to its existing supermarket building, consisting of approximately 17.96 acres, with a frontage of 1200 feet and an arterial highway, at a price of \$240,000 to be paid by (1) a deposit of \$1,000 on the signing of the agreement, (2) \$49,000 by certified cheque on closing, the closing date being fixed in the agreement as November 1, 1960, and (3) the balance of \$190,000 by giving back to the vendor a first mortgage covering the entire property to mature two years after the date of completion. The mortgage was to contain a provision whereby the mortgagor was entitled to obtain partial discharges at any time before maturity. It was also provided that if, on or before the closing date, the respondent should not have obtained (a) all necessary permits from governmental and administrative bodies allowing the erection and operation of a retail shopping centre (b) all necessary permits from the Department of Highways allowing access from the adjacent public highway, or (c) approval of Dominion's engineers to a site plan, then the respondent may either complete or terminate the agreement at its discretion. In the event of the agreement being terminated for any of the foregoing reasons, the deposit was to be retained by the vendor. It was further provided that should the respondent not be able to obtain permission to connect to storm sewers or water mains or should it be unable to arrange for sanitary sewer facilities to be brought to the perimeter of the property to service the shopping centre in due time for the completion thereof, the respondent at its option might also terminate the agreement. By a schedule to the agreement Dominion was granted certain easements permitting of access and

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maintenance and by a further schedule Dominion reserved the right to exercise control over the construction of all buildings within 600 feet of its existing building, the respondent undertook to maintain an access road until dedicated and accepted as a public highway and the respondent also undertook not to permit the erection of any building on the land which would be used to compete with Dominion for 30 years.

The respondent thereupon began its efforts to bring the proposed shopping centre into existence. Brochures were prepared, printed and circulated to prospective tenants at a cost of \$1,227.50, engineers' fees were incurred to the extent of \$1,082, architects' fees in the amount of \$1,756, and survey fees amounting to \$212. The respondent arranged to share office space with David Fine at a monthly rental of \$175, employed secretarial assistance and undertook to pay Facey a salary. Mr. Facey was willing to accept only one-half of the agreed salary and to wait for the balance and the respondent's solicitor also agreed to defer payment of his fees until the affairs of the respondent prospered.

It was a condition precedent to obtaining a mortgage commitment that firm lease commitments be obtained from reliable tenants for the shopping centre when erected. Voluminous correspondence was therefore entered into with various prospective lessees, but only one signed lease was obtained although optimistic negotiations were being conducted with other tenants who expressed definite interest. F. W. Woolworth, a variety store, was willing to sign a lease, in a form approved by it, which contained a clause that, should Dominion sell or abandon its grocery market, then Woolworth could terminate its proposed lease. The respondent unsuccessfully tried to have this provision removed because it was informed and foresaw that the amount of first mortgage monies that could be obtained might be reduced as a consequence.

The respondent was unable to close on the agreed date and Dominion readily agreed to an extension.

In January 1961 Dominion also gave its approval to a site plan as contemplated by the agreement for sale dated August 12, 1960, but the respondent never did obtain the

permits necessary to begin construction as were also contemplated in the above agreement, nor was construction of the proposed shopping centre ever begun.

Towards the end of January 1961, Mr. Facey was informed by the property manager of Dominion that Towers Marts of Canada Limited (hereinafter called Towers) had decided to establish a large discount departmental store in this area and was particularly anxious to have the respondent's site which, because of its prior agreement with the respondent, Dominion could not sell to Towers. This was no idle threat as one, H. B. Sussman, acting as agent for Towers, was also negotiating for available property just across the highway. In addition there is no doubt that the advent of a Towers discount store in such close proximity to the respondent's site effectively destroyed the prospect of a successful shopping centre being established on the site. Towers was introducing a new form of merchandising, and had unlimited resources to do so. It had completed its first store in Metropolitan Toronto and it had enjoyed a phenomenal success and caused concern among retail merchants, particularly operators and tenants of traditional shopping centres. Further, Towers was negotiating with Dominion for the acquisition of a number of other locations adjacent to Dominion's other supermarkets.

The directors of the respondent, being the persons already mentioned, met and decided to negotiate a sale to Towers. After some negotiation, directed mainly to price, during which the realities of the situation were forcefully brought to the respondent's attention, the sale of 12½ acres was agreed upon at a price of \$305,000.

Towers, having achieved its purpose in acquiring the site it wished, could afford to be magnanimous. It permitted the respondent to continue negotiations already begun with prospective tenants for which it agreed to pay a commission. Towers paid the real estate agent's commission which by custom in the area was normally paid by a vendor and Towers was also agreeable to some compensation being paid to the respondent for its efforts which was, of course, reflected in the sale price.

The respondent forthwith closed the agreement with Dominion and on the same day transferred title to Towers,

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the purchase price to Dominion being paid by the respondent from the proceeds of the sale to Towers.

Towers purchased only 12½ acres of the 17 acres which the respondent had agreed to purchase from Dominion, since these 12½ acres constituted the area which Towers desired for the erection of its discount store. The remaining acreage which did not front on the public highway but was situated in a ravine so that it was of doubtful utility, was retained by the respondent which disposed of it subsequently.

It was from the sale to Towers that the respondent realized its gain of \$55,018.08 which the appellant added to its declared income for the 1961 taxation year.

On the evidence adduced, I am of the opinion that the respondent, when it entered into the agreement of purchase and sale with Dominion had for its sole purpose the erection of a shopping centre on the land to be acquired and to derive rental income therefrom. In so concluding I have not overlooked the fact that the respondent was faced with a hard and tortuous path to bring its project to completion, primarily because of the limitation of its financial resources. However there was a real possibility of all obstacles being overcome and of the objective being achieved. The fact that the respondent had not completed the mortgage financing and other arrangements for its shopping centre at the time it sold to Towers does not warrant an inference that it had, from the beginning, contemplated resale of the property, inasmuch as such sale occurred before, in the ordinary course of events, such arrangements would have been made.

The amount of the deposit, which the respondent stood to lose if it terminated the agreement for purchase was \$1,000 which is negligible in relation to a project of this magnitude. However the respondent did expend approximately \$5,000 for architects and engineers fees, surveys and the like, which were directed exclusively to the construction of a shopping centre on the site. Further the agreement for sale with Dominion was subject to such conditions as Dominion considered necessary to ensure the erection of a shopping centre adjacent to its supermarket in which Dominion's advantage laid most. Although the mortgage was to contain a provision for partial discharge, such provision is consistent with the erection of the shopping centre in stages and

allowed the respondent to dispose of such part of the land as might be unnecessary for its shopping centre. If the land was capital in the hands of the respondent then the surplus over its requirements would also be capital (see *Sterling Paper Mills Inc. v. M.N.R.*)<sup>1</sup>

The conditions imposed by the provisions in the agreement with Dominion were designed to ensure that a shopping centre would be built and are inconsistent with speculation in the lands for any other purpose.

In addition to direct costs, as above mentioned, other obligations were incurred incidental to the completion of a shopping centre. I have in mind legal fees, the establishment of an office with secretarial assistance, although on a modest scale, and the preparation and circulation of promotional literature, all designed to secure tenants upon which the availability of first mortgage money depended and which could have no possible effect on a subsequent sale. The short existence of the respondent was not sufficient to put it into the business of dealing in shopping centres.

In my view, therefore, the agreement for sale between Dominion and the respondent constituted a capital asset rather than a revenue asset and I can see no valid reason for not considering the land which was the subject of the agreement for sale to be in the same category.

Counsel for the appellant in argument, pointed out that the respondent resold the land before it was under any obligation to buy the same because permits contemplated by the agreement for sale had not been obtained. The provision in question reads:

It is understood and agreed that if on or before the date provided herein for completion of the sale and purchase the Purchaser shall not

- (a) have obtained all necessary permits from all governmental or administrative bodies having jurisdiction in the premises allowing the erection and operation on the lands which are the subject of this agreement of a retail shopping centre, the buildings of which shall have a minimum ground floor area of 25% of the lands covered by this agreement and a maximum height of 35 feet, and
- (b) have obtained from the Department of Highways all permits required for such a shopping centre allowing access to the same directly from the adjacent public highway,
- (c) have obtained the approval of the Grantor's engineers to a site

<sup>1</sup> [1960] Ex. C.R. 401.

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plan as described in Schedule "C" herein hereto annexed, which approval shall not be unreasonably withheld.

the Purchaser may either complete the purchase, in which case it shall have no claim against the Vendor for the fulfilment of the above conditions (a) and (b) and (c) or otherwise, or the Purchaser may by notice given on or before the said date of completion terminate this agreement...

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The effect of such provision, as I see it, is to permit the purchaser to avoid the agreement if permits essential to the construction and operation of a shopping centre were not forthcoming after reasonable and conscientious efforts to obtain them, so that the purchaser's enterprise was frustrated. However, the provision leaves a discretion in the purchaser either to terminate the agreement in the eventuality contemplated or to complete the agreement. It is not, in my opinion, a condition precedent to the respondent's obligation to buy the property.

Counsel for the appellant, having assumed that there was no binding obligation between the parties, then submitted that even if the agreement between Dominion and the respondent of August 12, 1960, which he construed as analogous to an option, was entered into for capital purposes, if the subject matter of the option, or in this case the subject matter of the agreement, were sold before the exercise of the option or the completion of the agreement, then that transaction is a concern or adventure in the nature of trade. As authority for such proposition he cites the decision of Thurlow J. in *Hill-Clark-Francis Ltd. v. M.N.R.*<sup>1</sup>

During the course of the argument I was impressed with what appeared, superficially, to be an analogy between the facts of the present case and these under review by Mr. Justice Thurlow in the *Hill-Clark-Francis* case. However upon subsequent consideration I do not think the facts are actually analogous, nor do I believe that the decision of Mr. Justice Thurlow is authority for the submission advanced on behalf of the appellant. In the *Hill-Clark-Francis* case the appellant acquired an option to purchase shares of a company which was the source of lumber supply to make it a subsidiary company. It was found as a fact that the option had been acquired as a capital asset, but the shares represented by the option, which were bought and

sold, were regarded differently because in the meantime different circumstances intervened, so that the shares in question became a revenue asset. Thurlow J. had this to say:

It should not, I think, be overlooked that what the appellant acquired for a capital purpose was not shares at all but an option for which it paid \$100. Had the appellant gone on and acquired the shares with the same purpose in mind and carried out its plan to make Poitras Frères Inc. a subsidiary, the shares might well have constituted in the appellant's hands assets of a capital, as opposed to a revenue nature. What happened in fact was, however quite different, and I do not regard it as in any real or practical sense the equivalent of a mere realization of the capital asset represented by the option.

Much more than the option and its value was involved. The sale of the shares also involved the appellant giving up its right to a lumber supply.

In the present case the circumstances are not similar to those in the *Hill-Clark-Francis* case. I do not regard the sale of the lands that were the subject of the respondent's agreement with Dominion as being in any real or practical sense other than the realization of a capital asset.

The appeal is, therefore, dismissed with costs.

*Judgment accordingly.*

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

MANNIX LIMITED ..... PLAINTIFF;

AND

N. M. PATERSON & SONS LIMITED ..... DEFENDANT.

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*Shipping—Charter agreement—Carriage of cargo—Stowage and securing of cargo—Loss of cargo lashed on deck and breaking loose in heavy weather—Duty of shipowner regarding stowage of cargo—Burden of proving lack of negligence on part of shipowner—Effect of participation by shipper in stowage of cargo on shipowner's liability for stowage—Quebec Code of Civil Procedure, Articles 1675, 2388, 2424, and 2427.*

In this action the plaintiff claims damages for the loss of an 87 ton mechanical shovel which was being carried on the *S.S. Wellandoc*, a ship owned by the defendant, from Baie Comeau to Bagotville, Quebec. On November 30, 1954 the plaintiff entered into a time charter agreement with the defendant for the hire of the *S.S. Wellandoc* to carry steel outbound from Montreal and contractor's equipment inbound to Montreal and to and from St. Lawrence River ports. The

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defendant provided the vessel fully manned and the plaintiff was to be responsible for any damage caused through cargo handling at any or all ports.

On December 9, 1954 the ship left Baie Comeau for Bagotville after having loaded the shovel in question and other contractor's equipment. During the loading at Baie Comeau forty to fifty miles per hour winds caused heavy swells in the harbour and the ship was damaged by being banged against the wharf. The ship left Baie Comeau in heavy seas and high winds with the shovel lashed down on number two hatch forward. Three hours after the *S.S. Wellandoc* left Baie Comeau the shovel began to move and ten minutes later it broke loose and was lost overboard.

*Held:* That the stowage and method of securing the plaintiff's shovel were inadequate, improper and contrary to good practice and the dictates of ordinary prudence, having regard to the weight and dimensions of the shovel and the weather conditions which might reasonably have been anticipated at that time of the year in that area.

2. That Articles 2424, 2427 and 1675 of the Quebec *Civil Code* as well as the Quebec jurisprudence relating to such articles and English doctrine and jurisprudence may be considered and applied in the determination of this case.
3. That it is not necessary, having regard to Article 1675 of the Quebec *Civil Code*, and also generally according to English Law, for the shipper to show negligence on the part of the ship's owner, who, to escape liability for loss or damage to cargo, must prove that such loss or damage was caused by a fortuitous event or irresistible force or has arisen from a defect in the thing itself.
4. That if the shipowner in this case was released from its obligation to safely and properly secure and stow the plaintiff's shovel it could only have been because it was discharged of this obligation by agreement either express or implied, and no such agreement or release was alleged or proved. No such agreement is implied in the fact that the plaintiff's men participated in the loading and stowing of the shovel.
5. That in order that the participation of the plaintiff's men in the loading and stowing of the shovel might imply an agreement the effect of which would be to release the shipowner from its obligation to properly and safely stow the cargo it would have to be established that the plaintiff, or its representatives, knew and appreciated the risk to which the cargo was exposed by reason of the manner in which it was stowed and, with this knowledge, agreed to release the defendant and accept the risk.
6. That if the stowage of cargo were such that it might affect the stability of the ship or certain special methods of stowage were required to meet conditions well known to the shipowner, but of which the shipper had no knowledge, one cannot presume any intention on the part of the shipper, who assisted in the stowing of the cargo, to relieve the owner from its obligation to stow, secure and carry the cargo safely.
7. That the plaintiff's claim is allowed.

**ACTION** to recover value of mechanical shovel lost overboard from the deck of defendant's vessel.

The action was tried by the Honourable Mr. Justice Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

*Léon Lalande, Q.C.* for plaintiff.

*J. Brisset, Q.C.* for defendant.

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

SMITH D.J.A. now (February 8, 1965) delivered the following judgment:

By its action the plaintiff claims the value of a mechanical shovel, lost overboard from the deck of the defendant's vessel, the *S.S. Wellandoc*, on the 9th day of December 1954.

On the 30th day of November 1954 the plaintiff entered into a time charter agreement with the defendant for the hire of the *S.S. Wellandoc* to carry steel outbound from Montreal, and contractor's equipment inbound to Montreal, to and from St. Lawrence River ports, the said charter agreement being in the following terms:

November 30th 1954

Mannix Limited,  
660 St. Catherine St. W.,  
Montreal, P.Q.  
Attention Mr. G. J. Pollock

Dear Sirs:

As per our agreement the *SS Wellandoc* will be provided to carry out a voyage on your behalf from Montreal 1, P.Q. to Mont Louis, P.Q., Baie Comeau, P.Q. and Bagotville, P.Q., and return to Montreal, P.Q. or Cornwall, Ont, if possible, under the following terms and conditions.

1. Cargoes to consist of steel outbound and contractors' equipment inbound with no dangerous cargo permitted unless arranged for.

2. Charterers to have full use of ship's gear as on board.

3. Charterers to pay for all extra insurances on the vessel during the term of this charter. Extra meaning everything additional to insurances normally carried on this vessel prior to November 30th 1954.

4. Owners to provide this vessel fully manned, victualled and fueled at a daily rate of hire of \$900.00 or pro rata thereof. Hire payable in advance on the estimated term of the charter and to be adjusted in full immediately upon redelivery.

5. Delivery of the vessel to date from the hour the vessel clears Elevator 2 Montreal today with redelivery on the date and time when the vessel is safely returned to Montreal, cleaned and free of cargo.

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6. Charterers to be responsible for any and all damage caused through cargo handling at any or all ports and to make good said damage before the vessel is accepted at redelivery.

Yours very truly,

N. M. PATERSON & SONS LIMITED  
 (sgd) I. C. McEwen

Traffic Manager

Accepted:

Mannix Limited

The *Wellandoc* left Montreal on November 30th with 400 tons of steel-piling, one-half of which was stowed on deck. She called at Baie Comeau on December 3rd, and loaded cement and machinery which were to be unloaded at Mont Louis. The *Wellandoc* left Baie Comeau at 1150 hours on December 3rd, arrived at Mont Louis at 2300 hours on the same day and discharged most of her cargo. Up to that time the voyage had been uneventful.

The vessel left Mont Louis at 0355 hours E.S.T., December 6th, for Baie Comeau to load machinery belonging to the plaintiff. She arrived at Baie Comeau at 1930 hours on the same day and started loading at 2100 hours. Around midnight there was light snow and a moderate southeast wind. Loading was stopped at 0700 hours on December 7th when there was rain and snow with a strong east wind. The ship was tied up, starboard side to, on the east side of the inside spur dock, heading south and parallel to the shore. She started to roll and surge and fenders were placed over the side. The crew stood by continuously from the time the ship started to heave until 2 a.m., December 8th, during which time the wind attained a velocity of from forty to fifty m.p.h., and possibly more in gusts. The sea, coming from the northeast direction, was breaking over the outside pier, the ship getting the swell.

Although those in charge of the vessel had had warning of westerly winds of from twenty-five to thirty-five m.p.h. they actually experienced strong northeasterly wind of which there had been no indication. The Master considered that the ship could not leave her berth light, as she would have been in danger of being blown ashore. As a result of the heaving and banging of the vessel against the wharf she was damaged on her starboard side, both forward and

aft. Two cracks were noticed in plates on the starboard bow and plates were also shoved-in considerably from the deck-line down to the bilge-line for a distance of about twenty feet. Aft, one seam was opened in the oil bunker.

The *Wellandoc* completed loading at about 0005 hours on December 9th by which time she had loaded about 360 tons, mostly heavy machinery, including one shovel and one crane weighing about 87 tons each. These were loaded on deck, on number two and three hatches, the shovel forward and the crane aft. The shovel, on number two hatch, was a Bucyrus Model 54B which covered practically the whole of the hatch. Two thicknesses of 12" x 12" timbers were laid over the hatch and were secured by spikes. The shovel was placed on the floor so constructed, sitting on caterpillar tracks, heading athwartship, the tracks being blocked by 6" x 4" pieces of timber. Wires were used on both sides to lash the shovel. These wires which were tightened with turnbuckles led from the frame of the shovel to eye-bolts on the deck. The boom was raised to a perpendicular position and the wire cable normally used to operate the shovel was used to lash the boom to the bulwark on the port side.

The *Wellandoc* left Baie Comeau for Bagotville at 0120 hours on December 9th. From 0133 hours, strong south-westerly wind was encountered and the sky was overcast with occasional light snow. From 0230 hours the vessel was rolling and plunging heavily and at 0420 hours, conditions having worsened and it being noticed that the shovel was beginning to move, the vessel was turned about, it being the intention to return to Baie Comeau. At 0430 hours the shovel broke loose from its lashings, went overboard and was lost. The *Wellandoc* returned to Baie Comeau where she tied up at 0740 hours.

The preponderance of the proof is that the stowage and method of securing the plaintiff's shovel were inadequate and bad, having regard to the weight and dimensions of the machine and the weather conditions which might reasonably have been anticipated at that time of the year in that area. That such was the case would appear moreover, from the fact that in a little over three hours after leaving Baie Comeau, the shovel began to move and the lashings, which were intended to secure it, parted and the plaintiff's shovel went overboard.

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Messrs. Crocker and Bagger, marine surveyors, both of whom have had long experience in such matters, testified at some length as to the inadequate and inept means adopted to secure the shovel and indicated what precautions should, as a matter of ordinary prudence, have been taken in the circumstances to adequately secure and prevent the movement of the equipment. This evidence was not contradicted and the Court is satisfied that the stowage and securing of the plaintiff's shovel was inadequate, improper, and contrary to good practice and the dictates of ordinary prudence.

At the hearing the defendant relied, not so much on the contention that the stowage and securing of the said cargo was proper and adequate, but rather on the submission that the stowage and securing of the shovel had been executed entirely by the plaintiff's own employees, who had declared themselves entirely satisfied with it.

The evidence is contradictory as to the part played by the plaintiff's employees in the stowing and securing of the cargo. Although Captain McCurdy testified that the crew of the vessel had nothing to do with the stowage, he stated that he himself had checked the same and found it to be satisfactory. This testimony, would seem to be in contradiction to the allegation of the statement of defence, to the effect that the accident was due "to defects in the stowage by plaintiff's men." Moreover, the testimony of Bellefontaine, Master Mechanic, employed by the plaintiff, who apparently was superintending the plaintiff's employees, was that although the plaintiff supplied the cables and timbers used in connection with the stowage as well as the assistance of its men, the actual control of the stowage was left in the hands of the ship's crew.

The defence contains no allegation that, because of the plaintiff's participation in the stowage and securing of the cargo it is precluded from complaining of poor stowage or that the effect of this participation was to release the defendant from its obligation to safely and properly stow and secure the cargo. In any event (even if this had been alleged) "the mere fact that the charterer or shipper knew how the goods were being shipped and assented to what was done, will not generally excuse the shipowner". Carver, Carriage of Goods by Sea 10th Edition, page 462.

It may well be that there are cases in which the shipper, who has participated in or approved the stowage and securing of the cargo, is precluded from later complaining of such stowage. For example, when the shipper is fully aware, or it is patent, that stowage of a particular type of cargo in a particular manner or place will expose that cargo to damage, e.g. contamination, and nevertheless participates in and approves stowage in that manner, such shipper may be precluded from claiming in respect of damage to cargo due to said stowage.

Examples of such cases are those of *Bozzo v. Moffatt et al.*<sup>1</sup>, and *The Santamana*<sup>2</sup> cited on behalf of the defendant. 159 cited on behalf of the defendant.

In the *Bozzo* case stowage had been entrusted by the shippers to stevedores. Cargo was damaged due to failure of the stowers to use sufficient dunnage to protect the cargo of the type shipped. The Court apparently considered that the shippers (or their agents, stevedores) had better knowledge concerning the dunnage required for the protection of the cargo, than had the Master of the ship, and therefore relieved the Master of the responsibility.

Article 2388 *Civil Code* was cited on behalf of the defendant in support of the argument that articles 2424, 2427 and 1675 CC do not apply because it is the Law of England, rather than the Law of this Province, which is applicable. This proposition appears to be unfounded since article 2388 *Civil Code* provides clearly that it is the provisions contained in Chapter Four (relating to the Privilege and Maritime Lien upon vessels) which do not apply in cases before the Court of Vice-Admiralty. There is no such provision applicable to articles of the *Civil Code* other than those contained in Chapter Fourth. In any event the point would appear to be academic in so far as the present case is concerned, since it is conceded in the defendant's Memorandum of Authorities that "the rules under both systems of law, in admiralty matters, are generally the same and that our Courts have consistently and rightly sought guidance in such matters from British jurisprudence and doctrine."

The contract of affreightment under which the defendant contracted to carry plaintiff's property was entered into in

<sup>1</sup> (1881) XI Revue Legale 41.

<sup>2</sup> (1923) 14 Ll. L.R. 159

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the Province of Quebec and related to a voyage within the limits of that province. In the opinion of the Court, articles 2424, 2427 and 1675 CC cited on behalf of the plaintiff, as well as the Quebec jurisprudence relating to such articles, and English doctrine and jurisprudence may be considered and applied in the determination of this case.

Articles 2424, 2427 and 1675 CC provide that:

2424. The master is obliged to receive the goods, and carefully arrange and stow them in the ship, and to sign such bills of lading as may be required by the freighter or lessee, according to article 2420, upon receiving from him the receipts given for the goods.

2427. The master is obliged to exercise all needfull care of the cargo, and in case of wreck, or other obstruction to the voyage, by a fortuitous event or irresistible force, he is obliged to use the diligence and care of a prudent administrator for the preservation of the goods, and for their conveyance to the place of destination, and for that purpose to engage another ship, if it be necessary.

1675. They (carriers by land and by water) are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

Carver's Carriage of Goods by Sea 10th Edition, at page 459:

The master is by law required to be a competent stevedore. (per Willes, J. in *Anglo-African Co. v. Lamzed* (1865) L.R.K.P. p. 229.)

It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly not only in the interests of the seaworthiness of the vessel, but in order to avoid damage to the goods, . . . (per Lord Wright in *Canadian Transport Co. v. Court Line* [1940] A.C. 934, 943).

It is noteworthy that it is not necessary, having regard to article 1675 CC, (and also generally according to English Law) for the shipper to show negligence on the part of the ship's owner, who, to escape liability for loss or damage to cargo, must prove that such loss or damage was caused by a fortuitous event or irresistible force or has arisen from a defect in the thing itself.

Carver, Carriage of Goods by Sea 10th Edition at page 459:

We have seen that it is not generally necessary to show negligence in order to make a ship's owner responsible for the safety and good condition of the goods. Subject to the exceptions stipulated for in the contract, and those prescribed by the law, he is absolutely liable for their safety . . .

Also at page 459:

The duty of stowing the cargo in the ship lies on the owner and on the master as his representative unless there is an agreement to the contrary. The Master ought to be a competent stevedore, and he must see that the stowage is done with skill and care.

If therefore, the shipowner in the present case was released from its obligation to safely and properly secure and stow the plaintiff's shovel it could only have been because it was discharged of this obligation by agreement either express or implied. No such agreement or release was alleged and in the opinion of the Court none was proved. Certainly there is no evidence of any express agreement to this effect and in my opinion there is no evidence to justify the conclusion that such an agreement is implied in the fact that the plaintiff's men participated in the loading and stowing of the shovel. In order that this participation might imply an agreement the effect of which would be to release the shipowner from its obligation to properly and safely stow the cargo it would have to be established that the plaintiff, or its representatives, knew and appreciated the risk to which the cargo was exposed by reason of the manner in which it was stowed and with this knowledge agreed to release the defendant and accept the risk. There is neither allegation nor proof to support such a proposition.

The Master and crew of the *Wellandoc* were presumably aware, or should have been aware, that heavy seas and inclement weather were frequently encountered in that area and at that time of the year. They, moreover, knew or may be presumed to have known the effect heavy seas might have upon their vessel laden with a deck cargo of the nature, weight and dimensions of that loaded on their ship and of what constituted safe and adequate measures to secure such cargo against such conditions.

On the other hand the plaintiff's master-mechanic, Bellefontaine, who was in charge of the plaintiff's men, who assisted in the loading and stowing of the cargo, was a landsman with no knowledge of ships or experience at sea. In such circumstances it is improbable that he had any knowledge of what constituted proper and adequate measures to safely secure the plaintiff's cargo, in order to meet the conditions which the vessel was likely to encounter and there is in the Court's opinion no proof to justify the conclusion that either Bellefontaine or any other authorized representative of the plaintiff ever agreed to release the defendant from its obligation as shipowner to safely stow and carry the said cargo.

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As above indicated, it might well happen that stowage of below-deck cargo which did not have any bearing upon the stability or safety of the ship, but related solely to the safety of the cargo, (e.g. its protection against contamination by other cargo) might if undertaken by a shipper who was in a position to know and appreciate that damage might result to the cargo if stowed in a certain manner and nevertheless participated in or approved of stowage in this manner, preclude the shipper from claiming against the owner for cargo damage due to poor stowage.

On the other hand if the stowage were such that it might affect the stability of the ship or certain special methods of stowage were required to meet conditions well-known to the shipowner, but of which the shipper had no knowledge, one cannot presume any intention on the part of the shipper, who assisted in the stowing of the cargo, to relieve the owner from its obligation to stow, secure and carry the cargo safely.

The Court is unable to accept the proposition that there was an agreement, either express or implied, the effect of which was to relieve the defendant, shipowner, from its legal obligation to safely and properly stow and secure the said cargo.

Although Counsel for both parties made reference to the matter of seaworthiness, in their notes, and although there is at least some evidence bearing upon this aspect of the case, the Court considers it unnecessary to do more than state that even if there is evidence of unseaworthiness (and on this point no opinion is expressed) there is a complete lack of proof that the loss of plaintiff's shovel was caused by or in any way related to any unseaworthiness which may have existed.

Reference also was made to loss due to the perils of the sea. This defence however, was not pleaded expressly and, in the opinion of the Court, was not established by the proof.

The Court finds on the whole that the defendant was unsuccessful in proving that the loss of the plaintiff's shovel was caused by irresistible force, a fortuitous event or arose from a defect in the shovel itself. On the contrary it concludes that the shovel was improperly and negligently stowed and secured and that its loss was attributable to the

fault and negligence of the defendant's representatives and their failure to discharge their obligations under the said Contract of Carriage.

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The value of the plaintiff's shovel was admitted to be \$60,925.00. To the payment of this sum the defendant must be condemned.

Plaintiff's action is maintained and the defendant is condemned to pay to the plaintiff the said sum of \$60,925.00 with interest dated from the service of the action; and costs.

BETWEEN:

ROGER L. VINCENT ..... APPELLANT;

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AND

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

*Revenue—Income—Income tax—Computation of tax on income derived from several sources—Farming losses—Source of income other than farming—What expenses deductible from income from a particular source—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 11(1)(c), 12(1)(b), 13 and 139(1)(aa)—Income Tax Regulation 1700.*

These are appeals from the assessments of the appellant for income tax for the taxation years 1957-1960 inclusive.

The appellant was, at all material times, the president and director of a legal publishing company and he also owned and operated a 300 acre farm near Georgetown, Ontario. He had owned a farm near Streetsville, Ontario, but sold it for \$50,000 cash and a mortgage of \$100,000 immediately before purchasing the Georgetown farm. To effect repairs on and purchase machinery for his farm the appellant borrowed money from the bank on which he paid interest in his 1959 and 1960 taxation years. In all four taxation years under review the appellant suffered farming losses exceeding \$5,000 in each year, and he claimed part of such losses in each year as deductions in computing his taxable income.

The respondent added to the appellant's income the interest payments he had received in each of the taxation years under review on the mortgage he held on the Streetsville farm, and in computing the appellant's farming losses for these years he added thereto the amounts of interest paid by the appellant on the mortgage on his Georgetown farm and refused to allow these amounts as deductions in computing the appellant's incomes from sources other than farming. The respondent also added the interest paid by the appellant on his bank loan when computing appellant's farming losses for 1959 and 1960.

After the trial and before judgment the appellant in effect conceded that his chief source of income during the relevant taxation years was neither

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farming nor a combination of farming and some other source of income.

- Held: That in the the application of s. 13 of the *Income Tax Act* the appellant must ascertain, firstly his income from all sources other than farming, secondly, the farming loss, and thirdly, the amount of the farming loss, which the appellant is permitted thereby to deduct from his income from all other sources. Section 13 of the Act provides that the taxpayer's income for a year shall not be deemed to be less than his income for the year from all sources other than farming minus his farming loss for the year or an amount determined in accordance with the formula in the section, which cannot exceed \$5,000.
- 2 That the interest the appellant received on the mortgage he held on the Streetsville farm should be included in his income from sources other than farming. The source of this income was not farming but property, viz. the mortgage under which the appellant was entitled to interest. The mortgage was not property used for the purpose of producing income from the farming business but was itself a separate source of income, and is therefore a source of income other than farming.
  3. That s. 3 of the *Income Tax Act* contemplates as sources of income such things as businesses, of which the taxpayer may have more than one, property and offices of which he may also have more than one. Each business, property and office may be a source of income, and income from a source is to be computed by following the provisions of the Act applicable to the computation of income from each source on the assumption that the taxpayer had no income except from that particular source. In so computing income from a source the taxpayer is entitled to no deductions except those relating to that source.
  4. That the capital cost allowances in respect of property used to earn income from the farming business bear no relationship to the earning of income from the appellant's office or employment, or partnership or the acquisition of the interest from the mortgage on the Streetsville farm. The interest paid on the mortgage on the Georgetown farm and on the appellant's bank loan bears no relationship to the earning of income from his office or employment or partnership or the acquisition of the interest from the mortgage on the Streetsville farm and that both such items are directly and exclusively related to his Georgetown farming activities. The foregoing items are not properly deductible in computing the income from the appellant's sources of income other than farming from which it follows that the respondent was right in assessing the appellant as he did.
  5. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Cattanach at Hamilton.

*F. E. LaBrie* for appellant

*G. W. Ainslie* and *D. G. H. Bowman* for respondent.

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

CATTANACH J. now (February 18, 1965) delivered the following judgment:

These are appeals from the assessments of the appellant under the *Income Tax Act*, R.S.C. 1952, chapter 148 for the taxation years 1957, 1958, 1959 and 1960.

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The appellant was, throughout the taxation years in question, the president and member of the board of directors of a corporation carrying on a legal publishing business in Canada, from which he received income by way of salary, bonuses and director's fees and he was simultaneously engaged in the business of farming on a 300 acre farm owned and operated by him in the vicinity of the Town of Georgetown, in the County of Halton, Province of Ontario (hereinafter referred to as the "Georgetown farm"). Immediately prior to the appellant's purchase of the Georgetown farm, he had owned and operated a farm near Streetsville, Ontario (hereinafter referred to as the "Streetsville farm"), which he sold for \$150,000 receiving \$50,000 in cash and a first mortgage back for the balance with interest.

The appellant, in the course of operating the Georgetown farm, was obliged to make extensive repairs and additions to farm buildings and to purchase farm machinery. At the trial Counsel for the Minister conceded that these expenditures were capital outlays. However to effect such repairs and to purchase the required farm machinery, the appellant borrowed money from his bank on which loan he paid interest in the amounts of \$487.86 and \$768.65 in his 1959 and 1960 taxation years respectively.

As shown by his income tax returns, the appellant suffered farming losses as follows, in the 1957 taxation year, \$14,040.06, in the 1958 taxation year, \$5,806.67, in the 1959 taxation year \$14,229.08 and in the 1960 taxation year, \$8,408.57, and in those respective taxation years the appellant claimed, in respect of such losses, as deductions in computing his income, the following amounts, \$4,585.27; \$4,153.33; \$5,000; and \$5,000.

In assessing the appellant the Minister added to his income the following amounts, for 1957, \$142.11; for 1958, \$588.90; for 1959, \$499.56 and for 1960, \$840.75; being income from two partnerships in which the appellant participated and with respect to which there is no dispute, either

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as to the amounts or the taxability thereof, except as incidental to submissions on behalf of the appellant which will be outlined later.

The Minister also added to the appellant's income the following amounts, for 1957, \$5,000; for 1958, \$4,500; for 1959, \$3,213.69 and for 1960, \$3,000. These four amounts are payments of interest which the appellant received on the first mortgage which he held on the Streetsville farm as security for payment of the balance of the purchase price therefor and which farm had been sold almost simultaneously with his purchase of the Georgetown farm. The accuracy of these amounts is not in dispute and they come into question by reason of an alternative submission on behalf of the appellant that if it should be held that the payments of mortgage interest made by the appellant on the purchase of the Georgetown farm are properly included in computing the farming losses, then the mortgage interest payments received by him should be considered as income from the appellant's farming business.

The Minister, in computing the appellant's farming losses for 1957, 1958, 1959 and 1960 added thereto the respective amounts of \$5,580; \$3,600; \$3,213.69 and \$2,850, being the mortgage interest paid by the appellant on his purchase of the Georgetown farm and he refused to allow those amounts as deductions in computing the appellant's incomes from sources other than farming for those years. In addition the Minister also added, in his computation of the appellant's farming losses for the years 1959 and 1960, the respective amounts of \$487.86 and \$768.65 being interest paid by the appellant to his bank on the loan he had obtained to effect repairs to the farm buildings and to purchase farm machinery. The effect of such additions by the Minister to the appellant's farming losses is to increase the farm losses as computed by the appellant.

In 1957 the appellant had claimed a farming loss of \$4,585.27 which the Minister increased to \$5,000. In 1958 the farming loss of \$4,153.33 claimed by the appellant was increased by the Minister to \$5,000. In 1959 and 1960 the appellant had claimed farming losses of \$5,000 in each such year which the Minister did not alter.

By Notices of Objection dated May 7, 1962, the appellant objected to the assessments for each taxation year and

claimed, *inter alia*, that he should be allowed to deduct his full farming loss for each year, but the Minister confirmed the assessments as having been made in accordance with the provisions of the *Income Tax Act*.

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The Minister did not make a determination that the appellant's chief source of income for the taxation years under review was neither farming nor a combination of farming and some other source of income, as he might have done, in his discretion, under subsection (2) of section 13 of the *Income Tax Act*.

The appellant objected to the Minister's denial of his contention that he should be allowed to deduct his total farming losses for the 1957, 1958, 1959 and 1960 taxation years in computing his income from all sources for each of those taxation years.

He contended, first, that section 13(1) of the *Income Tax Act*, upon which the Minister relied in assessing the appellant as he did, does not apply.

Section 13(1), as applicable to the years 1958 to 1960, reads as follows:

- 13 (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of
- (a) his farming loss for the year, or
  - (b) \$2,500 plus the lesser of
    - (i) one-half of the amount by which his farming loss for the year exceeds \$2,500, or
    - (ii) \$2,500.

As applicable to the year 1957, section 13(1) was somewhat different, but the differences are of no significance to the points involved in these appeals.

The appellant's contention at the trial was that section 13(1) does not apply because the appellant's chief source of income in each of the taxation years was, in fact, a combination of farming and his employment. However, subsequent to the conclusion of the trial the appellant withdrew this contention, which withdrawal is tantamount to an admission that the appellant's chief source of income during the relevant taxation years was neither farming, nor a combination of farming and some other source of income.

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However, the appellant objects to the Minister having deducted, in computing his income from farming, the payments of mortgage interest on the purchase of the Georgetown farm in all taxation years in question as well as the interest paid on his bank loan in the years 1959 and 1960 because such payments were expenditures on capital account and as such are expressly disallowed by section 12(1)(b) of the *Income Tax Act*. Such deductions of mortgage and bank interest were made by virtue of section 11(1)(c) reading as follows:

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

. . .

(c) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on

(i) borrowed money used for the purpose of earning income from a business or property (other than borrowed money used to acquire property the income from which would be exempt), or

(ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt),

or a reasonable amount in respect thereof, whichever is the lesser;

The appellant, therefore, contends that such interest payments were not properly deductible in computing the appellant's farming income, but rather that they are proper statutory deductions in computing the appellant's income from all other sources for each appropriate taxation year.

As I mentioned before, the appellant contends alternatively, that if such interest payments are properly included in determining his farming loss, then the interest payments received by him on the sale of his Streetsville farm should be included in computing his income from the business of farming.

For reasons similar to those advanced in objecting to the Minister's deduction of mortgage and bank loan interest in computing the appellant's farming income and not in computing his income from sources other than farming the appellant contends that capital cost allowances should not be deducted in computing the appellant's income from farming for the 1958, 1959 and 1960 taxation years and that such

allowances should be deducted in computing his income from sources other than farming for those years.

In Part B, paragraph 4(a)(b)(c) and (d) of the Notice of Appeal it was objected that the computation of the appellant's income for the four taxation years were subject to the adjustments therein outlined which had not been made by the Minister. At the trial Counsel for the Minister agreed that the items therein set forth should be deducted, as alleged, subject to Counsel agreeing to the accuracy of the amounts. An exception was made by Counsel for the Minister with respect to subparagraph (v) of paragraph 4(d) wherein a claim was made by the appellant for deduction of a capital cost allowance for the year 1960, (which had not been previously claimed by him), from sources other than farming.

Accordingly three issues remain for determination.

First, whether the interest paid by the appellant on the mortgage given by him back to the vendor on the purchase of the Georgetown farm and on the money borrowed from the bank for capital outlays on the farm was properly deducted by the Minister in computing the appellant's income from the business of farming, as contended by the Minister, or whether those payments should be deducted in the computation of the appellant's income from sources other than farming, as contended by the appellant.

Second, whether the interest received by the appellant on the mortgage held by him on the Streetsville farm which he had sold, should be brought into the computation of his income from the business of farming and not into the computation of his income from other sources, as contended by the appellant should the first issue be resolved against him.

Third, whether capital cost allowance, for the years 1958, 1959 and 1960 should be deducted in the computation of the appellant's incomes from the business of farming, as the Minister contends, or in the computation of the appellant's incomes from other sources, as contended by the appellant.

The appellant, by his abandonment of his contention that his chief source of income was farming or a combination of farming and some other source of income has relieved me from the necessity of making a finding in this respect.

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Section 13 of the Act is, therefore, applicable.

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It follows from the provisions of section 13 that, for each taxation year, it is obligatory to ascertain, first, the appellant's income from all sources other than farming, second, the farming loss and third, the amount of the farming loss which the appellant is permitted thereby to deduct from his income from all other sources. When such amounts have been ascertained and the computation contemplated made, the resultant figure is to be deemed to be the income of the taxpayer. Section 13 provides that the taxpayer's income for a year shall not be deemed to be less than his income for the year from all sources other than farming minus his farming loss for the year or an amount determined in accordance with the formula in the section, which incidentally cannot exceed \$5,000.

The first problem, therefore, is to ascertain the appellant's income from sources other than farming. It is clear from the evidence that these sources are his office and employment in the publishing company, two partnerships in which he was a partner and the mortgage on the Streetsville farm.

It is clear, in my opinion, that there should be included in the appellant's income from other sources, the interest which he received from the mortgage on the Streetsville farm. Such income has no relationship to the farming activities of the appellant at the Georgetown farm. The source of this income was not farming but "property" (compare section 3 of the *Income Tax Act*) namely, the mortgage under which the appellant was entitled to interest. This mortgage was not property used for the purpose of producing income from the farming business but was itself a separate source of income. Such property is, therefore, a source of income other than farming.

The next problem is what deductions should be made in the computation of income from the sources other than farming and whether there should be deducted the capital cost allowances in respect of the property used in the farming business and the interest paid by the appellant on the mortgage for the unpaid purchase price of the Georgetown farm and on the bank loan used for capital expenditures on that farm.

Section 139(1)(az), (which is applicable to all taxation years in question except 1960) provides:

a taxpayer's income 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 of income and was entitled to no deductions except those related to that source or those sources; and.<sup>1</sup>

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Section 3 of the Act declares that a taxpayer's income for the purposes of Part I is his income from all (a) businesses, (b) property, (c) offices and employments. From this it is clear that what is contemplated as sources of income are things such as businesses, of which the taxpayer may have more than one, property, and offices of which he may also have more than one. Each business may be a source and each property and office may be a source. The word "source" has the same meaning in section 139(1) (az). The section directs that income from a source is to be computed in accordance with the Act, that is to say, by following the provisions of the Act applicable to the computation of income from each source on the assumption that the taxpayer had no income except from that particular source. In so computing income from a source, the taxpayer is entitled to no deductions except those relating to that source.

It is obvious that the capital cost allowances in respect of property used to earn income from the farming business, bear no relationship whatsoever to the earning of income from the appellant's office or employment, or partnerships or the acquisition of the interest from the mortgage on the Streetsville farm. It is equally obvious that the interest paid on the mortgage on the Georgetown farm and on the appellant's bank loan bears no relationship to the earning of income from his office or employment or partnership or the acquisition of the interest from the mortgage on the Streetsville farm and that both such items are directly and exclusively related to his Georgetown farming activities.

Therefore, in my view, the foregoing items are not properly deductible in computing the income from the appellant's sources of income other than farming from which it follows that the Minister was right in assessing the appellant as he did in these respects.

<sup>1</sup> Section 139(1)(az) was repealed by section 33(3) chapter 43, 1960 S.C. and by section 33(5) of the same statute section 139(1a)(a) was added. The difference in language is not material to the points involved in the appeal for the year 1960.

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The appellant made a further submission that Regulation 1700 of the *Income Tax Regulations* is *ultra vires* in so far as it purports to restrict the deduction of capital cost allowances in respect of property used in a farming business to the computation of income from that business. In view of the conclusion that I have reached as to the computation of income from different sources under the provisions of the Statute itself, I do not need to deal with that argument.

In view of the agreement of the parties that the assessments should be referred back to the Minister for the allowance of certain items which were not in controversy between the parties at the trial, the appeal is allowed and the assessments are referred back accordingly.

As the Minister has been successful on all matters that were in controversy between the parties at the hearing of the appeal the Minister shall be entitled to his costs, except any costs related exclusively to the items with respect to which the assessments are being referred back and the appellant shall be entitled to a set-off in respect of any costs incurred by him relating to such items.

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BETWEEN :

1964  
 Nov. 16-20,  
 23-27, 30,  
 Dec. 1-4,  
 7-9  
 —  
 1965  
 Feb. 18

TRAVER INVESTMENTS INC. (formerly known as Traver Corporation) AND E. I. DUPONT DE NEMOURS AND COMPANY ..... PLAINTIFFS;

AND

UNION CARBIDE AND CARBON }  
 CORPORATION AND CELANESE } DEFENDANTS.  
 CORPORATION OF AMERICA .. }

*Patents—Conflict proceedings—Limitation of effect of judgment in conflict action—Validity of claims in patent issued as result of conflict proceedings—Scope of conflict action—What constitutes the invention—Determination of first inventor—No adjudication on patent application not put in conflict by Commissioner of Patents—Disclosure of invention—Priority of invention—Principles relating to determination of meaning of inventor and in considering claims of patent application—Interpretation of the meaning of the claims in conflict—Effect of disclosing more than was invented—Effect of claiming more than was invented—Lack of knowledge of inventor of matters in specification of patent—Failure of inventor to act uberrimae fidei in his application for patent—Application of doctrine of substance and mechanical equivalence—*

*Restriction to claims of successful party in conflict proceedings—Conflict proceedings in this Court not alternative to having claims put in conflict by Commissioner of Patents—Patent Act, R.S.C. 1952, c. 203, ss. 28, 36 and 45(5), (7) and (8).*

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This is a conflict proceeding brought pursuant to s. 45(8) of the *Patent Act*, to determine the respective rights of the parties on their applications for patents related to a method and apparatus to treat polyethylene film to make its surface ink adherent. The patent applications in issue are the applications of Traver Investments Inc. No. 631,213, dated May 17, 1952, and No. 650,205, dated July 2, 1953, both of which were assigned to the plaintiff E. I. Dupont de Nemours and Company on July 25, 1962, and the application of the defendant, Union Carbide and Carbon Corporation, No. 627,046, dated February 18, 1952. The plaintiffs obtained a default judgment against the defendant, Celanese Corporation of America, prior to the trial of this action.

Prior to the commencement of this action the Commissioner made his decision in respect to the claims in the Traver Investments Inc. application No. 650,205 and the Union Carbide and Carbon Corporation application No. 627,046 but he took no action with respect to the Traver Investments Inc. application No. 631,213. In his decision the Commissioner of Patents ruled that there existed a conflict and that he would allow the claims to the respective applicants as set out in his decision.

The present action is directed to the claims dealt with in the decision of the Commissioner of Patents and certain other claims which were not dealt with in the decision of the Commissioner and were not in the respective applications of Traver Investments Inc. and Union Carbide and Carbon Corporation.

*Held:* That none of the findings in this conflict action puts an imprimatur of validity on the claims in conflict beyond the restricted meaning prescribed by s. 45(8) of the *Patent Act*, which is confined solely to the result which flows from such determination, namely, that the Commissioner of Patents must issue a patent containing the claims as hereinafter set out to the party mentioned. Their validity in such a patent in the usual meaning is a matter for determination only in an action for infringement or impeachment if such proceedings should be taken.

2. That the four matters to be adjudicated on in this action are what invention produces the successful result which is the subject matter of the patent applications, who invented it first, was the invention legally disclosed, and the validity of the claims as between the plaintiffs and the defendant, Union Carbide and Carbon Corporation, in the restricted meaning delineated by s. 45(8) of the *Patent Act*.
3. That the invention was the discovery that the phenomenon which made polyethylene film receptive to ink so the ink adhered to the film was produced by exposing the film to a form of electrical discharge; and that the form of the discharge which is essential to the process is aptly described as corona discharge, and further that the discovery that successful treatment of the polyethylene film by electrostatic discharge can be obtained only when the phenomenon of corona discharge is present, constitutes the invention.
4. That there was insufficient evidence adduced to establish that the application of the corona discharge treatment to the other materials mentioned in the claims, namely any plastics or associated structures other than polyethylene film, or any other resins or resinous materials, would result in improving their receptivity to printing inks.

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5. That this Court, in making its determination as to the issue of priority of invention as it is required to do by the statute, must find the date at which the inventor can prove he first formulated, either in writing or orally, a description which afforded the means of making that which was invented.
6. That some of the principles to be relied on in determining the meaning of inventor and in considering the claims of the patent applications are that an inventor must invent something that is a new and useful art, process, machine, manufacture, composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter; that an inventor must be the inventor of that which is disclosed and claimed and he may not claim what he has not described, or, putting it another way, the disclosure in his specification must support the claims or otherwise they are invalid, and in this respect there is a statutory duty of disclosure (s. 36, *Patent Act*.)
7. That it is relevant not only in the determination of the issue of priority of invention, but also in relation to the determination of the issue of the validity of the claims in conflict to note that the disclosures in any application, other than the disclosures in the subject application of the date of filing cannot be used by the respective subject applicants as an aid to the interpretation of the meaning of the claims in conflict, subject, however, to the two following principles of interpretation of the words in the claims, which principles limit in some measure the foregoing, namely: (a) if the words in a claim are clear and unambiguous, it will not be possible to expand or limit their scope by reference to the body of the specification, and (b) where the meaning of the terms employed in the claims is not clear and requires explanation, two sources are open to the patentee, viz., (i) the general meaning of the words as understood by the competent workmen in the art, and (ii) the precise meaning that has been given to them by the patentee in his specification.
8. That with respect to the application of the plaintiff, Traver Investments Inc., the inventor, Traver, purported to disclose more than he had invented and he also claimed much more than he had invented and in so doing he failed to establish by credible evidence that at any material time he had formulated, either orally or in writing, a description which affords the means of making that which he alleges he invented.
9. That on cross-examination with respect to the subject application, Traver admitted that concerning twenty-three matters in the specification bearing on technique, processes and equipment he knew nothing about them and that the ideas and the words employed concerning them were not his. By this evidence Traver himself established that his application does not comply with s. 36 of the *Patent Act* in that the specification does not describe his invention and the means of making that which he alleges he invented, or the operation and use as he now alleges was contemplated by him at any material time, but instead it is as contemplated by others and therefore irrelevant to the issue of who was the first inventor in this case; and he proves that the invention described in it is not his alleged invention.
10. That it is clear on the whole of the evidence that Traver did not act *uberrimae fidei* in his application, and on this ground alone he fails to establish that he was an inventor of anything, let alone a first inventor of the invention in issue in this case.

11. That the discovery which taught that successful treatment of polyethylene film could be accomplished by using any one of the many combinations of electrodes, dielectrics, spacing and voltage so long as corona discharge was present was genius and invention of the highest order and is not detracted from the least by the fact that Traver or some other person may have obtained successful treatment of polyethylene film without knowing why, by using one of the combinations of electrodes, dielectrics, spacing and voltage, and not recognizing that corona discharge was the essential feature of the invention.
12. That the doctrine of substance and mechanical equivalence is not relevant to the determination as to which of the four remedies provided by s. 45(8) of the *Patent Act* either party to the action is entitled to with respect to the conflict claims, the doctrine being applicable only in an action for infringement.
13. That entitlement of Union Carbide and Carbon Corporation to a patent containing claims in these proceedings is restricted to those claims, found to be legally in conflict between the parties to this action, which are within the ambit of the invention owned by Union Carbide and Carbon Corporation, which are contained in its application, and which comply with all relevant provisions of the *Patent Act*.
14. That in attempting to determine who was the first inventor and who disclosed the invention, only the Traver Investments Inc. application No. 650,205 and the Union Carbide and Carbon Corporation application No. 627,046, need be considered, because the Commissioner of Patents did not put in conflict the Traver Investments Inc. application No. 631,213 and therefore this Court is not called upon to adjudicate in respect to it, and the plaintiff's attempt to change this by its pleadings is of no avail. Its status is that of a pending application in the Canadian Patent Office not put in conflict between the two parties to this action.
15. That the claims which were not put in conflict between Traver Investments Ltd. and Union Carbide and Carbon Corporation by the Commissioner of Patents pursuant to s. 45 of the *Patent Act*, but which the parties sought to bring in issue between themselves in these conflict proceedings by their pleadings are not claims in respect to which this Court is required to adjudicate in that the Commissioner of Patents has not taken any action with respect to them pursuant to s. 45 of the *Patent Act* and these proceedings are not an alternative method, available to the parties of putting claims in conflict. The Commissioner of Patents alone is charged by the *Patent Act* with this duty.
16. That the plaintiffs' action is dismissed and the counterclaim of the defendant, Union Carbide and Carbon Corporation is allowed in part.

ACTION to determine rights of parties in conflict proceedings.

The action was tried by the Honourable Mr. Justice Gibson at Ottawa.

*G. F. Henderson, Q.C.* and *R. G. McClenahan* for plaintiff.

*H. G. Fox, Q.C.* and *D. F. Sim, Q.C.* for defendants.

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

GIBSON J. now (February 18, 1965) delivered the following judgment:

This is a conflict proceeding under subsection (8) of section 45 of *The Patent Act*, R.S.C. 1952, chapter 203 as amended, to determine the respective rights of the parties on their applications for a patent or patents containing claims which are numbered in this action C-1 to C-94 and C-107.

The subject matter of the alleged invention concerns a method and apparatus to treat polyethylene to make its surface ink adherent.

Polyethylene became available in substantial quantities after World War II, and is useful as a wrapping material, especially for wrapping foods. It then had the disability that its surface would not take print satisfactorily, in that the ink would not adhere to it adequately; and this was a problem in the whole industry. The solution to this problem, by overcoming this disability, is the alleged invention and forms the subject matter of the conflicting claims by the parties, which gave rise to these proceedings.

The plaintiff, Trayer Investments Inc. (hereinafter referred to as "Trayer"), is a corporation organized and existing under the laws of the State of Illinois, one of the United States of America, and has its head office in the City of Chicago, in the said state. This plaintiff was formerly known as Trayer Corporation and by change of name it became Trayer Investments Inc. The plaintiff, E. I. DuPont de Nemours and Company, is a company having its head office and place of business in the City of Wilmington, in the State of Delaware, one of the United States of America.

The defendant, Union Carbide and Carbon Corporation (hereinafter referred to as "Union Carbide"), is a body corporate and politic having a place of business in New York City, in the State of New York, one of the United States of America. The defendant, Celanese Corporation of America, is a body corporate and politic having a place of business at Newark, in the State of New Jersey, one of the United States of America.

The plaintiff, Traver Investments Inc., filed an application of invention in the Canadian Patent Office for an invention of one George W. Traver on May 17, 1952, and this application was given a file wrapper No. 631,213 and it is Exhibit 1 in this action. A second application was filed by it also on July 2, 1953, and that application was given a file wrapper No. 650,205, and it is Exhibit 2. (This plaintiff also filed an application in the United States Patent Office on October 26, 1950, and that application was given a file wrapper No. 192,313 in that office, and a copy of it is Exhibit 3.) This plaintiff assigned all its rights in the first two applications to the plaintiff, E. I. DuPont de Nemours and Company on July 25, 1962, which assignment was registered on September 11, 1962.

The plaintiffs allege that the date of the invention which was the subject matter of these applications was in May-June, 1949; and that the product using this invention was commercially marketed in March, 1950, submitting that an order for the production of such product had been taken in February, 1950.

The defendant, Union Carbide and Carbon Corporation, filed its application for a patent or patents in the Canadian Patent Office on February 18, 1952, and it was given the file wrapper No. 627,046, and it is Exhibit D-11 in this action. (This defendant had acquired prior to the above date all the rights of Visking Corporation, referred to in these reasons.)

The defendant, Union Carbide and Carbon Corporation, alleges a date of invention at least as early as May 3, 1950.

The defendant, Celanese Corporation of America, also filed applications for Letters Patent in the Canadian Patent Office, which were given Nos. 675,787 and 682,030, bearing dates November 10, 1954, and March 5, 1955, respectively; but this defendant did not appear at this trial, the plaintiffs having obtained default judgment against it on April 16, 1964.

Categorizing these claims may assist in explaining the matters raised at trial and therefore it is done in this way, namely:

1. *Claims concerning treatment of polyethylene involving the phenomenon known as "corona discharge"*

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- C-3, C-6, C-9, C-12, C-87 to C-89 incl., and C-92 to C-94 incl.
2. *Claims concerning treatment of plastics and associated structures*  
 C-1, C-2, C-4, C-5, C-7, C-8, C-10 and C-11.
  3. *Claims dealing with treatment of resins and resinous materials*  
 C-37, C-40, C-67 to C-76 incl.
  4. *Claims in Canadian Patent No. 662,521 issued May 17, 1963*  
 C-13 to C-17 incl., and C-107.
  5. *Claim in Canadian Patent No. 674,718 issued November 26, 1963*  
 C-83.
  6. *Claims which are not now in conflict between the parties to this action (settled)*  
 C-77.
  7. *Other claims not put in conflict by the Commissioner between the parties to this action*  
 C-21, C-32, C-33, C-38 to C-43 incl., C-48 and C-61.

It may also be helpful to further categorize these claims with a view to demonstrating the status in this lawsuit of each of them in so far as the plaintiffs and the defendant, Union Carbide, are respectively concerned. This is set out under four headings, numbered hereunder A, B, C and D, in respect to each of the plaintiffs and the defendant, Union Carbide, that is to say:

IN RESPECT TO THE PLAINTIFFS, (TRAVER *et al.*)

- A. *Conflict claims which were not in the plaintiffs' (Traver's) application for a patent (Exhibit 2), but which were offered to Traver by the Canadian Patent Office*  
 C-1 to C-12 incl., C-25 to C-28 incl., C-37, C-44 to C-47 incl., C-49 to C-52 incl., C-57, C-72, C-67 to C-77 incl., C-88 to C-94 incl.
- B. *Claims which the plaintiffs (Traver) had in its application (Exhibit 2) but which were offered to others in conflict by the Canadian Patent Office*  
 C-18 to C-20 incl., C-22 to C-24 incl.
- C. *Claims put in conflict by the Commissioner of Patents and asserted by the plaintiffs (Traver)*  
 All the claims in A plus B above, plus D on Union Carbide list (*infra*).
- D. *Claims not put in conflict by the Commissioner of Patents, but which are asserted in this action by Traver and are all the other claims not listed in A, B or C, which were not in the Traver application (Exhibit 2) and which were also not offered to the plaintiff Traver in the conflict proceedings by the Canadian Patent Office*

The claims in this group, Traver asserts, are put forward in this action in two ways, namely, in that they are

- (i) the claims which are the subject matter of the default judgment obtained by the plaintiffs against the defendant, Celanese Corporation on April 16, 1964 (referred to above); and

- (ii) the claims which were put in issue in this action by the pleadings of the plaintiffs. Under (i) above, these claims are C-32, C-33, C-38 to C-43 inclusive, C-48 and C-61.

Under (ii) above, these claims are C-13 to C-17 inclusive, and C-107.

IN RESPECT TO THE DEFENDANT, UNION CARBIDE

- A. *Conflict claims which were not in the defendant Union Carbide's application (Exhibit D-11) but which were offered in conflict to Union Carbide by the Canadian Patent Office*

C-18, C-19, C-20, C-22 to C-31 incl., C-34 to C-37 incl., C-44, C-46, C-51, C-53 to C-60 incl., C-62 to C-64 incl., C-67 to C-82 incl., C-84 to C-94 incl.

- B. *Claims which were in the application of the defendant Union Carbide (Exhibit D-11) but which were offered to others in conflict by the Canadian Patent Office*

C-1 to C-12 incl.

- C. *Claims put in conflict by the Commissioner of Patents, and asserted by Union Carbide*

These consist of all claims under A and B above, plus D on Traver list (*infra*).

- D. *Claim which was not put in conflict by the Commissioner of Patents but which Union Carbide brings in issue by its pleadings even though it was not in its application (Exhibit D-11).*

C-21 only.

Pursuant to subsection (7) of section 45 of *The Patent Act*, R.S.C. 1952, chapter 203, as amended, the Commissioner of Patents made his decision in respect to the claims in the plaintiff's (Traver's) application No. 650,205, dated July 2, 1952 (Exhibit 2) and the defendant Union Carbide's application No. 627,046, dated February 18, 1952 (Exhibit D-11); but he took no action in respect to the plaintiff Traver's application No. 631,213 dated May 17, 1952.

Exhibit 37 in this action sets out the various claims by number, indicates who was the respective originator of each claim, the respective person or persons between or among whom each claim was put in conflict by the Commissioner of Patents, and the decision pursuant to the statute of the Commissioner in respect to each of them.

The plaintiff Traver, not being satisfied with the decision of the Commissioner in respect to these claims, pursuant to the statutory right prescribed in subsection (8) of section 45 of *The Patent Act*, commenced these proceedings in this Court on March 29, 1962.

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In this action, as provided in subsection (8) of section 45 of *The Patent Act*, there may be a determination

either

- (a) "that there is no conflict between the claims in question",
- or
- (b) "that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by (it)",
- or
- (c) "that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants",
- or
- (d) "that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him."

But none of the parties to this action, which was commenced in this Court following the decision made by the Commissioner of Patents (that there existed a conflict and that he would allow the claims to the respective applicants as set out in his decision), was necessarily limited to adducing evidence and making submissions in respect thereof to this Court to one or more of the four remedies set out above and as provided for by said subsection (8) of section 45 of *The Patent Act*; but instead either of the parties was entitled to, and did in fact adduce evidence and made submissions in argument to justify this Court in making other and additional determinations, which are set out later in these reasons.

As to this latter, one of the main matters considered was the construction of the plaintiffs' application in the Canadian Patent Office, Exhibit 2, in relation to the issue of priority of invention.

At this trial not only was verbal evidence adduced, but many documents, memoranda, letters, materials, photographs, sketches, text book excerpts, etc., were introduced and filed as exhibits; and also there were various demonstrations held in Court of treatment processes with various apparatuses, to samples of polyethylene film.

In this adjudication of the issues raised in this action, it is,

of course, clear that none of the findings put an *imprimatur* of validity on the claims in conflict beyond the restricted meaning prescribed by subsection (8) of section 45 of *The Patent Act*, which is confined solely to the result which flows from such determination, namely, that the Commissioner of Patents must issue a patent containing the claims as hereinafter set out to the party mentioned. Their validity in such a patent in the usual meaning is a matter for determination only in an action for infringement or impeachment if such proceedings should be taken.

Section 28 of *The Patent Act*, R.S.C., chapter 203, as amended, sets out certain requirements which must obtain before an applicant may obtain a patent, and it reads as follows:

28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was

- (a) not known or used by any other person before he invented it,
- (b) not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned, and
- (c) not in public use or on sale in Canada for more than two years prior to his application in Canada,

may, on presentation to the Commissioner of a petition setting forth the facts (in this Act termed the filing of the application) and on compliance with all other requirements of this Act, obtain a patent granting to him an exclusive property in such invention.

(2) Any inventor or legal representative of an inventor who applies in Canada for a patent for an invention for which application for a patent has been made in any other country by such inventor or his legal representative before the filing of the application in Canada is not entitled to obtain in Canada a patent for that invention unless his application in Canada is filed, either

- (a) before issue of any patent to such inventor or his legal representative for the same invention in any other country, or
- (b) if a patent has issued in any other country, within twelve months after the filing of the first application by such inventor or his legal representative for patent for such invention in any other country.

(3) No patent shall issue for an invention that has an illicit object in view, or for any mere scientific principle or abstract theorem.

Any applicant as envisaged by said section 28 must also in the specification part of his application comply with section 36 of *The Patent Act*, which reads in part as follows:

36. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to

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enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it; in the case of a machine he shall explain the principle thereof and the best mode in which he has contemplated the application of that principle; in the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions; he shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege.

.....

The matters in this action for adjudication are firstly, what invention produces the successful result described earlier, secondly, who invented it first, thirdly, was the invention legally disclosed, and lastly, the validity of the claims as between the plaintiffs and the defendant Union Carbide (in the restricted meaning delineated by section 45(8) of *The Patent Act*.)

Dealing first with the invention, I find, on a consideration of the whole of the evidence that the invention was the discovery that the phenomenon which made polyethylene film receptive to ink so the ink adhered to the film was produced by exposing the polyethylene film to a form of electrical discharge; and that the form of this discharge which is essential to the process is aptly described as corona discharge.

The corona discharge that I refer to is the term used in its colloquial meaning, and not in its classical meaning, as discussed in the evidence. I find that most experts in the field at all material times used and at present use the term corona discharge in its colloquial meaning to describe the phenomenon which produces the successful result in this matter. In this sense the words "corona discharge" are used in these reasons, and this use of the words "corona discharge" correctly describes the material phenomenon which is referred to in the relevant specifications and claims in issue and in the evidence adduced in this action.

I also find on the evidence that electrostatic discharge range is a term which covers any electric action in such an apparatus as Exhibit 42 illustrates (or any variation thereof as may be accomplished as, for example, by changing the shape of the electrodes, etc.) which produces an electrostatic field; and included in its range are the Townsend range, the

corona range, and the sparking range; that electrical discharge includes any form of discharge which involves the passage of ionization current and that in the Townsend range it will not cause successful treatment when applied to polyethylene film, but instead the corona range must be reached before there can be successful treatment; and that unless the range of corona discharge is reached when an apparatus such as is illustrated in Exhibit 42 (or any variation thereof) is operating, there will not result successful treatment of polyethylene film so as to make it ink adherent.

I also find that there was insufficient evidence adduced to establish that the application of this successful treatment process to any other plastics or associated structures other than polyethylene film, or to any other resins or resinous materials, would result in improving their receptivity to printing inks.

I also find on the evidence that "corona discharge" is not equivalent to or synonymous with the other following words used in the said specifications, claims and/or evidence, namely, "electrostatic discharge to increase the unsaturation of surface molecules in said treated surface" (being words which merely suggest the result of the treatment without teaching how it is done), "subjecting the said surface to the action of electrostatic discharge while employing an alternating current to render the surface molecules of said treated surface receptive and strongly adherent, etc." (being words to the same effect as were found above), "electronic bombardment", "frequency . . . is substantially in excess of 60 cycles per second", "electrostatic discharge under a voltage in excess of ten thousand volts, to increase the unsaturated linkages", "diffuse electrical discharge", "glow discharge", "concentrated high voltage glow discharge", "the voltage of the circuit being sufficient to modify said surface, etc.", "thin electrode in a high voltage circuit, etc.", "gas filled discharge tube in a high voltage circuit", "diffuse discharge between said electrodes", "diffuse electrical discharge", "electronic bombardment" and "brush discharge".

A brief glossary of terms was put in evidence as Exhibit D-9, and in essence was proven to adequately define the words set out, and may be helpful in providing a dictionary for some of the words and phrases used in these reasons, and it is as follows:

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GLOSSARY

1. CORONA

The physical manifestation of a corona discharge. Corona results when a gas, usually air, has been stressed until a condition is maintained wherein some ionization of the gas is present and oxygen mol rearrangement takes place forming ozone, the presence of which may be detected by the odour manifested when corona is present. A purplish discharge or glow under reduced light may be seen in the vicinity of the metallic parts so charged with a sort of crackling noise. The stressed air is nearly at a point of break down or spark discharge yet quite controllable. Ambient atmospheric pressure, if reduced will induce corona discharge at relatively lower voltage than at normal 14.7 lbs. pressure.

2. CORONA DISCHARGE

A form of electrostatic discharge producing a corona.

3. ELECTRIC CORONA

Corona produced by electricity.

4. GLOW DISCHARGE

Activated gas resulting in emanation of light. See Crooks tube; neon light.

5. GLOW DISCHARGE OF ELECTRICITY

The glowing discharge from a gas or vapour induced by electricity.

6. POTENTIAL

Another term for voltage in electrical engineering.

7. ELECTRICAL POTENTIAL

Same as potential in electrical engineering.

8. HIGH ELECTRICAL POTENTIAL

High voltage. An ambiguous term requiring explanation to convey precise information. Depends upon the field involved; e.g. household lighting, overland transmission, radio transmission.

9. ELECTROSTATIC POTENTIAL

The voltage of an electrostatic charge.

10. POTENTIAL GRADIENT

Nature of the voltage drop between two points in a system subject to electrical charge or an electrical flowing current.

11. ELECTRICAL STRESS

Another term for electrical potential.

12. HIGH VOLTAGE

An ambiguous term. See No. 8.

13. ELECTROSTATIC FIELD

The volume of space being subjected to electrostatic stress.

14. ELECTROSTATIC STRESS

The voltage in an electrostatic field.

15. ELECTROSTATIC ACTION

The action created by an electrostatic discharge. The action involving charging and/or discharging of an effective condenser.

16. **ELECTROSTATIC FIELD OF SUBSTANTIAL INTENSITY**  
 Electrostatic field of high voltage. By itself an ambiguous term. See high voltage, high electrical potential.
17. **ELECTROSTATIC ACTION OF RELATIVELY LOW INTENSITY**  
 Electrostatic action carried on at relatively low voltage. An ambiguous term since it may refer to voltage of intensity below an unknown or unexpressed value.
18. **ELECTROSTATIC FORCE FIELD**  
 Same as No. 13.
19. **ELECTROSTATIC DISCHARGE**  
 Flow of electric current in discharging from a condenser surface.
20. **ELECTROSTATIC DISCHARGE FIELD**  
 Same as electrostatic field where there is actual current flow.
21. **ELECTRONIC BOMBARDMENT**  
 Action of moving electrons in encountering some object.
22. **ELECTRON BOMBARDMENT**  
 Same as No. 21.
23. **ELECTRICAL DISCHARGE**  
 The flow of current from higher to lower potential. As for example, from charged surface or from battery.
24. **ELECTRICAL FIELD**  
 A broader term than electrostatic field: Might refer to electromagnetic field as well.
25. **ELECTRICAL FIELD WITH UNIFORM POTENTIAL GRADIENT**  
 An electrical field wherein the potential differences from one point to any other equi-distant part is the same.
26. **DIFFUSE ELECTRICAL DISCHARGE**  
 An unconcentrated electrical discharge.
27. **ELECTRODE**  
 In an electric system one of a pair of interconnected conductors.
28. **GROUND**  
 One conductor in a system; usually of lowest potential of the system.
29. **ELECTRON EMITTING SOURCE**  
 A material in a condition and under surrounding condition to emit electrons; as for example, in an electron vacuum tube the filament when heated to sufficient temperature.
30. **ELECTRON EMITTING ELEMENT**  
 Same as No. 29.
31. **GAS FILLED DISCHARGE TUBE**  
 Gas filled tube activated so that gas gives off energy such as light; for example, a neon tube.
32. **DIELECTRIC**  
 A body through which or a medium in which, electric attraction or repulsion may be sustained. Dielectrics are always insulators; glass

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- is a dielectric, because unlike charges on opposite sides of a plate of glass, attract each other.
33. DIELECTRIC MATERIAL  
 Any material constituting a dielectric.
34. ARCING  
 The passage of electricity through a medium along a path changed from non-conducting to conducting.
35. OZONE  
 O<sub>3</sub>. An unstable form of oxygen created by ionization of oxygen or oxygen-containing gases.

There were also filed as Exhibits 41, 42 and 35 (set out in Schedule A to these reasons) certain drawings which illustrate the physical layout of the fundamental equipment which may be employed in utilizing the process which gives the successful treatment referred to above, to polyethylene film. Many variations of this fundamental apparatus may be devised to produce the desired result and these exhibits are merely illustrative of the kind of apparatus which may be used to produce successful results.

In Exhibit 41 there is illustrated a functional sketch of the basic equipment, namely, an oxy-dry tube under which is passed the polyethylene film which is to be processed, which rests on a ground electrode, which in this sketch is a plate. The remainder of the sketch illustrates the means of regulating (the Varic) and monitoring (the voltmeter and the ammeter) the voltage and current involved in operating the apparatus at the level produced by means of the step-up transformer.

In Exhibit 42 there is illustrated a second view of the fundamental treatment arrangement. In it is shown the oxy-dry tube, the film to be treated, and the lower electrode in a blown-up version so that the mechanism may be more clearly seen.

The first electrode is the argon gas enclosed in the tube. The second electrode is the conductive metal plate shown below the film. The glass which is the envelope of the oxy-dry tube is the buffer dielectric. The electrodes are connected to a high voltage alternating current source, which is produced after the manner illustrated in Exhibit 41. When this system is activated an electrical discharge takes place in the region indicated on the sketch between the

tube and the bottom electrode, and only when this electrical discharge reaches a certain level and is maintained within that certain level will successful treatment of the film take place. This said level is identified by a sound sometimes described as a frying sound which is evidence of the presence of ozone gas, which is normally generated when this discharge occurs in air, and it is pungent; and there is also an emission of light from the discharge region which is a bluish color. This phenomenon has the appearance of corona discharge and as stated is so colloquially described by the experts in this field and the level at which this form of electrical discharge occurs is aptly described as the corona range.

On the upper right hand corner of Exhibit 42 is a simplified model of an atom. The nucleus of the atom is represented by a cluster of spheres and around the nucleus are illustrated orbital electrons.

In the normal state a balance of charge exists between the positive nucleus and the negative electrons or in some cases between the positive nuclei of two atoms and their orbital electrons. Ionization of an atom occurs when one or more of the orbital electrons becomes detached as a result of excitation by, for example, an electric field.

When ionization takes place the net electrical charge on the atom is positive (the positively charged atom is called an ion) and one or more negatively charged electrons is or are released, and is or are free to act on other particles such as other atoms.

In this illustration in Exhibit 42, because of the high voltage the air in the gap between the electrodes becomes highly ionized. Because the current is alternating both positively charged ions and negatively charged electrons are attracted to the electrode beneath the polyethylene film, and the film is probably subjected both to electronic bombardment and ion bombardment. When this takes place at the level of discharge in the corona range successful treatment of the polyethylene film results.

The precise physical phenomenon that thus occurs to the polyethylene film is not known. This constitutes the theory of the invention.

But in contradistinction, the discovery that successful treatment can only be obtained when the phenomenon

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of corona discharge is present, constitutes the invention.

Exhibit 35, which is also set out in Schedule A to these reasons, is a copy of the drawings included in the plaintiffs' (Traver's) application, Exhibit 2, filed in the Canadian Patent Office, July 2, 1953. On it are seven figures. The first four of these figures essentially were in the plaintiffs' (Traver's) application, Exhibit 1, filed in the Canadian Patent Office on May 17, 1952. But Exhibit 35 does not illustrate the drawings attached to the plaintiffs' (Traver's) United States application, Exhibit 3, filed on October 26, 1950. The drawings attached to it illustrate essentially the Cameron Slitter apparatus, which is referred to later in these reasons.

The plaintiffs called two main expert witnesses, namely, Lewis C. Bancroft, who is a research supervisor at the Engineering Physics Laboratory of the plaintiff DuPont and who is a Bachelor of Science and Engineering from Princeton University, having graduated in 1950 in electrical engineering and having obtained a Master of Science degree in engineering at Princeton in 1952; and Ernest E. Lewis, who is research manager for the Film Department of the plaintiff DuPont and who graduated in 1936 from Colorado College with a Bachelor of Arts degree, majoring in chemistry, and who obtained his Ph.D. at Columbia University in 1940 in the field of organic chemistry.

Mr. Bancroft gave testimony regarding the electrical engineering processes and phenomena in connection with the treatment process and apparatus which is the alleged invention of Mr. Traver, and Dr. Lewis gave testimony concerning polyethylene film and other plastics and associated structures and also concerning other resin and resinous materials.

The defendant Union Carbide called as its expert witnesses Edward R. Hughes, who was an electrical engineer, having graduated in 1915, and who was at one time a student of Dr. Charles Proteus Steinmetz, and who has had extensive experience in the field of electrical engineering; and the alleged inventors, *viz.*, firstly, George M. Adams, who has a Master of Science degree, having graduated in chemical engineering from the University of Michigan at Ann Arbor and who was actively employed by Visking Corporation during all the material times when he alleges

he was the co-inventor of the process under discussion in this law suit (this division of Visking Corporation having been purchased subsequently by the defendant Union Carbide); and secondly, the other alleged co-inventor, Sidney J. Wakefield, who had attended Milwaukee School of Engineering for three and one-half years and who at the material times was an employee of Visking Corporation in its Electronics Department; and also Reinhard Max Stopp, who was employed by the Meisel Press Company, which was a printing press manufacturing company, with plant premises in Dorchester, Massachusetts, and who was the chief designer and engineer with that company for many years and until his retirement and who was the designer of the wax spray unit on the Meisel press which was referred to in evidence on this trial by Traver for the plaintiffs, and which is illustrated in a drawing, Exhibit 11, filed on this trial.

The witnesses, Messrs. Hughes, Adams and Wakefield, adduced evidence on behalf of the defendant Union Carbide in reference to the electrical engineering aspects of the alleged invention, now the property of the defendant, Union Carbide; and Mr. Stopp gave evidence as to the precise limitations of the uses of the Meisel press.

Of course these experts were not in agreement in all the technical aspects of the matters in issue in these proceedings, and did not definitely and certainly establish in evidence all the scientific matters about the subject process and the validity of some of the alleged claims as to what the process could accomplish. For example, the theory of what happens to the surface of a piece of polyethylene film which has been successfully treated was not established; nor was it established that the application of corona discharge treatment process would improve ink adherency to the many other plastics and associated structures, or to resins and resinous materials. And, as another example, there was disagreement concerning the categorization of various phenomena that occurred when apparatus using the subject process was put in operation.

But such a situation in matters such as this must always exist, because experts also operate in a world of possibilities and probabilities as does the Court. The experts can only weigh the probabilities based on their training and experience and make their best educated guesses, but the

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Court is left with the usual legal standard of proof, namely, more probable than not, or as it is sometimes put, the preponderance of believable evidence. And this was the test employed in reaching the conclusions in these reasons where it was necessary to resolve any conflict in such expert testimony.

As heretofore stated, expert testimony categorically established that the existence of corona discharge was essential for successful treatment in the process of treating polyethylene film by subjecting it to high tension electric stress; and it also established that before this discovery invention experts in the field had thought corona discharge was parasitic; and it also established that it did not matter what permutations or combinations of apparatus or process were employed, so long as corona discharge resulted, such being the sole factor in an electrostatic field which produces successful treatment.

Predicated on this, the second and third issues to determine concern finding the person (from whom the parties derived their respective rights by assignment) (i) who was the first inventor and (ii) who disclosed orally or in writing a description which afforded the means of making that which was invented (*Christiani v. Rice*<sup>1</sup>); that is, referring to the persons who so affirm in this action, was it George W. Traver (who has heretofore assigned his rights to the plaintiffs) or was it the alleged co-inventors George H. Adams and Sidney J. W. Wakefield (whose rights have been assigned to the defendant Union Carbide).

In this determination in my view only two applications need be considered, namely, the plaintiffs' application number 650,205 filed in the Canadian Patent Office July 2, 1953 (Exhibit 2 in this trial), and the defendant Union Carbide's application number 627,046 filed in the Canadian Patent Office February 18, 1952 (Exhibit D-11 in this trial).

I say this because the Commissioner of Patents did not put in conflict the plaintiffs' application number 631,213 filed May 17, 1952, and therefore this Court is not called upon to adjudicate in respect to it; and the plaintiffs' attempt to change this by its pleadings is of no avail. Its status is that of a pending application in the Canadian Patent Office not put in conflict between the two parties now in this action.

<sup>1</sup> [1930] S.C.R. 443 at 456.

## PRIORITY OF INVENTION

Priority of invention is to be determined by the application of the judicially defined meaning of the words of section 28 of *The Patent Act* to the facts which were adduced and established by credible evidence at this trial.

Before these proceedings were commenced in this Court what transpired heretofore between the parties in respect to their respective applications, Exhibit 2 and Exhibit D-11, was briefly as follows.

By reason of section 45(5) of *The Patent Act*, the parties were required and each did file an affidavit with the Commissioner of Patents in which each applicant complied with that subsection and stated:

- (1) the date of the conception of the invention,
- (2) the date of making of the first drawing,
- (3) the date of making of the first written or verbal disclosure,
- (4) the dates and nature of the successful steps subsequently taken by the inventor to develop and perfect the said invention.

George W. Traver (represented by plaintiffs) alleged the following four dates:

- (1) that during month of May, 1949, he conceived the invention,
- (2) that the first drawing illustrating the invention was made on August 22, 1950,
- (3) that the first oral disclosure was made in May, 1949, and the first written disclosure was made on February 3, 1950,
- (4) that during December, 1949, to January, 1950, and thereafter the continuous polyethylene sheet treating process was used commercially.

Messrs. Adams and Wakefield (represented by the defendant Union Carbide) for their said dates set out the following in their affidavits:

- (1) that on or before March 17, 1950, they conceived their invention,
- (2) that the first drawing of the invention was made on or about March 23, 1950,
- (3) that the first oral disclosure to others was made on or about March 21, 1950,

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(4) that the first sale of polyethylene film treated on an apparatus made for production purposes, utilizing the invention occurred in May, 1950.

Then the Commissioner as he was required to do by subsection (7) of section 45 of *The Patent Act*, determined which in his opinion was the prior inventor. He did this independently, without either party knowing or seeing what was in the other party's affidavit and without any of the deponents being subjected to cross-examination by the Commissioner or by the other party to test the validity of any of the facts alleged in such affidavits. The Commissioner's decision was made "after examining the facts stated in the affidavits". In reaching such decision, what the Commissioner was called upon to do by the statute in his consideration of the above four dates set out in the respective affidavits of the applicants (and the other facts in such affidavits) was not to give any particular weight to any of these said four dates to reach his determination but to consider the matter at large, and thereby somehow to determine the prior date of invention and the date and the mode in which the first written or verbal disclosure of such invention was made.

As previously stated, the results of the said decision in respect to the invention and the claims is noted in these proceedings on the schedule which was filed as Exhibit 37.

After such decision, on March 29, 1962, the plaintiffs commenced this action in this Court; and the issue of a patent or patents containing such claims in conflict, as this Court may find are warranted by the evidence, awaits the decision of this Court.

Now this Court, as stated, in making its determination as to the issue of priority of invention as it is required to do by the statute, must find "the date at which the inventor can prove he . . . first formulated, either in writing or verbally, a description which (afforded) the means of making that which (was) invented".

This is the test prescribed by Canadian patent law as enunciated in *Christiani v. Rice (supra)*; and Rinfret, J. (as he then was) at p. 456 further proclaimed:

There is no necessity of a disclosure to the public. If the inventor wishes to get a patent, he will have to give the consideration to the public; but, if he does not and if he makes no application for the patent, while he will

run the risk of enjoying no monopoly, he will none the less, if he has communicated his invention to "others", be the first and true inventor in the eyes of the Canadian patent law as it now stands, so as to prevent any other person from securing a Canadian patent for the same invention.

The determination of who is the prior inventor in this case also necessarily involves a number of principles in relation (a) to the meaning of inventor and also (b) in relation to the claims.

Some of these principles are:

- (1) that an inventor must invent something that is a new and useful art, process, machine, manufacture, composition of matter, or any new and useful improvement in any art, process, machine manufacture or composition of matter;
- (2) that an inventor must be first to so invent;
- (3) that an inventor must be the inventor of that which is disclosed and claimed and he may not claim what he has not described; or putting it another way, the disclosure in his specifications must support the claims or otherwise they are invalid; and in this respect there is a statutory duty of disclosure (section 36 of *The Patent Act*). (*Minerals Separation North American Corporation v. Noranda Mines Ltd.*<sup>1</sup>)

This latter principle numbered 3 above is relevant in this case in respect to the issue of priority of invention because of what was contained in the respective patent applications and because of what was said and done at the various material times, by the alleged inventors. As a result the application of this principle is of assistance in the determination of the truth of the two questions of fact, *viz.*, firstly, as to what was invented, and secondly, as to who invented it first.

It is also helpful to note that this latter particular principle was more categorically defined by the learned former President of this Court, Thorson P., in the above cited case wherein he marshalled in precise fashion the elements that go to make up this principle, and which he had extracted from a number of prior cases where the same were established, and which are:

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<sup>1</sup> [1947] Ex. C.R. 306.

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- (a) that the description must be both clear and accurate containing a correct description of the invention as contemplated by the inventor, and of its operation or use as contemplated by the inventor;
- (b) that it must be free from avoidable obscurity or ambiguity and be as simple and distinct as the difficulty of description permits;
- (c) that it must not contain erroneous or misleading statements calculated to deceive or mislead the persons to whom the specification is addressed and render it difficult for them without trial and experiment to comprehend in what manner the invention is to be performed;
- (d) that it must not direct the use of alternative methods of putting it into effect if only one is practicable, even if persons skilled in the art would be likely to choose the practicable method;
- (e) that the description of the invention must be full, that is, its ambit must be defined, for nothing that has not been described may be validly claimed;
- (f) that the description must also give all the information that is necessary for successful operation or use of the invention, without leaving such results to the chance of successful experiment; and if warnings are required in order to avert failure, such warnings must be given;
- (g) that the inventor must act *uberrimae fidei* and give all information known to him that will enable the invention to be carried out to its best effect as contemplated by him.

It is also relevant not only in the determination of the issue of priority of invention, but also in relation to the determination of the issue of the validity of the claims in conflict to note that the disclosures in any application, other than the disclosures in the subject application at the date of filing, cannot be used by the respective subject applicants as an aid to the interpretation of the meaning of the claims in conflict, subject, however, to the two following principles of interpretation of the words in the claims, which principles limit in some measure the foregoing, namely:

- (a) if the words in a claim are clear and unambiguous, it will not be possible to expand or limit their scope by reference to the body of the specification and

- (b) where the meaning of terms employed in the claims is not clear and requires explanation, two sources are open to the patentee, namely,
  - (i) the general meaning of that word as understood by the competent workman in the art, and
  - (ii) the precise meaning that has been given to it by the patentee in his specification.

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Employing the above principles, the plaintiffs' (Traver's) application and then the defendant's (Union Carbide) (Adams and Wakefield) application are now analyzed by examining,

- (a) the oral or verbal evidence adduced at this trial, and
- (b) the written evidence,

for the purpose of determining what credible evidence was adduced to the satisfaction of the Court to enable it to make a finding on the balance of probabilities as to issue of priority of invention.

THE PLAINTIFFS' (TRAVER'S) APPLICATION

Traver said in his disclosure affidavit filed in the United States Patent Office, in his application, Exhibit 3, and sworn to on January 4, 1954 (a copy of which is Exhibit D-1 in this trial), that he had conceived his invention and first disclosed it on July 7, 1948. At this trial he contended that the first dates of conception of his invention and disclosure should have been May or June, 1949. He explains the swearing of this affidavit which I find he swore falsely by saying that his lawyer, Horace Dawson, of Chicago, Illinois, told him that it was all right to sign and swear it. Traver does not, even at this trial, say that he got confused about the date nor does he give any explanation from which it could be validly inferred that he did not swear falsely. In effect, he says, and I so find, that he knew he was swearing a false affidavit at that time.

The next alleged oral disclosure concerns the so-called Meisel Press story. Traver said in evidence that on or about May or June, 1949, he had used the Meisel Press at Traver Corporation and has successfully treated polyethylene film and that he had told Mr. Fred J. Pool, Manager of Plastics

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Division of Traver Corporation, about it. He did not mention anything about this Meisel Press story in his U.S. application, Exhibit 3, which was filed on October 26, 1950, or in his first Canadian application, Exhibit 1, filed on May 17, 1952, or in the only application before this Court, Exhibit 2, which was filed July 2, 1953. The first time he mentioned it was on his discovery deposition in the United States interference proceedings held at Palm Beach, Florida, in 1963.

Fred J. Pool, a sometime employee of Traver Corporation, on the other hand, in his evidence at this trial, stated that he did not recall Traver ever telling him anything about treating polyethylene film by using the Meisel Press.

Mr. Junius Cook, the sometime patent attorney of Mr. Traver and the Traver Corporation, also was not told anything about it in 1950 at least, even though Mr. Cook at this trial in discussing the Meisel Press (having investigated the drawing sometime between 1950 and the date of this trial) tried to give some credence to Traver's story.

The defendant's witness, Stopp, who had invented the Meisel Press, gave evidence to the effect that without very substantial alterations, the alleged juxtaposition of elements in it were such that the oxy-dry tubes could not be so located to give a gap of less than one-quarter of an inch to permit successful operation of the machine and therefore I am of opinion that in the circumstances of the alleged operation of the machine, described by Traver in evidence, it would have been impossible to have produced successful treatment of the polyethylene film.

In my opinion, therefore, the story that successful treatment was had by employing the Meisel Press as told by Traver is not true and I so find.

Traver then gave evidence that in 1949 in about June, he caused the said Fred J. Pool, an employe of Traver Corporation, and Arthur Groh, who was the superintendent of the production department, to set up an experimental process for treating polyethylene plastic film by using a conventional oxy-dry tube and a metal ground bar inserting the film in between and they obtained successful treatment by electrically energizing the tube through a conventional 10,000-volt transformer that they used extensively at

Traver Corporation at that time which transformer was connected to the conventional 110-volt power system.

Traver alleged he caused to be connected the single electrode of the oxy-dry tube and the ground bar electrically with the 10,000-volt transformer and plugged the primary winding of the transformer into the socket supplied to the conventional 110-volt A.C. power supply system at the Traver Corporation in Chicago; and the result was an electrical discharge so applied to the side of the polyethylene film facing the tube. He alleges that the gap between the tube and the ground bar was one-eighth of an inch and that on that particular occasion successful treatment was obtained in that ink adhered to the film after the scotch tape test had been employed. The scotch tape test was employed by taking a piece of scotch adhesive tape and pressing it upon the inked portions of the film and then stripping the tape from the sheet. Using such a test, successful treatment was demonstrated, he said, to have been obtained in that the ink still adhered to the film.

This original one-tube set-up, Traver said, was taken apart and is not now in existence but he said that a reproduction of it was made in 1955 and a photograph of this reproduction was made in 1955, a copy of which photograph was filed as Exhibit 14 on this trial.

Traver then alleged that he immediately directed Fred Pool to proceed with the building of a multiple tube set-up exactly like the single tube unit using eight tubes instead of one and using a metal foil instead of a plate. He says that this multiple tube apparatus was set up around about June, 1949, and that the same principles were employed in setting it up as were employed in the single tube apparatus; and he said that this multiple tube apparatus is illustrated by the photograph, Exhibit 14. He said that the original apparatus is not now in existence but that a reproduction of this machine was made in 1955 and a photograph of such reproduction was taken and a copy of that photograph was filed as Exhibit 15.

Then Traver says that as a result of obtaining successful results on this machine, the principle components of which are illustrated in Exhibit 42, he instructed Fred Pool to proceed with adapting a machine known as the Cameron

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slitter so that it could be used in this process to give constant treatment to polyethylene film.

Pool admitted that during all this time, and indeed until sometime between 1954 and 1959, he did not know that corona discharge was essential in any such process for the successful treatment of polyethylene film. Pool said he only found this out from one Kritchever at this later point in time, at which later time Kritchever told him to drop the word corona into any evidence he gave in any proceedings concerning this process.

Kritchever also says he only found out in 1954, or perhaps later, that it was essential that corona discharge be present using any treatment apparatus to obtain successful treatment of polyethylene film.

This Cameron slitter permitted a roll of polyethylene film on a master band to pass over and under numerous rollers and to go around a large top roller and then to be exposed to a bank of oxy-dry tubes and then be rewound at the finish end.

The Cameron slitter in its usual operation was used for slitting rolls of paper and films and this machine was particularly adapted for slitting film from a master roll of a given width into smaller rolls and rewinding these smaller carefully cut rolls on five separate shafts so as to prevent them from intertwining.

Traver said he instructed Pool to take out the knives from the Cameron slitter which was used at the plant of Traver Corporation and place on the most exposed top roller a bank of about five oxy-dry tubes, so placed in a curb bank that they would be set about one-eighth of an inch from the metal roller.

Traver said that this Cameron slitter was so adapted in about September 1949, and that the first time he saw it in operation was about April, 1950, but he said that he received a report on February 3, 1950, on its operation from Fred Pool, with which report were enclosed samples of polyethylene film, one of which was supposed to have been treated by the oxy-dry tube method in the Cameron slitter. A copy of this letter was filed as Exhibit 17.

It should be noted that this letter makes reference to the use of a 15,000-volt transformer, whereas there was no evidence that a 15,000-volt transformer had ever been

purchased by Traver Corporation. In addition, these words appear in the letter, *viz.*:

... Apparently, the higher the voltage, the better the treatment. We are going ahead with a design for commercial treatment using this method.

We still have some problems with the electrostatic field we create in this process, but as we have discussed, perhaps the continuous grounded belt might be helpful.

Will keep you posted as we develop this further.

Traver then stated he returned this letter to Pool after writing on it these words, "Good work! Now let us give this top priority so that we can process all our Poly orders."

Then the evidence was that this Cameron slitter was used at least until the early part of 1951 in the Traver Corporation for treating intermittently polyethylene film.

Then in 1951, according to the evidence, a flat plate apparatus as is illustrated in figure 7 on Exhibit 35 was built and used to treat polyethylene film on a production basis.

In this connection, it should be noted that the drawings included in the United States application, Exhibit 3, filed in the United States Patent Office on October 26, 1950, in effect illustrate the Cameron slitter; and that the drawings in the first Canadian application, Exhibit 1, which was filed in the Canadian Patent Office on May 17, 1952, are illustrated in figures 1, 2, 3 and 4 of Exhibit 35; and that only in the Canadian application, Exhibit 2, filed on July 2, 1963, are there drawings which are illustrated by all the seven figures on Exhibit 35. (In fact, Exhibit 35 is a reproduction of the drawings filed with the application, Exhibit 2.)

The allegations that the first written description or disclosure made by Traver was made by him in the said memorandum from Fred J. Pool under date February 3, 1950, Exhibit 17, must of necessity be confined to the apparatus set-up illustrated by Exhibit 42, and it is significant that in this memorandum there is no mention of spacing, and no mention of any of the things which are associated with corona discharge, and also it is suggested that a 15,000-volt transformer was employed in the operation of this apparatus.

The next written disclosure claimed to have been made by Mr. Traver was in a memorandum prepared by the said Junius F. Cook, sometime patent lawyer for Mr. Traver,

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on August 22, 1950, and on a drawing made at the same time, both of which are filed as Exhibits 25 and 26.

These documents also do not disclose the spacing or voltage employed or a description of any of the other ingredients of the phenomenon of corona discharge.

In addition, although Traver alleged that this Cameron slitter was used on and off all during 1950, there were no production records produced, no production figures given and no evidence adduced as to what products or materials the machine was slitting and treating other than the so-called job pockets, Exhibits 19A, 20A and 23A.

The Cameron slitter was supposed to have been employed in treating the film which was used in making the plastic bags found in the job pockets, which were introduced in evidence as Exhibits 19A, 20A and 23A.

These job pockets, the witness Kritchever stated he found when he searched in the records which had been taken over from Traver Corporation by Container Corporation when the latter purchased certain of the assets of the former. Kritchever did not know the time or the year they were found, but he stated that they were found, after a search was made for evidence following instructions given by Horace Dawson, the patent attorney who completed the preparation of Exhibit 1, after it had been handed over to him after its partial preparation by Mr. Junius Cook. (This is the same Mr. Dawson who also prepared Exhibit 2, and who also prepared Traver's false affidavit, Exhibit D-1.)

The witness Harris called by the plaintiffs alleged that he inspected this adapted Cameron slitter (which it was alleged was producing successful treatment to polyethylene) at Traver Corporation in December, 1949; and he said that Paul Traver, brother of the alleged inventor, told him about it, and took him and showed it to him but did not suggest that he keep such information confidential, even though Visking Corporation, by whom Harris was employed, was the largest producer of polyethylene film in the world and this discovery and the machine which produced successful treatment to polyethylene film would have been at that time a major breakthrough in the art.

On this evidence, I find it is impossible to believe that the Cameron slitter was employed to give successful treatment on any commercial production basis during the year

1950 or that the plastic bags allegedly found in these so-called job pockets were actually in these pockets since 1950 or were from a production run of plastic bags successfully treated by the Cameron slitter in 1950.

It is also impossible to find on this evidence that there was any successful treatment on any commercial production basis (and certainly not by any process that Traver knew and realized was successful because of the *sine qua non*, the presence of corona discharge), by Traver Corporation during 1950 and this is especially so because it is unbelievable, and I so hold, that Horace Dawson, the patent attorney, who as stated finally prepared Exhibit 1 and did prepare Exhibit 2, and under whose direction all the searches for evidence were made, would not have cautioned Kritchever and these other persons (whom he was at that time directing to search for proof of priority of invention by Traver) to take even the most elementary precautions to make identification of these bags provable so that what they found as a result of the searches in the records taken over from Traver Corporation could be submitted to a Court with reasonable expectation that such evidence would be accepted as proving something. But no such identification was made according to the evidence, and therefore it is a reasonable inference that no physical evidence was found that could be so identified and proven. It is significant that Dawson was not called as a witness to tell what he did and what instructions he gave and what he found or caused to be found as a result of those instructions.

The failure to have Dawson testify at this trial in part has assisted me in reaching the conclusions I have, in respect to this part of the evidence, but I would have reached the same conclusions even if I had drawn no inference from his failure to testify.

I am therefore unable to find that there was any oral or verbal evidence adduced proving that there was any invention by Traver disclosed by way of a description which afforded the means of making that which was alleged to have been invented by him at least during all of 1950.

It was also alleged that Traver made certain written disclosures.

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Hereunder is set out some of the relevant documentary evidence concerning this allegation by Traver.

Exhibit 17 filed is a copy of a letter dated February 3, 1950, from Pool to Traver, with an endorsement on it made by Traver after he received it. This the plaintiffs allege was the first written disclosure of the invention of Traver. There is, however, nothing in this memorandum which constitutes a description by Traver "which affords the means of making that which (was alleged to have been) invented."

Exhibit D-3 which was filed, concerns the Maple Crest Wrapper which Traver is supposed to have treated in his deep-freeze unit at his ranch, and it is a memorandum from Traver to Pool, apparently received by Pool on July 31, 1950. From the evidence it appears Pool had sent him two samples, one treated by a so-called flame process of Kritchever and the other treated by the Cameron slitter apparatus by Traver Corporation. On this memorandum, Traver wrote these words, "How did we do it this time?"

These words, it may be said, are hardly the words of an inventor, who now alleges at this trial that he conceived and disclosed both verbally and in writing a description of his invention (and in which he now alleges he realized that corona discharge was the important factor which produced successful treatment) which afforded the means of making that which was invented.

Exhibit D-1 which is the preliminary statement by way of an affidavit which George Traver filed in respect to the U.S. application, Exhibit 3, was apparently called for in the interference proceedings in the United States in respect to the same. This affidavit as stated was prepared by Horace Dawson and sworn by George Traver on January 4, 1954. In this affidavit Mr. Traver swore: "The date upon which the invention was first disclosed to others was July 7, 1948."

Exhibit 25 which is a memorandum dated August 22, 1950, was prepared by Mr. Junius Cook and it concerns a conference among Messrs. Pool, Groh and Cook held on that date.

This is supposed to have represented the full knowledge of Traver at that time of his invention. But it is significant to note that there is no mention of the voltage to be used, no mention of gap, no mention of corona discharge, and no mention of ozone in this memorandum. In other words

there was no description in these documents which afforded the means of making that which was alleged to have been invented.

Exhibit 26, filed, is a sketch made by Cook on August 22, 1950, at the said conference showing the treatment equipment to be used in making the alleged Traver invention operable but it should be noted that it does not indicate any of the ingredients which would show anyone how to produce successful treatment of polyethylene film. In other words, it would fail to teach any competent workman what he had to do to get successful treatment.

Exhibit 34, filed, is a copy of a letter of August 23, 1950, from Cook to Traver Corporation enclosing copies of Exhibits 25 to 26.

Exhibit 3, which is a copy of the U.S. Patent application of George W. Traver which consists of claims, specifications and drawings (essentially the Cameron slitter) to which George W. Traver swears on October 17, 1950, contains these words, namely, that "I have read the foregoing specifications and claims and I verily believe I am the original, first and sole inventor of the invention on discovery in means for and method of conditioning plastic films for printing, described and claimed therein." But again, this document suffers from the same disabilities as Exhibits 25 and 26, and the same comments apply to it.

Exhibit 22 is a copy of a letter dated June 3, 1950, from Fred J. Pool of Traver Corporation, to a customer of it, namely, Graham Paper Company, St. Louis, Missouri. From it, an inference could be drawn that Traver Corporation was not using the Cameron slitter process to treat polyethylene film. Mr. Pool's precise words in this letter are: "Please be advised that recently developed technique will enable us to offer this customer printed Tralon bags with printing far superior to any which has been previously available. For this reason we have slightly delayed shipment of their order so that this new process may be utilized in manufacturing this run. We have scheduled shipment of these bags for the week of June 12, or sooner."

It is possible that Traver Corporation may have been purchasing treated film from Visking Corporation at that time. And it is also possible that someone in the Traver Corporation at that time may have known that there existed

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a process and apparatus to successfully treat polyethylene film to make it ink adherent. But certainly, on the evidence, there is no question about it that neither Traver nor Pool nor anyone in Traver Corporation did know in June, 1950, and indeed until at least 1954, that corona discharge was the factor which was producing successful treatment and the only factor; and certainly there was no evidence adduced that either Traver or anyone acting under his directions did at any time so identify such factor as the critical one. In my opinion, on the evidence, Traver found this out from someone else, long after October, 1950.

The evidence is, as was proved by a demonstration in Court, using the set-up that Traver alleged was used in 1950 and  $\frac{3}{8}$ " spacing, that no successful treatment resulted. So Traver, or Traver Corporation, if they produced successful treatment of polyethylene film in 1950 must have employed only the oxy-dry tube set-up, 10,000 volts and  $\frac{1}{8}$ " spacing, but nowhere in the evidence is there any proof that in 1950 Traver formulated verbally or in writing a description of such.

Pool in his 3 February 1950 letter, Exhibit 17, did not describe such a set-up; and Traver, in Exhibit 3, did not confine himself to such a set-up and also did not describe it. In Exhibits 25 and 26, also, Cook did not described it. Instead, in both these documents, the matter is put broadly.

The only conclusion therefore that can be reached is that Traver did not nor did anyone under his direction cause to be formulated verbally or in writing a description which afforded the means of making that which Traver alleged he invented, at least up to October 17, 1950.

It is a proper conclusion to find that up to that date, Traver and the others under his direction were experimenting. But now, in retrospect Traver is saying that he used the oxy-dry tube, 10,000 volts and  $\frac{1}{8}$ " spacing set-up to get successful treatment and disclosed it, because he now knows that that particular set-up will produce successful treatment, in that corona discharge will be present.

But it is clear that all the evidence adduced on behalf of the plaintiffs (Traver) was directed to the attempt to prove that sometime early in 1950, and at least prior to the alleged material date of Adams and Wakefield (defendant Union Carbide), namely, May 3, 1950, Traver successfully

treated polyethylene film so as to make it ink-adherent using a process in which the phenomenon of corona discharge was present and that he knew and disclosed this factor as the critical one, and disclosed both verbally and in writing a description which afforded the means of making that which was invented.

The attempt was not successful.

Certainly, neither Traver nor anyone acting under Traver's directions discovered at least until after October 17, 1950, that isolating corona discharge as the critical factor was the invention.

I therefore find that the evidence adduced by and on behalf of Traver did not establish that Traver at any time was the inventor of the treatment process involving the phenomenon of corona discharge; and as stated, that alone is the invention which is the subject of these proceedings. Indeed, the evidence adduced by and on behalf of Traver affirmatively established that he was not the inventor of this treatment process.

In coming to this conclusion, I have taken into consideration that it is true that someone, between 1952 and 1953, found out that corona discharge was the factor and slipped in the word corona in a patent application for Traver's alleged invention and the word corona appeared for the first time in the Traver 1953 application, Exhibit 2; but even the person who caused these words to be inserted in that application, Exhibit 2, did not know their true significance. The specification at page 20 only employed the word corona as follows:

The corona observed during the operation is believed to be visible evidence of such flow of electrons. However, it is believed that the treatment may be effected by the electron flow even without such visible evidence.

I have also taken into consideration that it may be that Traver, without any knowledge of what any other inventor was doing, sometime in 1950, after the month of October, did discover that successful treatment could be had by employing the Cameron slitter process, Exhibit 42, providing a  $\frac{1}{8}$ " gap was used (although there is some doubt that there was any precise knowledge or understanding that the width of the gap was critical using this particular apparatus), but he claimed even in 1950 on October 20 in his

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U.S. application, Exhibit 3, too broadly and not what he at this trial now alleges he had invented.

In addition, in his application, Exhibit 2, which is the subject application which this Court has to consider and which was filed July 2, 1953, he may have disclosed in an obtuse way that he may have invented, namely, the process of treatment as employed in the Cameron slitter, the basic elements of which are set out in Exhibit 42, which again required a spacing of no more than  $\frac{1}{8}$ " but he did not confine his purported disclosure to this. Instead, he purported in that application to disclose more than he had invented and he also claimed much more than he had invented, and in so doing he fails to establish by credible evidence that at any material time, and certainly not up to 20 October 1950, he had formulated, either in writing or verbally a description which affords the means of making that which he alleges he invented.

In so doing, he breached the legal principles above referred to, which he was required to observe before he would obtain an adjudication that he was a first inventor in this case.

A few references to the evidence will suffice to demonstrate this.

In respect to Exhibit 2, the subject application, Traver admitted on cross-examination that concerning twenty-three matters in the specification, bearing on techniques, processes and equipment, he knew nothing about them, and that the ideas and the words employed concerning them were not his. By this evidence Traver himself established that his application does not comply with section 36 of *The Patent Act* in that the specification does not describe his invention and the means of making that which he alleges he invented, or the operation and use as he now alleges was contemplated by him at any material time, but instead it is as contemplated by others and therefore irrelevant to the issue of who was the first inventor in this case; and he proves that the invention described in it is not his (Traver's) alleged invention.

This cross-examination also clearly established that the specification is obscure and ambiguous, and employing the correct principles in the interpretation of the words, it is clear that it does not teach the competent workman the

means of making that which Traver claims to have invented, and therefore the only reasonable conclusion is that Traver had not formulated at any material time the means of making his alleged invention.

It also established that there was no credible evidence that Traver had made the invention of the corona method of treatment (which all witnesses agreed was essential to successful treatment). At all material times, it is clear he knew nothing about it.

It also established that there was no credible evidence that even at the date of his application, Exhibit 2, viz., 2 July 1953, Traver understood how to make the invention reproducible.

From what has been said above and from the whole of this evidence, also, it is abundantly clear that Traver in his application did not act *uberrimae fidei*, and on this ground alone he fails to establish that he was an inventor of anything, let alone a first inventor of the invention in issue in this case.

These words, however, do not exhaust the findings which could be made in respect to Traver's application, Exhibit 2, but they are sufficient for the purpose of these reasons.

Specifically, therefore, in dealing with the evidence and in elaboration of the finding already made, I find that Traver in the memorandum sent to him by Frederick J. Pool, under date of 3 February, 1950, in the memorandum and drawings prepared by Junius Cook dated 22 August 1950, Exhibits 25 and 26, in his U.S. application for patent dated 26 October 1950, Exhibit 3, and in his Canadian application dated 2 July 1953, Exhibit 2, or at any material time, in any other written document which was introduced in evidence at this trial, or verbally to any person at least until after 22 August 1950 Traver did not formulate a description "which (afforded) the means of making that which (he now alleges he) invented". Traver during all material times overreached to an unconscionable extent and in law he is the inventor of nothing in so far as the subject matter of this trial is concerned.

APPLICATION OF DEFENDANT UNION CARBIDE  
(ADAMS AND WAKEFIELD) (EXHIBIT D-11)

The evidence of the defendant Union Carbide established that on March 21, 1950, the first successful result was

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obtained and recorded in a book regularly kept in connection with the normal work of George Adams (Exhibit D-12, pages F, G, H, I, J); and that on May 3, 1950, it was recognized that corona was the essential phenomenon which had to be present to accomplish successful treatment of polyethylene film (Exhibit D-12, page S), Adams having between these dates tested, analyzed and discarded ultra-violet light, x-rays, radio frequency, ozone, and passage of electrical current through the sheet.

These written memoranda, and the verbal disclosures to the Visking Corporation employees in March, 1950, each constituted a complete description affording a means of making that which was invented.

On the evidence I find that it was not obvious or natural on March 21, 1950, after the first successful result was obtained, to discover and isolate the corona that was present as the element and the only element that would produce successful treatment of polyethylene film,

This discovery which taught that successful treatment could be accomplished by using any one of the many combinations of electrodes, dielectrics, spacing and voltage so long as corona discharge was present, was genius and invention of the highest order. And it is not detracted from in the least by the fact that Mr. Traver or some other person employed or acting for him or Traver Corporation or independently, may have obtained without knowing why, even before March 21, 1950 (which, as stated above, I do not find), successful treatment of polyethylene film by using the particular combination of an oxy-dry tube, 10,000-volt transformer, and a  $\frac{1}{8}$ " spacing and confined solely to such combination, while not recognizing that corona discharge was the essential feature of the invention.

This latter conclusion is supported in many places in the evidence; but one such reference will demonstrate this unequivocally, namely, an excerpt from the cross-examination of Pool, which reads as follows:

Q. And, so, are we also agreed that as of August 22, 1950 neither you nor Mr. Cook, nor Mr. Traver regarded corona as an essential feature of this alleged invention?

A. I don't think we knew what was taking place or why precisely.

Q. And is it fair to say, then, in view of that lack of knowledge, that you did not specifically regard corona as essential?

A. I don't think we knew at that time whether corona was essential or not. We knew an oxy-dry tube under certain conditions would do the job. Why and what it did, we didn't know.

....

Q. And, last, but not least, the voltage, is that right?

A. We suspected that the voltage we had was satisfactory under the conditions that we were then experimenting with.

Q. You suspected, but you didn't know?

A. We didn't know, that's right.

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During all this relevant period Sidney J. Wakefield, the co-inventor with Adams, said he worked cooperatively with Adams and I find he corroborates the evidence of priority of invention and disclosure within the principle or test enunciated in *Christiani v. Rice* (Exhibit D-19, D-20, D-21, D-24).

I find also that the commercial production by Visking Corporation using this invention was commenced on a regular basis at least as early as July 31, 1950 (Exhibits D-17 and D-18).

The conclusion therefore I reach is that as between the plaintiffs and the defendant Union Carbide Adams and Wakefield (for the defendant Union Carbide) were the inventors, within the meaning of section 28 of *The Patent Act*, R.S.C. 1952, chapter 203, as amended, and the cases, of the method (and article resulting therefrom) of treating a polyethylene structure so as to make ink adherent to its surface, by subjecting the surface of such polyethylene which is to be imprinted subsequently, to high voltage electrical stress accompanied by corona discharge.

VALIDITY OF THE CONFLICT CLAIMS

Having so found, it now is necessary, as between the plaintiffs and the defendant Union Carbide to consider the conflict claims (all of which are set out in schedule B to these reasons) to determine to which (and to what extent) of the four remedies provided by section 45(8) of *The Patent Act*, the defendant Union Carbide is entitled.

In this determination the doctrine of substance and

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mechanical equivalence is not relevant, although the contrary was urged for the plaintiffs, such being applicable only in an action for infringement.

Entitlement to a patent containing claims in these proceedings is restricted to those claims (a) found to be legally in conflict, between the parties to this action and (b) which are within the ambit of the invention owned by the defendant Union Carbide, and (c) which are contained in the application, Exhibit D-11, and (d) which comply with all relevant provisions of *The Patent Act*.

The claims put in issue in this action may be considered by separating the claims into seven categories or groups, and having done so, to adjudicate in respect to each:

1. The claims which were not put in conflict between the plaintiffs (Traver) and the defendant Union Carbide by the Commissioner of Patents pursuant to section 45 of *The Patent Act*, but which the parties sought to bring in issue between themselves in these conflict proceedings by their pleadings, I find are not claims in respect to which this Court in this action is required to adjudicate in that the Commissioner of Patents has not taken any action in respect to them pursuant to section 45 of *The Patent Act* and these proceedings are not an alternative method, available to the parties (by these proceedings), of putting claims in conflict. The Commissioner of Patents alone is charged by *The Patent Act* with this duty, and if, in another and a proper case, he should fail to do his duty, there are other appropriate remedies available to any party who should feel aggrieved. If either of the parties in this case felt that the Commissioner of Patents had not done his duty in failing to put certain claims in conflict between them, either or both should have taken other appropriate action to provide a remedy. What the parties purported to do in this case by their pleadings is not appropriate. In respect to this group of claims no other adjudication other than this is therefore made as between the plaintiffs (Traver) and the defendant Union Carbide. These claims are: C-13 to C-17 inclusive, C-21, C-32, C-33, C-38 to C-43 inclusive, C-48, C-61, C-83 and C-107.

(It should be noted, regarding the above claims, that

(a) in respect to claims numbered C-32, C-33, C-38 to C-43 inclusive, C-48 and C-61, that these were the subject matter of the default judgment dated April 16, 1964, obtained by the plaintiffs (Traver) against the defendant Celanese Corporation of America; but such judgment vis-a-vis the issues between the plaintiffs (Traver) and the defendant Union Carbide in this action is immaterial;

(b) in respect to claims numbered C-13 to C-17 inclusive, that they are now included in Canadian Patent No. 662,521 issued May 17, 1963; and in respect to claim numbered C-83, it is now included in Canadian Patent No. 674,718, issued November 26, 1963; but such facts vis-a-vis the issues between the plaintiffs (Traver) and the defendant Union Carbide in this action are also immaterial.)

2. Claim C-77 is the subject of a settlement and was not in issue at the trial of this action.

3. Claims 44 to 52 (which are taken from the so-called Lemon application—see Exhibit 37) which refer to treatment by “glow discharge”, or by a “spaced thin and elongated electrode in a high voltage current”, or by “an electrode and a gas-filled discharge tube in a high voltage circuit”, or by “a thin electrode in a high voltage circuit” I find are not equivalent or synonymous with treatment by corona discharge; and no evidence was adduced that treatment by such methods would be successful, and therefore I find that treatment by such processes is not within the ambit of the invention; and therefore that the defendant Union Carbide is not entitled to the issue of a patent containing such claims.

4. In respect to claims C-1, C-2, C-4, C-5, C-7, C-8, C-10 and C-11 all of which concern treatment of plastics and associated structures, I find that there was no evidence adduced that treatment of such materials by the corona discharge process would be successful, and therefore the defendant Union Carbide is not entitled to the issue of a patent containing such claims.

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5. In respect to claims C-37, C-40, C-67 to C-76 inclusive, all of which deal with the treatment of resins and resinous materials, I find that there was no evidence adduced that treatment of such materials and substances would be successful by the corona discharge process, and therefore Union Carbide is not entitled to the issue of a patent containing such claims.

6. Claims C-3, C-6, C-9, C-12, C-87 to C-89 inclusive, C-92 and C-93 I find are all claims for the method (or article) resulting from employing the method known as the corona discharge method, of treating polyethylene structures so as to make ink adherent to its surface and therefore they are all within the ambit of the invention, and the defendant Union Carbide is entitled to the issue of a patent containing such claims.

7. All other claims in issue, I find, do not legally describe the phenomenon which produces successful treatment to polyethylene structures, and therefore the defendant Union Carbide is not entitled to the issue of a patent containing such claims.

In the result, therefore, the plaintiff's action is dismissed with costs, and the defendant Union Carbide's counterclaim to the extent indicated in these reasons is allowed with costs.

*Judgment accordingly.*

SCHEDULE "A"

(This is Schedule "A" to the Reasons for Judgment of Gibson J., in Traver Investments Inc., et. al., and Union Carbide and Carbon Corporation, et. al., Court No. A-598.)

Exhibit No. 35, at trial.

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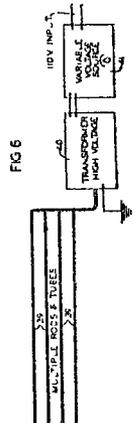
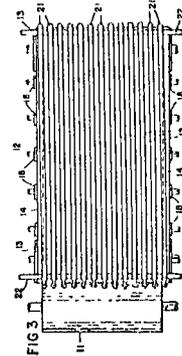
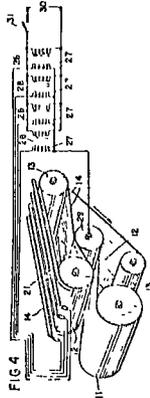
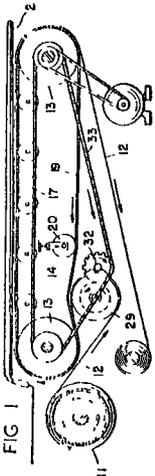
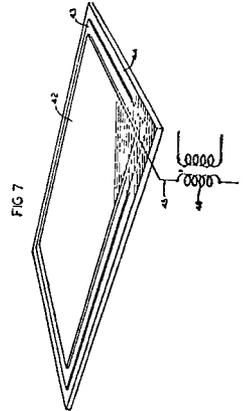
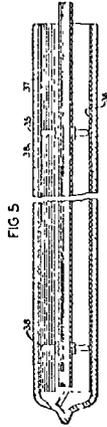
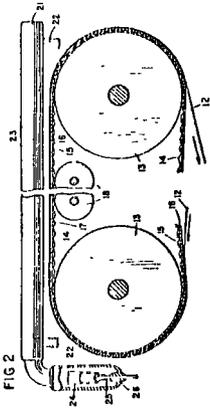


Exhibit No. 41, at trial.

# TRAVER TREATMENT (1 TUBE)

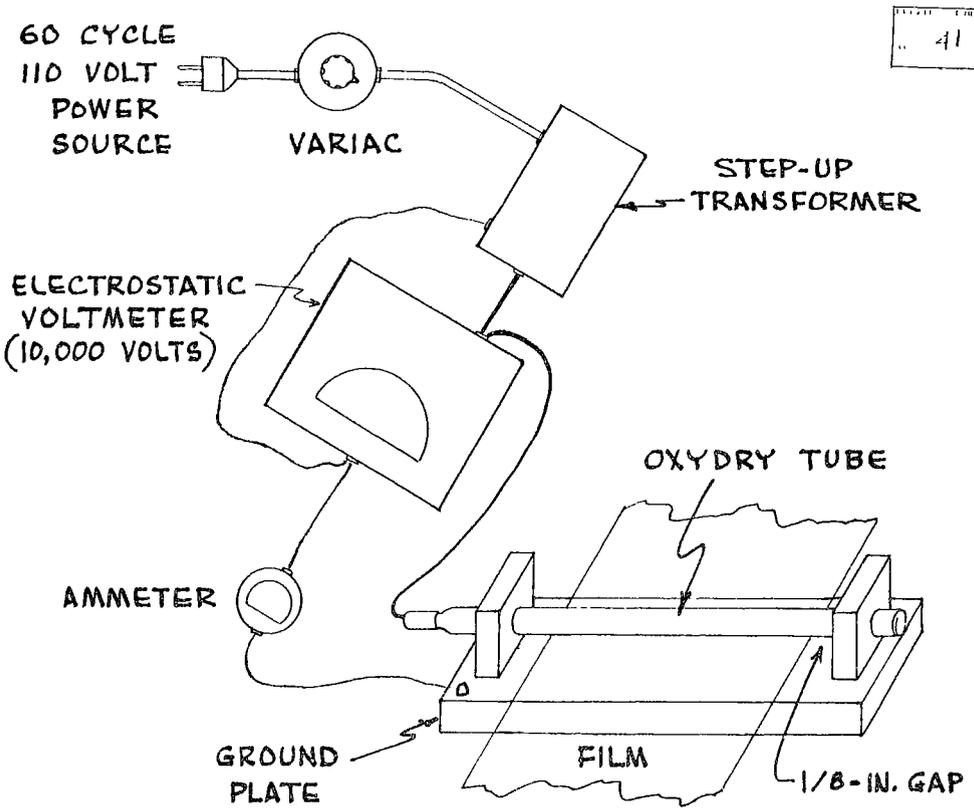
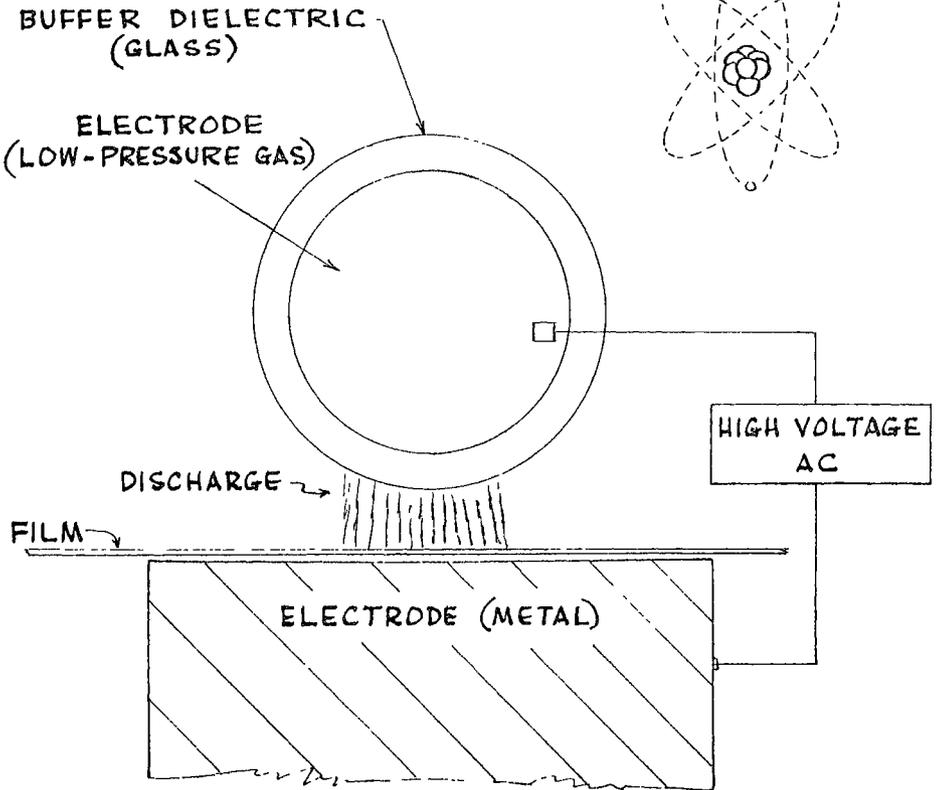


Exhibit No. 42, at trial.

# FUNDAMENTAL TREATING ARRANGEMENT

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**SCHEDULE "B"**

TRAVER  
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MENTS INC.  
*et al.*

(This is Schedule "B" to the Reasons for Judgment of Gibson J., in Traver Investments Inc., et al., and Union Carbide and Carbon Corporation, et al., Court No. A-598.)

*v.*  
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(These claims are set out in Exhibits 4 and 83 filed; and the letter "C" followed by a number at the left designates the respective claims number references.)

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—

- C1 The method of treating plastic structure to render a surface thereof adherent to subsequently imprinted ink impressions which comprises directly exposing the surface of the structure to be imprinted to high voltage electric stress accompanied by corona discharge.
- C2 The method as set forth in claim 1, characterized in that the plastic structure is a film.
- C3 The method as set forth in claims 2 and 3, characterized in that the plastic structure is formed of polyethylene.
- C4 The method as set forth in claim 1, characterized in that the treated surface of the structure is subsequently imprinted.
- C5 The method as set forth in claim 2, characterized in that the treated surface of the film is subsequently imprinted.
- C6 The method as set forth in claim 2, characterized in that the film is formed of polyethylene and the treated surface thereof is subsequently imprinted.
- C7 An article of manufacture comprising a plastic structure having a surface resulting from direct exposure to high voltage electric stress accompanied by corona discharge to provide ink adhesion.
- C8 An article as set forth in claim 7, characterized in that the plastic structure is a film.
- C9 An article as set forth in claims 7 and 8, characterized in that the plastic structure is formed of polyethylene.
- C10 An article of manufacture comprising a printed plastic structure wherein the imprints are on a surface which prior to imprinting had been directly exposed to high voltage electric stress accompanied by corona discharge.
- C11 An article as set forth in claim 10 wherein the plastic structure is a film.
- C12 An article as set forth in claim 11 wherein the polyethylene plastic structure is formed of polyethylene.
- C13 A method of treating plastic film to improve the adhesion of ink impressions subsequently imprinted thereon which comprises subjecting the directly opposite surfaces of said plastic film simultaneously to the same zone of action of high voltage stress accompanied by corona discharge.
- C14 A method as set forth in claim 13 wherein the film is a polyethylene film.

- C15 A method of treating plastic film to improve the adhesion of ink impressions subsequently imprinted thereon which comprises continuously passing said film through a zone of action of high voltage stress accompanied by corona discharge and maintaining said film in said zone to expose simultaneously the directly opposite surfaces thereof to the action of said high voltage stress accompanied by corona discharge.
- C16 A method as set forth in claim 15 wherein the film is a polyethylene film.
- C17 An apparatus for treating plastic film to improve the adhesion thereof to ink impressions subsequently imprinted thereon comprising a pair of stationary electrodes disposed in parallel spaced relationship to provide a gap therebetween, means to produce high voltage stress accompanied by corona discharge in said gap, means to pass a film through said gap, and means on each of the opposed surfaces of the electrodes to space said film during passage through said gap from said electrodes whereby the directly opposite surfaces of the film are simultaneously exposed and subject to said high voltage stress accompanied by corona discharge upon passage through said gap.
- C18 The method of treating a polyethylene body to render a surface thereof adherent to decorative matter, which consists of subjecting the surface portion to the action of an electrostatic discharge to increase the unsaturation of surface molecules of said treated surface, whereby upon the application of decorative matter to said treated surface, said matter is strongly adherent thereto.
- C19 The method of treating a polyethylene body to render a surface thereof adherent to decorative matter, which consists of subjecting said surface to the action of electrostatic discharge while employing an alternating current, to render the surface molecules of said treated surface receptive and strongly adherent to decorative matter applied thereto.
- C20 The method of treating a surface of a polyethylene body to render the same adherent to decorative matter, which comprises subjecting said surface to electronic bombardment of at least sixty cycles per second.
- C21 The process of claim 20 in which the frequency is substantially in excess of sixty cycles per second.
- C22 The method of treating a polyethylene body to render a surface thereof adherent to decorative matter, which consists of subjecting said surface to the action of electrostatic discharge under a voltage in excess of ten thousand volts, to increase the unsaturated linkages in the polyethylene surface molecules, whereby upon the application of decorative matter to said treated surface, said matter is strongly adherent thereto.
- C23 A decorated polyethylene product, comprising a polyethylene body having on one unoxidized surface thereof polyethylene molecules which are unsaturated, and decorative material adhering to such surface.

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- C24 A decorated film product, comprising a polyethylene film having on an unoxidized surface thereof polyethylene molecules having double bonds, and decorative material adhering to said surface.
- C25 Process for the treatment of the surface of a body of polyethylene resin, which comprises subjecting a surface of a body of polyethylene resin substantially uniformly to a diffuse electrical discharge to improve the receptivity of said surface for printing inks.
- C26 Process for the treatment of the surface of a film of polyethylene resin, which comprises subjecting a surface of a separate, discrete, self-supporting film of polyethylene resin to a diffuse electrical discharge to improve the receptivity of said surface for printing inks.
- C27 Process for the treatment of the surface of a film of polyethylene resin, which comprises passing said film continuously into a diffuse electrical discharge, said surface being treated substantially uniformly with said discharge to improve the receptivity of said surface to printing inks, and continuously taking up said film while retaining its treated surface.
- C28 Process for the treatment of the surface of a film of polyethylene resin, which comprises treating a surface of a separate, discrete, self-supporting film of polyethylene resin to improve the receptivity of said surface for printing inks by passing said film continuously between electrodes while maintaining a sufficiently high difference in potential between said electrodes to cause a diffuse electrical discharge between said electrodes, continuously moving said film relative to said electrodes, and continuously taking up said film while retaining its treated surface.
- C29 Process for the treatment of the surface of a film of polyethylene resin, which comprises subjecting a surface of a film of polyethylene resin to a diffuse electrical discharge to improve the receptivity of said surface for printing inks by passing said film continuously between electrodes, while maintaining a sufficiently high difference in potential between said electrodes to cause said diffuse electrical discharge between said electrodes and while limiting said discharge to prevent the formation of localized arcs through weak spots in said film, said surface being treated substantially uniformly with said discharge, and continuously taking up the resulting treated film with its treated surface intact.
- C30 Process for the treatment of a polyethylene resin which comprises subjecting said resin to a diffuse electrical discharge by passing said polyethylene resin between electrodes to which a high electrical potential is applied and between which is positioned a sheet of dielectric material.
- C31 Process for the treatment of the surface of a separate, discrete, self-supporting film of polyethylene resin, which comprises passing said film continuously between electrodes, maintaining said electrodes at a sufficiently high difference in potential to cause a diffuse electrical discharge between said electrodes, bringing the surface of the film to be treated uniformly into contact with said discharge to improve the

receptivity of said surface to printing inks while maintaining a solid dielectric between said film and one of said electrodes, continuously moving said film relative to said electrodes, and continuously taking up the resulting treated film with its treated surface intact.

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C32 Process for the treatment of the surface of a body of polyethylene resin, which comprises subjecting a surface of said body to a diffuse electrical discharge to improve the receptivity of said surface to coating materials and then coating at least a portion of the resulting treated surface.

C33 Process for the treatment of the surface of a body of polyethylene resin, which comprises subjecting a surface of said body to a diffuse electrical discharge to improve the receptivity of said surface to coating materials and then coating at least a portion of the resulting treated surface with a coating material which is fluent and continuous under the conditions of coating.

C34 Process for the treatment of the surface of a body of polyethylene resin, which comprises subjecting a surface of a body of polyethylene resin to a diffuse electrical discharge to improve the receptivity of said surface for printing inks and then printing on the resulting treated surface with a printing ink.

C35 Process for the treatment of the surface of a film of polyethylene resin, which comprises subjecting a surface of a film of polyethylene resin to a diffuse electrical discharge to improve the receptivity of said surface for printing inks and then printing on the resulting treated surface with a printing ink.

C36 Process for the treatment of the surface of a film of polyethylene resin, which comprises subjecting a surface of a film of polyethylene resin to a diffuse electrical discharge to improve the receptivity of said surface for printing inks by passing said film continuously between electrodes while maintaining a sufficiently high difference in potential between said electrodes to cause a diffuse electrical discharge between said electrodes, said surface being treated substantially uniformly with said discharge, and then printing on the resulting treated surface with a printing ink.

C37 Apparatus for the treatment of a continuous film of resin, said apparatus comprising an electrode, means for causing a diffuse electrical discharge to emanate from said electrode, means for moving a continuous film of resin past said electrode with a surface of said film in said discharge and means for taking up said film while retaining its treated surface.

C38 Apparatus for the treatment of a continuous film of polyethylene resin, said apparatus comprising a pair of electrodes, means for causing a diffuse electrical discharge between said electrodes, means for moving a continuous film of polyethylene resin continuously between said electrodes with its surface uniformly in said discharge, and a windup roll for continuously taking up the resulting treated film with its treated surface intact.

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- C39 Apparatus as set out in claim 38 in which one of said electrodes comprises a plurality of parallel wires spaced from the surface of said film.
- C40 Apparatus for the treatment of a continuous film of resin, said apparatus comprising electrodes, means for causing a diffuse electrical discharge between said electrodes, means for moving a continuous film of resin continuously between said electrodes with a surface of said film in said discharge, and solid dielectric interposed between one of said electrodes and said film for limiting the current between said electrodes to prevent localized arcs from passing between said electrodes through weak spots or pin holes in said film.
- C41 Apparatus for the treatment of polyethylene resins, which comprises a pair of electrodes, means for applying a high potential to said electrodes to cause a diffuse electrical discharge between said electrodes, means for supporting the polyethylene resin between said electrodes with a surface of said resin exposed to said discharge and a sheet of dielectric material between said polyethylene resin and at least one of said electrodes.
- C42 A method of treating a surface of an article formed of polyethylene or similar material having a wax-like surface to receive coatings, such as printing ink, colouring, adhesive or the like, which comprises exposing the surface to a concentrated high voltage glow discharge of electricity along a narrow line at a voltage and for a time sufficient to modify said surface to render the latter adherent to the coatings.
- C43 A method of treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, which comprises moving the article into a concentrated high voltage glow discharge of electricity along a narrow line at a voltage and for a time sufficient to modify the surface facing said discharge to render the latter adherent to the coatings.
- C44 A method of treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, which comprises moving the article into the space between narrow spaced electrodes in a concentrated high voltage circuit to expose a surface of said article to a high voltage glow discharge at a voltage and for a time sufficient to modify said surfaces to render the latter adherent to the coatings.
- C45 A method of treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, which comprises moving the article into the space between an electrode spaced from a gas-filled discharge tube, said electrode and tube being in a high voltage circuit, thereby exposing at least a portion of a surface of said article to a high voltage glow discharge, the voltage and time of exposure being sufficient to render said surface adherent to the coatings.
- C46 A method of treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring,

adhesive or the like, which comprises passing the article over a metal roller and between the latter and a thin electrode spaced therefrom, said roller and electrode being in a high voltage circuit, thereby exposing at least a portion of a surface of said article to a high voltage glow discharge, the voltage and time of exposure being sufficient to render said surface adherent to the coatings.

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- C47 A method of treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, which comprises passing the article over a metal roller and between the latter and a gas-filled discharge tube spaced therefrom, said roller and tube being in a high voltage circuit, thereby exposing at least a portion of a surface of said article to a high voltage glow discharge, the voltage and time of exposure being sufficient to render said surface adherent to the coatings.
- C48 A method of treating opposed surfaces of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, which comprises moving the article over an electrode having a layer of non-conducting semi-porous material on the surface thereof and between said electrode and another electrode spaced therefrom, said electrodes being in a high voltage circuit, thereby exposing at least portions of opposite surfaces of said article to a high voltage glow discharge, the voltage and time of exposure being sufficient to render said surfaces adherent to the coatings.
- C49 Apparatus for treating the surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, comprising spaced thin and elongated electrodes in a high voltage circuit, said electrodes being spaced apart to permit the article to be moved therebetween with a surface spaced from one electrode, and the voltage of the circuit being sufficient to modify said surface to render the latter adherent to the coatings.
- C50 Apparatus for treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, comprising an electrode and a gas-filled discharge tube in a high voltage circuit, said electrode and tube being spaced apart to permit the article to be moved therebetween with a surface spaced from one of them, and the voltage of the circuit being sufficient to modify said surface to render the latter adherent to the coating.
- C51 Apparatus for treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink, colouring, adhesive or the like, comprising a metal roller and a thin electrode in a high voltage circuit, said roller and electrode being spaced apart so that the surface of an article running over the roller facing the electrode is spaced therefrom, and the voltage of the circuit being sufficient to modify said surface to render the latter adherent to the coatings.
- C52 Apparatus for treating a surface of an article formed of polyethylene or similar material to receive coatings, such as printing ink,

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colouring, adhesive or the like, comprising a metal roller and a gas-filled discharge tube in a high voltage circuit, said roller and tube being spaced apart so that the surface of an article running over the roller facing the tube is spaced therefrom, and the voltage of the circuit being sufficient to modify said surface to render the latter adherent to the coatings.

- C53 Process for the treatment of a polyethylene resin which comprises subjecting a surface of said resin to a diffuse electrical discharge in an electrical field having a substantially uniform potential gradient to improve the receptivity of said surface to printing inks.
- C54 Process for the treatment of a polyethylene resin which comprises subjecting a surface of said resin to a diffuse electrical discharge by passing said polyethylene resin between a pair of plate electrodes of extended area to which a high electrical potential is applied to improve the receptivity of said surface to printing inks.
- C55 Process for the treatment of a polyethylene resin which comprises subjecting a surface of said resin to a diffuse electrical discharge by passing said polyethylene resin between a pair of plate electrodes of extended area positioned uniformly distant from one another to which a high electrical potential is applied to improve the receptivity of said surface to printing inks.
- C56 Process for the treatment of a polyethylene resin which comprises subjecting a surface of said resin to a diffuse electrical discharge in an electrical field having a substantially uniform potential gradient while another surface of the polyethylene resin is in contact with a solid surface to improve the receptivity of the first-mentioned surface to printing inks without imparting to said other surface an improved receptivity to printing inks.
- C57 Process for the treatment of polyethylene resin film which comprises passing a discrete, separate self-sustaining film of a polyethylene resin between electrodes maintained at a sufficiently high potential difference to cause a diffuse electrical discharge between said electrodes, while one surface of said film is in contact with a solid surface and another surface of said film is exposed to said diffuse electrical discharge so that an improved receptivity to printing inks is imparted to said exposed surface while the surface which is in contact with said solid surface does not develop receptivity to printing inks.
- C58 Process for the treatment of a polyethylene resin film which comprises continuously passing a discrete, separate self-sustaining film of a polyethylene resin between a pair of electrodes of extended area positioned uniformly distant from one another and maintained at a sufficiently high potential difference to cause a diffuse discharge between said electrodes while all of the surface of one side of said film is exposed to said discharge and all of the surface of the other side of said film between said electrodes is in contact with a solid surface so that an improved receptivity to printing inks is imparted to said exposed side while said other side does not develop receptivity to printing inks, and continuously moving said film away from said

electrodes while maintaining the discharge-treated surface of said film intact.

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C59 Apparatus for the treatment of polyethylene resin which comprises a pair of electrodes of extended surface area, means for applying a high potential to said electrodes to cause a diffuse electrical discharge between said electrodes, and means for supporting the polyethylene resin between said electrodes with a surface of said polyethylene resin exposed to said discharge.

C60 Apparatus for the treatment of polyethylene resin which comprises a pair of electrodes of extended surface area, means for applying a high potential to said electrodes to cause a diffuse electrical discharge between said electrodes, and means for moving the polyethylene resin between said electrodes with a surface of said polyethylene resin exposed to said discharge

C61 Apparatus for the treatment of polyethylene resin which comprises a pair of electrodes of extended surface area uniformly spaced from one another, means for applying a high potential to said electrodes to cause a diffuse electrical discharge between said electrodes, and means for moving the polyethylene resin between said electrodes with a surface of said polyethylene resin exposed to said discharge.

C62 Apparatus for the treatment of polyethylene resin which comprises a pair of electrodes, means for applying a high potential to said electrodes to cause a diffuse electrical discharge between said electrodes, and means for supporting the polyethylene resin with the surface in contact with a solid between said electrodes and with another surface exposed to said discharge, and means for moving said polyethylene resin relative to said electrodes and said solid.

C63 Apparatus for the treatment of resin film which comprises an arcuate convex electrode of extended area for supporting a film of resin continuously supplied thereto with said film about said electrode, a second electrode, said second electrode being of extended area, arcuate and concave, and being spaced from said first electrode with its concave side facing the convex side of said first electrode, and means for maintaining said electrodes at a potential difference such that there is a diffuse electrical discharge between said electrodes.

C64 Apparatus as set forth in claim 63 in which said first electrode is a rotatable cylinder.

C65 Apparatus as set forth in claim 64 in which a sheet of dielectric material is spaced between one of said electrodes and said film of resin on said cylindrical electrode.

C66 Apparatus as set forth in claim 65 in which said second electrode is spaced uniformly distant from said cylindrical electrode, said apparatus including a guide for leading said film away from said cylinder electrode after said film has been subjected to said discharge.

C67 The method of rendering a resinous surface wettable which comprises subjecting said surface to a corona discharge.

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- C68 The method of rendering a resinous material wettable which comprises passing said resinous material between two electrodes which are maintained at such a potential difference as to produce a corona discharge therebetween.
- C69 The method of increasing the wettability of resinous material which is normally not wettable, which comprises subjecting said resinous material to a corona discharge.
- C70 The method of treating resinous material to increase its wettability and adherent qualities which comprises subjecting said resinous material to a corona discharge.
- C71 The method of rendering a resinous material adherent which comprises passing said resinous material between two electrodes which are maintained at a potential difference which produces corona therebetween.
- C72 The method of increasing the adherent quality of resinous material which comprises subjecting it to a corona discharge.
- C73 The method of rendering a normally nonadhering resinous material more adherent which comprises exposing said material to electrical corona.
- C74 The method of rendering resinous material adherent which comprises exposing said material to electrical corona for a period of time, depending upon the degree of adherence desired.
- C75 The method of rendering resinous material wettable which comprises electrically exposing said material to electrical corona for a period of time, depending upon the degree of wettability desired.
- C76 Apparatus for subjecting resinous material to a corona discharge comprising a first electrode, a second electrode spaced from said first electrode, means to apply a corona discharge producing potential to said electrodes, and means to pass said material between said electrodes.
- C78 Process which comprises subjecting a surface of a body of organic polymeric material selected from the group consisting of polyamides, polyethylene terephthalate, polystyrene and polyvinyl chloride to a diffuse electrical discharge to improve the receptivity of said surface for coating materials.
- C79 Process which comprises subjecting a surface of a sheet of organic polymeric material selected from the group consisting of polyamides, polyethylene terephthalate, polystyrene and polyvinyl chloride to a diffuse electrical discharge in a gaseous atmosphere to improve the receptivity of said surface for coating materials.
- C80 Process which comprises subjecting a surface of a sheet of organic polymeric material selected from the group consisting of polyamides, polyethylene terephthalate, polystyrene and polyvinyl chloride to a diffuse electrical discharge by passing said sheet continuously into close proximity to an electrode from which said diffuse discharge is emanating, said discharge being insufficient to rupture said film.

- C81 Process which comprises subjecting a surface of a sheet of organic polymeric material selected from the group consisting of polyamides, polyethylene terephthalate, polystyrene and polyvinyl chloride to a diffuse electrical discharge by passing said sheet continuously between electrodes while maintaining a sufficiently high difference in potential between said electrodes to cause a diffuse discharge to emanate from at least one of said electrodes and taking up the resulting coated sheet material while maintaining its treated surface.
- C82 Process which comprises subjecting the surface of a body of organic polymeric material selected from the group consisting of polyamides, polyethylene terephthalate, polystyrene and polyvinyl chloride to a diffuse electrical discharge insufficient to rupture the film in an electrical field having a substantially uniform potential gradient.
- C83 Process which comprises subjecting the surface of an article of organic polymeric material selected from the group consisting of polyamides, polyethylene terephthalate, polystyrene and polyvinyl chloride to a diffuse electrical discharge while one surface of said article is in contact with a solid surface of dielectric material.
- C84 Process which comprises subjecting a surface of a sheet of polystyrene material to a diffuse electrical discharge in a gaseous atmosphere to improve the receptivity of said surface for coating materials.
- C85 Process which comprises subjecting a surface of a sheet of organic polymeric material to a diffuse electrical discharge in a gaseous atmosphere to improve the receptivity of said surface for coating materials, said polymeric material being a polyamide.
- C86 Process which comprises subjecting a surface of a sheet of polyethylene terephthalate to a diffuse electrical discharge in a gaseous atmosphere to improve the receptivity of said surface for coating materials.
- C87 A method for the production of a polyethylene terephthalate film having improved surface bonding properties that comprises treating a polyethylene terephthalate film which has been molecularly oriented by drawing but has not been heat-set, by subjecting a surface of the film to high voltage electric stress accompanied by corona discharge.
- C88 The process of treating a polyethylene surface of a sheet of solidified polyethylene to improve the bonding property of the treated surface which comprises, directing a corona discharge into contact with the surface to be treated in an oxygen containing atmosphere.
- C89 The process of claim 88 and wherein the corona discharge is generated by electrodes between which the solidified sheet passes.
- C90 The process of treating the surface of solidified polyethylene to improve the bonding property of inks and adhesives to the treated surface consisting in exposing the surface to electron bombardment in proximity to an electron emitting source.
- C91 The process of treating the surface of a solidified polyethylene article to improve the bonding property of inks and adhesives to the

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- C92 treated surface consisting in exposing the surface to electron bombardment in an electrostatic field and in proximity to an electron emitting element.
- C92 The method of treating a polyethylene body to render a surface thereof adherent to subsequently imprinted ink impressions which consists of directly exposing the surface of the body to high voltage corona discharge.
- Gibson J. C93 The method of treating a polyethylene body to render a surface thereof adherent to subsequently imprinted ink impressions thereon which consists of directly exposing the surface of the body to a high voltage corona discharge and then printing upon said exposed surface.
- C94 The method of treating a polyethylene body to render a surface thereof adherent to subsequently imprinted ink impressions thereon which consists of exposing the surface of the body to a high voltage corona discharge and then printing upon said exposed surface
- C107 An apparatus for treating plastic film to improve the adhesion thereof to ink impressions subsequently imprinted thereon comprising a pair of electrodes disposed in spaced relationship to provide a gap therebetween, means to produce high voltage stress accompanied by corona discharge in said gap, means to pass a plastic film through said gap, and means on each of the opposed surfaces of the electrodes to space said film during passage through said gap from said electrodes whereby both surfaces of the film are simultaneously exposed and subjected to said high voltage stress accompanied by corona discharge.

BETWEEN:

KILLARNEY PROPERTIES LIMITED . . . APPELLANT;

AND

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

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*Revenue—Income—Income tax—Purchase and subsequent sale of land by taxpayer—Construction and sale of shopping centre—Intention of taxpayer in purchasing land—Dual or alternative intention of taxpayer—Secondary alternative intent becoming preferred alternative—Promotional and profit-making scheme—Adventure in the nature of trade—Speculative nature of enterprise—Admission by taxpayer of alternative intent to sell—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).*

This is an appeal against the reassessment of the taxable income of the appellant for the taxation year 1961 by the inclusion therein of the sum of \$10,957 25, being the profit realized on the sale early in 1961 of a shopping centre erected by the appellant on certain lands in Edmonton, Alberta acquired by the appellant in 1959.

The appellant was incorporated in June 1959 and on June 30, 1959 it purchased the land in question from Kisbey Properties Limited which became the largest shareholder of the appellant and its largest creditor. Construction of the shopping centre commenced in September 1959 and was not completely finished until February 1960. An interim construction mortgage was obtained in September 1959 but the appellant never did succeed in replacing it with a conventional mortgage from a life insurance company despite its efforts to do so. This appears to be the main reason put forward by the appellant for selling the shopping centre.

The appellant received offers to purchase the shopping centre on August 6, 1959, on June 1, 1960, on December 20, 1960 and on January 17, 1961, which last offer was accepted. In its letter of refusal of this offer dated August 6, 1959 the appellant stated there was no possibility of a sale "at the price and on the conditions mentioned". The evidence established that as early as August 9, 1959, before construction had commenced, the directors of the appellant were considering the conditions under which the property might be sold. The minutes of the meeting of the directors of the appellant on April 4, 1960 included the declaration "Future plans of the Company in connection with the shopping centre revolved around selling the property. A price of \$160,000 would be acceptable, the Board felt".

*Held:* That there is in the evidence abundant proof that those who directed the affairs of the appellant had a dual or alternative intention.

2. That the evidence establishes that what might previously have been regarded as a secondary alternative intent to sell the property had become a preferred alternative by April 1960.
3. That the financial set-up of the appellant had the earmarks of a promotional and profit-making scheme.
4. That the acquisition, development and sale of the property in question was an adventure in the nature of trade, the President of the Company

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acknowledging that because of the district in which the shopping centre was to be located, and since, at the beginning they were not sure of obtaining tenants for the various units of the shopping centre, the project was a speculative one and this was not the first time that the prime movers in the enterprise ever engaged in a similar project.

5. That the appellant has failed to adduce any convincing evidence in support of its allegation that it was because it was impossible to procure a conventional mortgage that the appellant found it necessary to sell the shopping centre and there is cogent evidence to the contrary.
6. That the only logical conclusion to be drawn from the evidence is that the directors and shareholders of the appellant, far from intending to keep the shopping centre as an investment, were anxious to sell it and thus realize over a 33 per cent profit on their investment.
7. That this case is exceptional because it is one of the very rare cases wherein there is an admission by the taxpayer of an alternative intent to sell.
8. That the appeal is dismissed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Kearney at Edmonton.

*G. Edward Trott* for appellant.

*Howard L. Irving* and *G. F. Jones* for respondent.

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

KEARNEY J. now (February 22, 1965) delivered the following judgment:

This action concerns a profit of \$10,957.25 realized by the appellant in its taxation year 1961 on the sale, early in 1961, of a shopping centre which it had caused to be erected on a site consisting of two adjacent parcels of land situated on 97th Street and 129B Avenue in the City of Edmonton, which it had acquired in 1959.

It is submitted on behalf of the appellant that the aforesaid profit was not taxable income but a capital gain, since the site was acquired for the purpose of building a shopping centre which the appellant intended to retain as an investment from which good revenue could be derived. It was only when it became evident that a conventional mortgage loan could not be acquired to replace the then existing construction mortgage and after it discovered that excessive maintenance costs would be encountered due to faulty construction that it was decided to accept an offer of sale.

According to the respondent, the appellant acquired the said land in the course of business, or as a trading venture, with a view to turning it to account at a profit. The acquisition of the site, the construction of the shopping centre thereon and its subsequent sale resulted in a profit of \$10,957.25, which was income from such business or an adventure in the nature of trade within the meaning of ss. 3, 4 and paragraph (e) of s-s. (1) of s. 139 of the *Income Tax Act*, R.S.C. 1952, c. 148.

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The parties agreed that the amount in issue and the facts leading up to the realization of the aforesaid \$10,957.25 are not in dispute.

The only witness heard was Mr. William J. Martenson, who was called on behalf of the appellant. Counsel for the respondent, apart from his cross-examination of the witness, also examined the witness for discovery and read into the record certain questions and answers from the discovery proceeding. In his examination in chief, Mr. Martenson testified that he was a land developer, that he held a degree in Mechanical Engineering and that in 1959, when he became President of the appellant company, he also held the position of Sales Manager for Imperial Real Estate Limited. Prior to entering into the aforesaid business he had been engaged in oil field work with Schlumberger of Canada.

He was successful in having thirteen friends and associates join him in acquiring the aforesaid site with the intention of constructing thereon a shopping centre as an investment. On June 9, 1959, the appellant company was incorporated under the laws of the Province of Alberta.

On June 30, 1959, Killarney Properties Limited (hereinafter called Killarney Ltd.) acquired, for the sum of \$1 and other good and valuable consideration, from Kisbey Properties Limited (hereinafter called Kisbey Ltd.), with the exception of the westerly thirty-one feet throughout Lots Twenty-one (21) to Twenty-four (24), inclusive, in Block Twenty-four (24), in the City of Edmonton (Ex. 2), but, according to an affidavit of G. Edward Trott, agent, for Killarney Ltd., attached to the deed, the true consideration paid by the transferee amounted to \$20,000. Kisbey Ltd. had acquired the said property from the City of Edmonton.

On September 4, 1959, as appears by Exhibit 3, the City of Edmonton, in consideration of \$3,500 paid to it by

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Kisbey Ltd. and Killarney Ltd. (the said Kisbey Ltd. having assigned its interest to the said Killarney Ltd. by assignment dated July 16, 1959), transferred to Killarney Ltd. an adjoining piece of property described as Lot 20 of Block 24. Attached to the deed is an affidavit of the aforesaid agent of Killarney Ltd. in which he declares that the present value of the land, in his opinion, amounted to \$10,000. Asked how did Killarney Ltd. happen to be receiving transfer of Lot 20 from the City of Edmonton, he replied: "Lot 20 was adjacent to the other lands and so Killarney undertook to buy."

The witness filed as Exhibit 4 a list giving the names and occupations of his friends and associates who became shareholders of the Company, together with their respective shareholdings; it showed 110 shares. The first name on the list is his own. He owned three shares and his loan to the Company amounted to \$600. The last name on the list is Kisbey Ltd.; the latter held twenty shares.

Kisbey Ltd. was not only the largest shareholder but also the largest lender, and its loan amounted to \$11,798.

The witness stated that before Kisbey Ltd. sold the land to Killarney Ltd. it had not taken any steps toward construction of a shopping centre, nor had it arranged for any leases, but it had consulted architects.

Q. Who arranged for these shareholders of Killarney to put money into the company?

A. Myself.

Q. What was done with this money?

A. It was used to pay for the land.

The anticipated yield, based on the net return on the project before depreciation and on the cash invested, which amounted to \$30,000, would rise to 56 per cent when the mortgage had been retired, which, it was estimated, would be in ten years time. In the opinion of the witness, such return was much higher than normally found in most revenue properties due, to a large extent, to the increase in the value of the land as a result of development. After selling the property in 1961 for \$150,000—of which \$133,000 was paid in cash and \$17,000 in the form of a second mortgage—, a cash balance of close to \$30,000 remained in the treasury and the Company, the witness said, re-invested it in an office-and-retail-type development of a larger size, in Edmonton, being handled by the group

of which Killarney was a part. Returning to the history of the shopping centre, Mr. Martenson stated that the building contract was given to the lowest bidder, Prince Construction Company Limited, for an amount of \$78,000 (Ex. 5).

Construction began in September 1959 and it was anticipated that the building would be completed in six or eight weeks, which would be in late October or November, but it was near Christmas when the tenants were able to move in and the shopping centre was not completely finished until February 1960. The work was carried out much more slowly than most contracts of the same nature. The contractor, without the consent of the Company, made many changes at the request of tenants with respect to leasehold improvements. This led to difficulty in negotiating a settlement with the tenants, but, finally, under threat of legal action against them, "the contractor settled rather than face this thing in Court."

The shopping centre was completely leased in March 1960.

Messrs. Walden and Gourlay, both directors of Killarney Ltd., were in receipt of modest salaries for looking after collection of rents and dealings with the tenants.

No mortgage money had been arranged for until after the construction contract had been allotted. Unsuccessful efforts had been made to secure a loan from regular life insurance companies at interest rates of 7 to 7½ per cent with no bonus, and an interim construction type of mortgage was obtained on September 11, 1959 from First Investors Corporation Limited for \$90,000 at 7 per cent and a \$10,000 bonus, the due date of which was November 1, 1961 (Ex. 6).

The witness stated that the following offers to purchase were received. On August 6, 1959, Vergil Chambers, of Edmonton, offered, through his solicitors, to purchase the shopping centre for \$130,000, payable \$40,000 cash and a mortgage for \$90,000, amortized over ten years, with interest at 7 per cent (Ex. 7). The Company, by letter, refused the offer and informed the purchaser that, at the price and on the conditions mentioned, there was no possibility of a sale. The letter went on to say: "The only thing we could suggest is that Mr. Chambers offer to purchase all the outstanding shares in Killarney Properties Ltd. for

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\$40,000. If all the shareholders agree to this he would then take over the company as is." (Ex. 8).

Mr. Martenson stated that the property was never listed for sale with any real estate agent and added that he was interested, from an agent's point of view, in having the property for sale and earning a commission, but that his request to obtain the listing was rejected by the directors as a whole.

On June 1, 1960, an offer was received from Nielsen Investment Ltd. for \$155,000, payable \$15,000 cash, plus an equity in a certain piece of property, and the balance, amounting to \$98,000, payable \$1,000 per month, with interest at 7 per cent (Ex. 9). The aforesaid offer was rejected.

On December 20, 1960, an offer was received from George Mah, which, the witness said, resulted in the ultimate sale of the property. The price was \$137,500, payable \$4,000 cash, an additional \$45,000 payable on the possession date, \$84,000 by way of mortgage—to be arranged by the purchaser—and \$4,500 by a second mortgage to Killarney Ltd. as vendor (Ex. 10). The offer was refused, but on January 17, 1961, Mr. Mah, through his attorneys, made a second offer (Ex. 11) amounting to \$150,000, payable \$133,000 in cash and \$17,000 by way of second mortgages payable over a period of ten years at seven and one-half per cent interest. The offer contained the following condition:

This offer is subject to the confirmation by North American Life that they will grant a mortgage to Mr. Mah on the above referred property in the sum of \$85,000. All adjustments will be as at the date of possession and the date of possession is set at February 1st, 1961.

The offer was accepted.

The Company paid to the agent, Melton Real Estate Co., which handled the transaction, \$1,000 as commission. The regular tariff, the witness said, would amount to \$6,500. Mr. Martenson stated that, at the date of purchase, the First Investors mortgage was not discharged because the Company was unable to obtain, to repay it, a conventional mortgage from another source. Mr. Mah arranged a new mortgage and retired the existing mortgage. Asked what considerations influenced the directors in deciding to sell, the witness replied:

They were concerned by that time that they had been unable to arrange a mortgage to pay this First Investors mortgage which was due

that same year. This was a large debt which was about to mature, and many attempts had been made to obtain a long-term mortgage through a conventional company at conventional rates of 7 or 7½ per cent, and we had been unsuccessful, so this was a consideration from the point of view of servicing this debt. There was also the consideration that the tenants still were fairly unhappy, and we had not solved all our problems with them by this time, and this was a frustrating thing for the property manager, and the directors. A third factor was also that the building was not well built and there were a series of problems, none really large in themselves, but many in number and quite irritating, things like doors not closing properly, sidewalks in front falling away from the building and that type of thing, so this was a consideration also that there might be extensive maintenance problems in the future that would not only cost money but further create tenant and landlord problems. And I think a fourth factor is that this was the first building or development ever undertaken by this group and they were quite inexperienced, and most problems probably loomed much larger than they would appear to a developer who was experienced in this sort of thing, and this was definitely another factor in influencing the directors to accept this offer.

The witness stated that, in the fall of 1960, he contacted at least five mortgage companies and that other directors contacted at least another five. None of the companies showed any interest except North American Life Assurance Co. John Klink, the manager of that firm, agreed in principle to the idea but he had exhausted his quota of funds and could give no assurance that the Company would get any conventional mortgage funds in the future through his firm. The witness added that, in fact, North American Life Assurance Company eventually did grant a mortgage.

In cross-examination, counsel for the respondent elicited the following information from Mr. Martenson. This was not the first business venture that he and a number of associates had entered into. He and a number of them, in 1959, bought substantial acreage, sold enough to pay back the cost and held the balance.

About 105 shares of the Company were issued and the price paid was one cent a share. Apart from Kisbey, which was the original owner of the property, the amounts advanced as loans by other shareholders amounted to about \$17,000, and, together with the price of their equity stock, their investment in the Company totalled about \$18,000.

The witness was asked to file a copy of minutes of a directors' meeting of the Company dated July 6, 1959 (Ex. A), which sets out the Memorandum of Association; I shall comment upon it later.

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The witness agreed that the construction was started in September 1959 and that prior to this the Company had already received the Vergil Chambers offer of August 9. The witness was asked to file as Exhibit B an extract from the minutes of the meeting which considered the said offer; this extract reads in part as follows:

On motion duly made and unanimously passed it was resolved that solicitors for the company should write to solicitors for Vergil Chambers and advise him that the only offer we can consider at the present time is one to acquire all the shares in Killarney Properties Ltd. with the understanding that the leasing commissions have been paid in full and the architects fees will be paid in full. All other benefits, rights and obligations would be assumed by Mr. Chambers. (I will not read the last two paragraphs, my Lord.)

The witness was asked

Q. So that the directors on this 9th day of August, 1959 are already giving consideration to under what conditions that the property might be sold?

A. Yes.

The witness agreed that construction was started in September 1959 and that, prior to this, the Company had already received the Vergil Chambers offer of August 9. In reference to the construction mortgage the Company received only \$80,000 in mortgage money because of having to pay a \$10,000 bonus. The witness agreed that the ordinary mortgage company which grants a conventional mortgage does not require a bonus of this type. The witness was asked to produce a copy of a meeting of directors of April 4, 1960, held following the completion of the building (Ex. C), an extract from which reads thus:

2. Mr. Martenson reported that except for some minor deficiencies the building was complete. One unit remains unleased but three applications are in hand from prospective tenants. The building will be fully leased by May 1, 1960.

3. Mr. Walden reported that all tenants had paid their rents according to schedule and that all bills had been paid, except those relating to the balance of construction. \$3,750 has been paid on the mortgage.

4. A letter from Prince Construction Company Ltd. re final settlement was studied. The final price is to be \$95,000. Alternatives of financing were discussed by the Board and it was decided to approach the mortgagor to obtain additional funds to pay the contractor. Mr. Walden to attend to the details.

5. It was decided that a sign would not be erected on the building at this time.

\* \* \*

7. Future plans of the company in connection with the shopping centre revolved around selling the property. A price of \$160,000 would be acceptable, the Board felt.

The witness agreed that once the leases were completed the Company planned to apply for what is called "a conventional mortgage", as it then would be in a position to show a mortgage company the rental income that could be obtained.

Mr. Martenson declared that, in the latter part of 1960, he contacted, among five others, Mr. Klink of North American Life Assurance Company, who informed him that the shopping centre was a development on which the Insurance Company conceivably would grant a mortgage but that his allotment, at that time, had been expended.

After reminding the witness that the last paragraph of Mr. Mah's offer of January 17, 1961, states:

This offer is subject to the confirmation by North American Life that they will grant a mortgage to Mr. Mah on the above reference to property in the sum of \$85,000.

counsel for the respondent asked the following questions and received these answers:

Q. And with this offer you knew that the offer was contingent upon North American Life loaning the money? The company knew that?

A. Yes.

Q. And did the company then, in looking for mortgage money, go to North American Life or Mr. Klink and say—"Now, you have some money, will you loan it to us?"

A. No.

Q. You didn't?

A. No.

Q. Nor after January 17th, 1961, did the company approach any other mortgage institution in order to borrow money for this purpose?

A. No.

Q. Now, Mr. Martenson, the offer to purchase from Mr. Mah, the first one which I think was Exhibit No. 10, that is Mah's earlier offer dated December 20th, 1960, and this offer came to you through Melton's Real Estate?

A. Yes.

Q. And by a man called Pat Turner?

A. Yes.

Q. You were at this time the commercial manager of Imperial Realtors?

A. Yes.

An offer for the property in the amount of \$155,000, dated June 1, 1960, whereof \$42,000 was to be paid by a transfer of the purchaser's equity in another property, was declined. The Company likewise declined an offer of \$137,000, dated December 20, 1960, by George Mah who,

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on January 17, 1961, made a new offer of \$150,000, of which \$133,000 was payable in cash, and which the Company accepted.

Q. And Mr. Turner had a similar position with Meltons?

A. Yes.

Q. And you were close friends?

A. Yes.

Q. Your office buildings were for all practical purposes next door?

A. Yes.

Q. And you visited and had coffee together and you discussed various things intimately over all the time we are concerned with?

A. We discussed things, yes.

Q. And the letter and the offer from Mah of December 20th came as no surprise to you. Pat Turner, the Melton man, talked to you about it prior to the offer being made, did he not?

A. Yes.

Q. And in between the first offer that Mr. Mah made of December 20th, 1960 and the second offer of January 17th, 1961, you and Pat Turner negotiated further in respect of this?

A. We said merely what we wanted. We didn't make a counter-offer.

Q. In other words you and Turner discussed this matter over quite sometime?

A. We did discuss it, yes.

On re-examination by his own counsel, he was asked who, among the members of the Company, including the witness, were interested in land development companies prior to 1959. The witness replied:

Some of the members were with me in Kisbey Properties Limited and some were with me in the development of a Golf and Country club.

Q. Who were they?

A. I probably can't tell you without referring to the shareholder list. Those that had shares in each were myself, Mr. Walden, Mr. Sawatzky, Mr. Gillmore, and I believe that is all.

Q. Was Mr. Black in Kisbey?

A. Yes.

After indicating to the witness that the cost of the shopping centre was \$95,000, which is \$17,000 in excess of the contract price, counsel for the appellant put the following question:

How did the company obtain the funds on which to pay the contract?

A. These funds were obtained primarily from the mortgage we received and the balance from the bank loan.

(I might here observe that reference to the bank-loan appears on Exhibit 1, where a caveat which was placed on the property by the Bank of Nova Scotia is shown.)

Q. Now, Mr. Martenson, for the period with which we are concerned, Mr. Martenson, you were President of Killarney Properties Limited and also a real estate salesman?

A. Yes.

Q. Now, which were you during the discussions with Mr. Turner that you spoke about to my learned friend?

A. I was both. I was wearing two hats at the time in that I represented both a real estate agency and the company that owned the property.

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The following is an extract from the questions and answers given by Mr. Martenson on examination for discovery read into the record by counsel for the respondent:

117. Q. Was the amount of the bonus partly because of the location of the shopping centre in that perhaps it was somewhat of a speculative investment in comparison to perhaps others?

A. Partly because it is speculative, yes, in that all the leases were not acquired at that time and partly because of the shorter duration their overhead or handling costs, or what have you, have to be amortized over a shorter period of time.

273. Q. Now I notice, sir, that in the paragraph immediately above the adjournment paragraph that last sentence reads, "The directors felt the company is best suited to invest in real estate and that the company should try to increase its assets by fifty percent per year."

A. Yes.

274. Q. And the increase in assets at fifty per cent per year would be by carrying on business?

A. Yes.

275. Q. And I presume that this would involve buying and selling?

A. It would, it could involve buying and selling or straight development work.

277. Q. So that it was then the company's view that in order to achieve a fifty per cent increase in assets per year the best way to do it was by development of real estate?

A. Yes.

278. Q. And the real estate, upon development would either be retained by the appellant company or sold, whichever seemed more favourable?

A. Yes.

279. Q. And this, I presume, has at all times been the intention, if a company has an intention, of the appellant.

A. What would be the intention?

280. Q. Of attempting to increase its assets as fast as possible in the way we have described?

A. Yes.

In support of the appellant's claim, his counsel submitted that, in the early days of the Company, there was no intent on the part of its directors and shareholders to sell the property and that the compelling reason which led them

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to do so, instead of retaining it as an investment, was because they encountered what he described as a "big stumbling block". The said obstacle rested on the allegation that the Company, despite repeated efforts by its directors, was unable to obtain a conventional mortgage to replace the \$90,000 construction mortgage negotiated with First Investors Corporation Limited and which fell due on November 1, 1961.

In my opinion, there is to be found, in the evidence previously referred to, abundant proof that those who directed the affairs of the Company had a dual or alternative intention.

As appears by questions and answers Nos. 173, 277 and 278 *supra*, Martenson, on discovery, testified that the Company, by real estate development, would try to increase its assets by 50 per cent per annum, and, thereupon, to either retain the project so developed or sell it—which ever seemed more favourable.

The Company, it may be recalled, was incorporated in June 1959 and the first offer for the property of \$130,000 was made by Mr. Chambers on August 6, 1959 (Ex. 7), whereupon the Company, on August 10 (Ex. 8), while declaring that the offer was unacceptable, showed its interest in selling the property by informing the intended purchaser that, subject to ratification by the shareholders, it would be interested, if the said purchaser would make an offer, to buy all the outstanding shares in "Killarney Properties Limited for \$40,000".

The above occurrence took place less than a month after the Company had signed the building contract (Ex. 5) and a month before any construction had commenced or the construction mortgage with First Investors Corporation Ltd. had been signed (Ex. 6). Mr. Martenson's testimony discloses that, in February 1960, the shopping centre was nominally completed and lessees were in occupation.

The minutes of the director's meeting of the Company held on April 4, 1960 (Ex. D) provide another piece of revealing evidence of intent to sell. The said meeting began with a most encouraging statement made by the Secretary, Mr. Walden, who reported that the one remaining vacant unit in the shopping centre would be occupied by May 1; that all tenants had paid their rents on schedule; that all bills, except those relating to the balance of construction

cost, had been paid; and that the final price for construction was to be \$95,000. After discussing alternative methods of financing, it was decided to approach The First Investors Corporation Ltd. to obtain additional funds to pay the contractor, and Mr. Walden was instructed to attend to the details. The evidence does not disclose whether such approach had been made.

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The meeting concluded with the following declaration of intent:

Future plans of the Company in connection with the shopping centre revolved around selling the property. A price of \$160,000 would be acceptable, the Board felt.

The foregoing evidence, in my opinion, establishes that what might, previously, have been regarded as a secondary alternative intent to sell the property had now become a preferred alternative. Indeed it would hardly be overstatement to say that the intent to sell had become a determination to do so.

The financial set-up of the Company, in my opinion, had the earmarks of a promotional and profit-making scheme entered into more particularly by Mr. Martenson and three or four close associates, who through Kisbey Ltd., in which they were shareholders, held a controlling interest in Killarney Properties Ltd. The capital-stock of the Company consisted of 30,000 n.p.v. shares, which could be issued for such consideration as the directors might determine, but not to exceed \$1 a share. All the issued shares of the Company were acquired by its original shareholders for 1 cent a share and they were entitled to obtain further shares, at the same price, up to some 11,000 shares, to be apportioned among the shareholders according to the amount of money they lent to the Company, which totalled approximately \$30,000. In other words, the shareholders practically received their equity-holdings in the Company as a bonus for the money which they loaned to the Company.

Before passing on to consideration of the main items of defence, I might here comment on the speculative nature of the undertaking and the background of the prime movers of the venture.

The president of the Company acknowledged that because of the district in which the shopping centre was to be located, and since, at the beginning, they were not sure

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of obtaining tenants for the various units of the shopping centre, the project was a speculative one. We are not here dealing with a case in which it was the first time that the prime movers of the enterprise ever engaged in a similar project. They had previously organized and developed Kisbey Ltd. from which the instant property had been purchased and an unnamed golf club.

In my opinion, the acquisition, development and sale of the instant property was a further adventure in the nature of trade.

Now, with respect to the main defence, viz., that it was because it was impossible to procure a conventional mortgage that the Company was left with little or no alternative but to dispose of the shopping centre, in my opinion, the appellant has failed to adduce any convincing evidence in support of this submission and there is cogent proof in the record to the contrary. It was only in November 1960 that the president and some of his associates endeavoured, without success, to obtain a conventional mortgage, and, at this time, the president was informed that, for the fact that North American Life Insurance Co. had used up their quota for the year, they would have been prepared to grant a mortgage. After the turn of the year, the president of the Company admitted that he had not approached the aforesaid Insurance Company notwithstanding that he was well aware that Mr. Mah was negotiating with the same Insurance Company for an \$85,000 construction loan and that the latter's offer to purchase the property in issue for \$150,000, dated January 17, 1961, was made conditional upon the Insurance Company granting the said loan.

I consider that the only logical conclusion to be drawn from the aforesaid evidence is that the directors and the shareholders of the Company, far from intending to keep the shopping centre as an investment, were anxious to sell it and thus realize over a 33 per cent profit on their investment.

Counsel for the appellant raised other arguments, such as: trouble of an irritating nature with tenants; some evidence of defective workmanship; doors not closing properly; and the like. Mr. Martenson, in his evidence, said that such troubles, although they would appear large to some inexperienced shareholders, to a man like himself they did not

mean much, but that they were, however, a factor in influencing the directors to accept Mr. Mah's offer. However, I regard these irritations as being of minor importance and as having little probative value.

Mention of the fact was made that the very first object of the Company, as inscribed in its Memorandum of Association, was to acquire the site in issue to construct a shopping centre thereon and to lease the stores contained therein.

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I place little stock in the above described point, because also included in the said objects were, *inter alia*:

- (c) To carry on business as investors, brokers and agents and to undertake and carry on and execute all kinds of financial, commercial, trading and other operations which may seem to be capable of being conveniently carried on or in connection with any of these objects or calculated directly or indirectly to enhance the value of or facilitate the realization of or render profitable any of the Company's property or rights.
- (k) To establish, promote and otherwise assist any company or companies for the purpose of furthering any of the objects of this Company.
- (m) To sell or dispose of the undertaking of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures, or securities of any other Company wheresoever incorporated having objects altogether or in part similar to those of this Company and to distribute any of the property of the Company among the members in specie.

It was alleged that the Company did not hire a real estate agent nor advertise the property for sale. The president was himself a real estate agent who was anxious to earn a fee upon the sale of the Company, which fee, it was said, would have amounted to over \$6,000, but instead of paying anything to Martenson, the Company paid \$1,000 to Mr. P. Turner, who was supposed to be the agent of the purchaser, Mr. Mah. I am unable to accept the submission of counsel for the appellant that, although, perhaps, not important in themselves, the cumulative effects of the above-mentioned occurrences are sufficient to establish that the appellant was not engaged in any adventure in the nature of trade and did not intend to turn the property to account but to retain it as an investment.

The present instance was not the first occasion that he had entered into an undertaking of a similar nature and the evidence disclosed that Mr. Martenson and three or four others, at his instigation, had joined him as associates on at

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least two other occasions in undertakings similar to the instant one, and there is no evidence whether or not the same can be said with regard to other shareholders of the Company.

I consider that the present case is exceptional because it is one of the very rare cases—see also the judgment of Noël J. in *The Minister of National Revenue v. Clifton Lane*<sup>1</sup>—wherein there is an admission by the taxpayer of an alternative intent to sell. Such direct evidence does not appear in *Regal Heights Ltd. v. Minister of National Revenue*<sup>2</sup>; nevertheless, as noted by counsel for the respondent, the taxpayer was found liable and the Court inferred from the surrounding circumstances that sensible businessmen, if they were unable to develop the property as they hoped to do, could and would re-sell it at some gain to themselves.

Counsel for the appellant placed a great deal of reliance on *Dorwin Shopping Centre v. Minister of National Revenue*<sup>3</sup>, a judgment of Cattanach J. in which it was held that the taxpayer was not liable for tax. In my opinion, the *Dorwin* case is readily distinguishable upon its particular facts. The preponderance of evidence confirmed the sworn statements (albeit self-serving) of the directors that the Company did not intend to turn the property to account by re-sale, and, unlike in the instant case, there was no admission of a preferred or alternative intention to do so.

Furthermore, in contrast to the case at bar, wherein it is clear that the directors knew where a conventional mortgage could have been had but refused or neglected to obtain it, the directors of the Dorwin Co. had reasonable expectations of obtaining from an Insurance Company sufficient mortgage money to complete their building project, but despite their best efforts they were unsuccessful in obtaining it, with the result that the Company's plans were frustrated.

For the foregoing reasons, I consider that the present appeal must be dismissed with taxable costs in favour of the respondent.

<sup>1</sup> [1964] Ex. C.R. 866; [1964] C.T.C. 81 at 87.

<sup>2</sup> [1960] S.C.R. 907.

<sup>3</sup> [1964] Ex. C.R. 234.

BETWEEN:

RADIO CORPORATION OF AMERICA . . . PLAINTIFF;

AND

PHILCO CORPORATION (DELAWARE) . . DEFENDANT.

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*Patents—Conflict proceeding—Jurisdiction of the Exchequer Court—Limitation on scope of conflict proceeding—Review of provisions of the Patent Act—Patent Act, R.S.C. 1952, c. 203, ss. 10, 23, 29, 42, 43, 45 46 and 63—Exchequer Court Act R.S.C. 1952, c. 98, ss. 18(1)(c) and 21.*

This is an application by the defendant for an order striking out certain parts of the Statement of Claim in the action which was commenced following the decision of the Commissioner of Patents with respect to certain claims in conflict between the respective applications of the parties hereto for patents for inventions relating to colour television.

The issue to be decided is whether or not the proceeding instituted in this Court must be confined to the claims in conflict before the Commissioner of Patents.

*Held:* That s. 21 of the *Exchequer Court Act* confers jurisdiction on the Court where a right to relief exists, in the classes of cases therein defined, by virtue of some other statutory provision, at common law or in equity, but it does not create a right to relief as well as confer jurisdiction on the Court.

2. That the Court has jurisdiction, in addition to that conferred by s. 21 of the *Exchequer Court Act*, wherever some statutory provision expressly imposes on the Court a duty to hear and determine some claim for relief in classes of cases not covered by s. 21.
3. That no right to obtain relief from a Court in respect to applications for patents of invention exists except where such right has been conferred expressly or impliedly by the *Patent Act*.
4. That proceedings under s. 45(8) of the *Patent Act* are restricted to a determination of the respective rights of the parties in respect of the subject matter of the claims put in conflict by the Commissioner of Patents.
5. That the paragraph in the Statement of Claim which is an attempt by the plaintiff to set up a contention that neither the plaintiff nor the defendant is entitled to a patent in respect of certain of the claims in conflict by virtue of the applications that have been put in conflict inasmuch as the subject matter of such claims was invented by a third person who has assigned his rights to the plaintiff should not be struck out.
6. That an order will go that, *inter alia*, certain paragraphs of the Statement of Claim be struck out.

APPLICATION to strike out parts of the Statement of Claim.

The application was heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

*R. S. Smart* for plaintiff.

*David Watson* for defendant.

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JACKETT P. now (February 23, 1965) delivered the following decision:

This is an application by the defendant for an order striking out certain parts of the Statement of Claim. It raises important questions as to the ambit of relief that is available in an action in this Court following upon proceedings before the Commissioner of Patents concerning conflicting claims in respect of an invention.

As a background to considering the matters that have to be decided, it seems desirable to consider at some length the various provisions of the *Patent Act*, R.S.C. 1952, chapter 203, as amended, which indicate the general outline of the statutory scheme contained in that statute for creating and enforcing exclusive rights in respect of inventions as well as the provisions which relate particularly to conflicts between the claims of two or more persons to or in respect of the same invention.

The provisions which indicate the main features of the statutory scheme for creating and enforcing exclusive rights in respect of inventions are the following:

10. All specifications, drawings, models, disclaimers, judgments, returns, and other papers, except *caveats*, and except those filed in connection with applications for patents that are still pending or have been abandoned shall be open to the inspection of the public at the Patent Office, under such regulations as are adopted in that behalf.

\* \* \*

28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was

- (a) not known or used by any other person before he invented it,
- (b) not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned, and
- (c) not in public use or on sale in Canada for more than two years prior to his application in Canada,

may, on presentation to the Commissioner of a petition setting forth the facts (in this Act termed the filing of the application) and on compliance with all other requirements of this Act, obtain a patent granting to him an exclusive property in such invention.

\* \* \*

29. (1) An application for a patent for an invention filed in Canada by any person entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party who has, or whose agent or other legal representative has, previously regularly filed an application for a patent for the same invention in any other country which by treaty, convention or law affords similar privilege to citizens of Canada, has the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such other country, if the application in this

country is filed within twelve months from the earliest date on which any such application was filed in such other country or from the 13th day of June, 1923.

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(2) No patent shall be granted on an application for a patent for an invention that had been patented or described in a patent or publication printed in Canada or any other country more than two years before the date of the actual filing of the application in Canada, or had been in public use or on sale in Canada for more than two years prior to such filing.

\* \* \*

35 The applicant shall, in his application for a patent, insert the title or name of the invention, and shall, with the application, send in a specification in duplicate of the invention and an additional or third copy of the claim or claims.

36. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it; in the case of a machine he shall explain the principle thereof and the best mode in which he has contemplated the application of that principle; in the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions; he shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege.

\* \* \*

37. On each application for a patent a careful examination shall be made by competent examiners to be employed in the Patent Office for that purpose.

38. (1) A patent shall be granted for one invention only but in an action or other proceeding a patent shall not be deemed to be invalid by reason only that it has been granted for more than one invention.

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42. Whenever the Commissioner is satisfied that the applicant is not by law entitled to be granted a patent he shall refuse the application and, by registered letter addressed to the applicant or his registered agent, notify such applicant of such refusal and of the ground or reason therefor.

\* \* \*

44 Every person who has failed to obtain a patent by reason of a refusal or objection of the Commissioner to grant it may, at any time within six months after notice as provided for in sections 42 and 43 has been mailed, appeal from the decision of the Commissioner to the Exchequer Court and that Court has exclusive jurisdiction to hear and determine such appeal.

\* \* \*

46. Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, subject to the conditions in this Act prescribed, grant to the patentee and his legal representatives for the term therein mentioned, from the granting of the same, the exclusive right, privilege and liberty of making, constructing,

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using and vending to others to be used the said invention, subject to adjudication in respect thereof before any court of competent jurisdiction.

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55. (1) A patent is void if any material allegation in the petition of the applicant in respect of such patent is untrue, or if the specification and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and such omission or addition is wilfully made for the purpose of misleading.

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57. (1) Any person who infringes a patent is liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.

\* \* \*

62. (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court at the instance of the Attorney General of Canada or at the instance of any interested person.

The Commissioner's authority to "refuse" an application is limited to cases where he "is satisfied that the applicant is not by law entitled to be granted a patent" (section 42). Presumably, in other cases, the Commissioner is bound to grant a patent. Patents will, therefore, be granted to persons not entitled thereto in cases where the Commissioner had not the necessary material on which to satisfy himself that the applicant was not entitled and in cases where the Commissioner, even though he had the material, did not reach the correct conclusion. Section 46 takes account of this situation when it provides that a patent shall grant to the patentee the exclusive right in respect of the invention "subject to adjudication in respect thereof before any court of competent jurisdiction".

Having regard to the conditions of secrecy under which an application for a patent is processed (section 10), it is impossible for the Commissioner to take steps that he might otherwise take to test the correctness of the applicant's contentions for the purpose of avoiding the issuance of patents to persons not entitled thereto.

Two sources of information that are available to the Commissioner are patents that have been issued and co-pending applications by other persons. This information makes possible the following:

- (1) if the invention claimed by an applicant was described in a patent more than two years before the applicant filed his application, the Commissioner can refuse the application because it does not comply with section 28(1)(b) which specifically requires

that the invention in respect to which an application may be filed must be an invention that was "not described in any patent . . . more than two years before presentation of the petition";

- (2) if the invention claimed by an applicant was described in a patent granted at any time after the commencement of that two-year period (whether or not the patent contains a claim for that invention) or is described in a co-pending application, a question will be raised in the Commissioner's mind as to whether some person other than the applicant is the first inventor (if the Commissioner is satisfied that some other person, and not the applicant, is the first inventor, the applicant's claim should be refused for failing to satisfy the requirement in section 28(1)(a).)

Certain provisions of the *Patent Act* that are apparently designed to enable the Commissioner to deal with at least some of the cases of doubt as to who is the first inventor in such a way as to avoid granting patents for the same invention to more than one person as he might otherwise be required to do by the provisions of the statute. These are:

43. Whenever it appears to the Commissioner that the invention to which an application relates has been, before the filing of the application, described in a patent granted in Canada or any other country, and such application was filed within two years after the date on which such patent was so granted and the Commissioner entertains doubts whether the patentee of such invention is, as between him and the applicant, the first inventor, the Commissioner shall, by registered letter addressed to the applicant or his registered agent, object to grant a patent on such application and state, with sufficient detail to enable the applicant, if he can, to answer, the ground or reason for such objection; the applicant has the right, within such period or extended period of time as the Commissioner may allow, to answer such objection and if it is not in due course answered to the satisfaction of the Commissioner he shall refuse the application.

\* \* \*

- 45. (1) Conflict between two or more pending applications exists
  - (a) when each of them contains one or more claims defining substantially the same invention, or
  - (b) when one or more claims of one application describe the invention disclosed in the other application.

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

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(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in, things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

- (a) the date at which the idea of the invention described in the conflicting claims was conceived;
- (b) the date upon which the first drawing of the invention was made;
- (c) the date when and the mode in which the first written or verbal disclosure of the invention was made; and
- (d) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

- (a) that there is in fact no conflict between the claims in question,
- (b) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,
- (c) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or
- (d) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

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63. (1) No patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made by the inventor by whom the patent was applied for, it had already been known or used by some other person, unless it is established either that,

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(a) before the date of the application for the patent such other person had disclosed or used the invention in such manner that it had become available to the public, or that

(b) such other person had, before the issue of the patent, made an application for patent in Canada upon which conflict proceedings should have been directed, or that

(c) such other person had at any time made an application in Canada which, by virtue of section 29, had the same force and effect as if it had been filed in Canada before the issue of the patent and upon which conflict proceedings should properly have been directed had it been so filed.

(2) Notwithstanding the provisions of section 43, an application for a patent for an invention for which a patent has already issued under this Act shall be rejected unless the applicant, within a time to be fixed by the Commissioner, commences an action to set aside the prior patent, so far as it covers the invention in question, but if such action is so commenced and diligently prosecuted, the application shall not be deemed to have been abandoned unless the applicant fails to proceed upon it within a reasonable time after the action has been finally disposed of.

(3) Where the application was filed within one year from the date of the filing of the application for the prior patent, the provisions of subsection (1) do not apply to the determination of the respective rights of the parties to such action.

In considering whether these provisions create a reasonably well coordinated scheme for dealing with conflicts, it is important to bear in mind that

(a) the first inventor of an invention has, by virtue of section 28, a *prima facie* right to a patent conditioned upon his making application for a patent within two years of his invention being described in a patent or in some other publication or of his invention being in public use or on sale in Canada, whichever happened first;

(b) the first inventor's *prima facie* right to a patent under section 28 may, in some cases, be defeated by a patent issued to a subsequent inventor before the first inventor filed his application unless the first inventor filed his application within one year from the date of filing of the application for that patent (see section 63); and

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(c) an application may describe or disclose an invention without making a claim for it and a patent may also describe or disclose an invention without granting an exclusive right in respect of that invention (compare the language of section 28(1)(b), section 45(1) and section 63(2)).

In an attempt to ascertain the effect of the conflict provisions set out above and to understand the reason for the differences between the different provisions, I propose to consider them from the point of view of different classes of conflicts between an application No. 1 (which will have described or disclosed an invention with or without making a claim therefor and which may or may not have matured into a patent which may have granted exclusive rights in respect of that invention or which may merely have described or disclosed that invention) and an application No. 2 for the same invention<sup>1</sup>.

The first class is the case where application No. 2 was filed more than two years after application No. 1 matured into a patent which described or disclosed the invention, whether or not it contained claims for the invention. No special conflict provisions are needed for this class of conflict because application No. 2 is barred by virtue of section 28(1)(b)<sup>2</sup>.

The second class is the case where application No. 2 is an application for an invention which is described or disclosed in application No. 1 and is filed within the period of two years commencing with the issue of a patent pursuant to application No. 1, or, by virtue of section 29, has force and effect as though it were filed within that period. (Hereafter, when I speak of an application filed during a certain period or at a certain time, I include in my reference an application that has the force and effect of being so filed by virtue of section 29.)

<sup>1</sup> For convenience, I may, on occasion, refer to the respective applicants as applicant No. 1 and applicant No. 2 and, if one of the applications has matured into a patent, I may refer to it as patent No. 1 or patent No. 2, as the case may be.

<sup>2</sup> Sections 28(1)(b) and 43 apply even where the disclosure is in a patent granted in some other country and applies whether or not there is a claim in the patent for the invention. I am restricting my analysis to the effect of these provisions in relation to conflicts arising under the Canadian statute. As far as Canadian patents are concerned, section 63(2) precludes the application of section 43 where there is a claim in the patent for the invention.

One subdivision of the second class is where the patent issued pursuant to application No. 1 merely discloses or describes, but does not contain a claim in respect of, the invention, in which event the Commissioner must, if he recognizes the conflict, proceed under section 43 and give applicant No. 2 an opportunity to satisfy him that he is the first inventor<sup>1</sup>. If applicant No. 2 so satisfies the Commissioner or if the Commissioner does not recognize the conflict, a patent may issue to applicant No. 2 and he will then be the sole person, as between himself and applicant No. 1, having the exclusive right to use the invention.

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A second subdivision of the second class is where the Commissioner recognizes that the patent issued pursuant to application No. 1 contains a claim for the invention claimed by application No. 2 as well as disclosing it. Section 63(2) prevents the granting of application No. 2, where the Commissioner recognizes such a conflict, unless applicant No. 2 commences proceedings to set aside the patent issued pursuant to application No. 1 and, presumably, is successful in setting that patent aside.

It would seem that, in proceedings commenced pursuant to section 63(2) in a case where application No. 2 was filed within the two year period commencing with the issue of Patent No. 1 (my second class of conflicts):

- (a) if application No. 2 was filed within one year of the issue of Patent No. 1, he is, by virtue of section 63(3), not subject to the rule in section 63(1) and may attack the validity of Patent No. 1 on the ground that the inventor named therein is not the first inventor; and
- (b) if application No. 2 was filed during the second year of the two year period commencing with the issue of Patent No. 1, applicant No. 2 is subject to the rule in section 63(1) and, as he obviously cannot meet the requirements of paragraphs (b) or (c) of section 63(1), because his application was filed, or has force and effect as though it were filed, after and not before the issue of Patent No. 1, he must comply with paragraph (a) of section 63(1) by showing that, before the date of application No. 1, he had disclosed or used the invention in such

<sup>1</sup> See footnote No. 2 on page 204.

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manner that it had become available to the public, before he is entitled to attack the validity of Patent No. 1 on the ground that the inventor named therein is not the first inventor.

A third subdivision of the second class is where section 63(2) should have operated to prohibit the grant of a patent pursuant to application No. 2 made after the date of the patent issued pursuant to application No. 1 but did not so operate because the Commissioner did not realize that application No. 2 was for the same invention as that for which there was a claim in the patent issued pursuant to application No. 1. In such a case there may be two patents for the same invention. If that happens, paragraph (b) or (c) of section 63(1) would not be available to patentee No. 1 to enable him to attack Patent No. 2 on the ground that he was the first inventor but paragraph (a) of section 63(1) would be available to patentee No. 1 because his patent would have disclosed the invention in such manner that it had become available to the public when it was issued, and, therefore, before application No. 2 was filed. It is conceivable that patentee No. 2 might have made a disclosure meeting the requirement of section 63(1)(a) before the date of application No. 1, but it does not seem probable.

The third class is where application No. 1 and application No. 2 were co-pending for some period of time, no matter how short, before application No. 1 matured into a patent which described or disclosed the invention, whether or not that patent contained claims for the invention. This class breaks into two sub-classes. The first sub-class is where the Commissioner recognizes the conflict and puts the claims in conflict under section 45. If that happens, the conflict is presumably resolved at one of the stages contemplated by section 45. The second sub-class is where the Commissioner does not recognize the conflict and, for that reason, the conflict is not resolved in the manner contemplated by that section.

Where two applications containing claims for the same invention are pending at the same time (either in fact or, by virtue of section 29, are deemed to have been) and where the Commissioner does not recognize that there is

a conflict, the result probably will be that two patents will issue to two different persons for the same invention. In such event, either patentee, by virtue of paragraph (b) or (c) of subsection (1) of section 63, even if he cannot satisfy the requirements of paragraph (a) of that subsection, may attack the validity of the other's patent on the ground that the attacker is the first inventor.

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In this analysis of the scheme of the *Patent Act* in relation to conflicting claims, I have been attempting only to appreciate the general scheme of the legislation and I must not be taken to have expressed an opinion on any of the questions that may arise as to the application of the various provisions to specific problems.

However, while, for the purpose of my analysis, I have assumed the correctness of the decision of this Court in *re Fry*<sup>1</sup>, I cannot refrain from saying that, if it were not for that decision, I should have reached the opposite conclusion. In that case, it was decided that the rule in section 63(2) is not applicable to "an application for a patent for an invention for which a patent has already issued" unless the patent had issued before the subsequent application was filed. In other words, according to *re Fry*, section 63(2) does not apply if the two applications were ever co-pending. In my view, the subsection should be read as applying to any application for an invention for which a patent has already issued at the time that the Commissioner is having to decide whether the application should "be rejected". Certainly, it would seem that the public interest would be served if the Commissioner were required to apply the rule in section 63(2) wherever he recognizes that there is an existing patent for the invention claimed so as to avoid the co-existence of two patents for the same invention wherever possible. It was suggested to me in the course of argument that, as section 43 was brought into operation only when an application was filed after the issue of a patent describing the invention to which the application relates, section 63(2), which refers to section 43, should be read subject to a similar limitation. While the two sections, *prima facie*, apply to overlapping situations, in my view, they deal with quite different problems. Conceivably, after a patent issues either in Canada or elsewhere, some person might "steal"

<sup>1</sup> [1940] 1 D.L.R. 361.

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the invention described therein and make it the subject of an application for a patent. Section 43 deals with that possibility which, by reason of section 28(1)(b) and the secrecy of patent matters until the patent issues, only arises in connection with applications filed during the two year period *after* a patent issues, by empowering the Commissioner to put the applicant to the proof of his claim that he is the prior inventor. Section 63(2) deals with quite a different problem, that of avoiding, where possible, the co-existence of two patents under the *Patent Act* for the same invention. That sub-section prohibits the issue of a patent for an invention for which a patent has already issued under the Canadian Act until the prior patent has been successfully attacked in the Courts. This rule obviously applies to some of the cases to which section 43 applies and it is expressed to apply notwithstanding that section. There is no reason why the rule in section 63(2) should be restricted to an application made after the patent was issued and the subsection does not contain such a limitation expressly. The fact that section 43 contains such a limitation expressly and that section 63(2) does not confirms me in my view that it is not to be implied in section 63(2).

I come now to the proceedings that gave rise to the present application.

On October 17, 1950, Clarence Weston Hansell filed an application in respect of an invention for colour television (No. 606,877). Hansell's rights are now vested in the plaintiff. On December 29, 1950, Wilson P. Boothroyd and Edgar M. Creamer, Jr., filed an application for an invention for colour television (No. 609,764). Their rights are now vested in the defendant. There are nineteen claims at the end of the specification in the plaintiff's application and there are ninety claims at the end of the specification in the defendant's application. In September, 1961, the Commissioner sent notices of apparent conflict to the applicants under subsection (2) of section 45 and, after going through the procedure contemplated by subsections (3) and (4), there were twelve identical claims retained in the two applications, which claims had been given the numbers C1 to C12, inclusive, for the purposes of section 45. On December 13, 1963, the Commissioner rendered his decision under subsection (7) of section 45 holding that, with reference to

Claims C1 to C4, inclusive, C. W. Hansell in application No. 606,877 was the prior inventor in view of the date of August 18, 1949, established by affidavits and exhibits and that, with reference to Claims C5 to C12 inclusive, W. P. Boothroyd and E. M. Creamer, Jr., in application No. 609,764, were the prior inventors in view of the date of March, 1949, established by affidavits and exhibits. By the letters advising the parties of his decision, the Commissioner also advised them "that, unless within three months from this date action is taken in accordance with subsection (8) of section 45 of the *Patent Act* . . . the prosecution will be resumed having regard to the Commissioner's decision in respect of the conflicting claims of the above outline".

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By statement of claim filed on March 12, 1964, the plaintiff instituted proceedings against the defendant in this Court seeking a declaration that Hansell and not Boothroyd and Creamer was the first inventor of the patentable subject matter of Claims C5 to C12 inclusive. In April, 1964, the defendant filed a statement of defence and counter claim, claiming, in effect, an adjudication that Boothroyd and Creamer were the first inventors of all of Claims C1 to C12, inclusive.

On November 23, 1964, the plaintiff made a minor amendment to paragraph 9 of its statement of claim, which amendment is not relevant in this application because the defendant has not asked for any relief with regard thereto. In addition, the plaintiff, on that day, amended its statement of claim by adding new paragraphs 10 to 19, reading as follows:

10. Claims C1 and C2 correspond respectively to claims 32 and 34 of application 609,764; claims C3-C7 inclusive correspond to claims 36-40 respectively of application 609,764; claims C8, C9 and C10 correspond respectively to claims 44, 45 and 46 of the said application; claim C11 corresponds to claim 35 of the said application and claim C12 corresponds to claim 90 of the said application. The said application also contains claims numbered 1-31 inclusive, 33, 41-43 inclusive, and 47-89 inclusive.

11. Conflict exists between applications 608,877 and 609,764 with respect to claims 1-13 inclusive of application 609,764 by virtue of the disclosure in application 608,877 of the subject matter of the said claims and the plaintiff alleges and the fact is that as between the parties Clarence W. Hansell and not W. P. Boothroyd and E. M. Creamer, Jr. is the prior inventor of the subject matter of the said claims.

12. Claims 14-31 of application 609,764 are the same claims as claims 1-8 inclusive, 10-14 inclusive, and 16-20 inclusive of Canadian Patent 529,494 covering an invention of R. C. Ballard, of which the plaintiff is the owner. Application 609,764 and application 604,461 which matured to Canadian

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Patent 529,494 were copending in the Canadian Patent Office and conflict proceedings should have been directed thereupon. The plaintiff alleges and the fact is that R. C. Ballard and not W. P. Boothroyd and E. M. Creamer, Jr. was the first inventor of the subject matter of the said claims and as between the parties the defendant is not entitled to a patent containing the said claims.

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13. Conflict exists between application 609,764 and 608,877 in respect of claim 33 of application 609,764 by virtue of the disclosure in application 606,877 of the subject matter of the said claim. The plaintiff alleges and the fact is that as between the parties C. W. Hansell and not W. P. Boothroyd and E. W. Creamer, Jr. was the prior inventor of the subject matter of the said claim and the plaintiff and not the defendant is entitled to the issue of a patent containing the said claim.

(References in the above paragraph to application 608,877 are apparently intended to be to application 606,877.)

14. Claims 54, 55, 57, 58, 60, 64, 65, 67 and 68 of application 609,764 are the same claims respectively as claims 2, 3, 5, 7, 10, 12, 13, 14 and 16 of Canadian Patent 553,388 for an invention of Alda V. Bedford and owned by the Plaintiff. Claims 59, 62 and 63 of application 609,764 are the same as claims 2, 5, and 6 of Canadian Patent 553,389 on an invention of Alda V. Bedford and owned by the Plaintiff. Claims 47-53 and 56, 61 and 66 of application 609,764 are for subject matter disclosed in said patents 553,388 and 553,389. Application Nos. 611,076 and 712,616 which matured respectively to patents 553,388 and 553,389 were copending with application 609,764 and conflict proceedings should have been directed thereon. The plaintiff alleges and the fact is that as between the parties Alda V. Bedford and not W. P. Boothroyd and E. M. Creamer, Jr. was the first inventor of the subject matter of claims 47-68 inclusive of application 609,764 and the defendant is not entitled to a patent containing the said claims

15. Claims 69-78 inclusive of application 609,764 are for subject matter which was known or used by G. C. Sziklai before it was invented by W. P. Boothroyd and E. M. Creamer, Jr., if in fact it was ever invented by W. P. Boothroyd and E. M. Creamer, Jr. which is not admitted but denied. The said G. C. Sziklai had knowledge of the said subject matter at least as early as July 1949 and made the same available to the public before the date of application 609,764 by disclosing the same to the United States Federal Communications Commission and to the defendant in September 1949 in exhibit 209 to the plaintiff's submission to the Federal Communications Commission, a copy of which was supplied to the defendant. The plaintiff therefore alleges that the defendant is not entitled to a patent containing claims 69-78 inclusive of application 609,764.

16. Conflict exists in respect of claims 81, 82, 85, 86, 87, 88 and 89 between application 609,764 and application 606,877 by virtue of the disclosure in application 606,877 of the subject matter of the said claims. The plaintiff alleges and the fact is that C. W. Hansell and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of the said claims and the plaintiff and not the defendant is entitled to a patent containing the same.

17. Claims 41, 42, 43, 79, 80, 83 and 84 of application 609,764 are for subject matter disclosed in Canadian patent 602,209 on an invention of John Evans, the said patent being owned by the plaintiff. Application 600,681 which matured to Canadian Patent 602,209 was copending with application 609,764 and conflict proceedings should have been directed

thereon. The plaintiff alleges and the fact is that John Evans and not W. P. Boothroyd and E. M. Creamer, Jr. was the first inventor of the subject matter of the said claims and the defendant is not entitled to a patent containing the same.

18. Claims C5, C6, C7, C8, C9 and C10 are for subject matter described in both application 606,877 and application 600,681 which matured to Canadian patent 602,209. Until recently the plaintiff mistakenly believed that C. W. Hansell was the first inventor of the said subject matter but on discovering that in fact John Evans was the first inventor of the said subject matter, the plaintiff made application to the Commissioner of Patents on the 1st day of April, 1964 to reissue Patent No. 602,209 with the said claims. The said application bears Serial No. 899,329 and is currently pending before the Canadian Patent Office. Conflict exists between the said application Serial No. 899,329 and application 609,764 by virtue of the inclusion in both applications of the said claims. The plaintiff alleges and the fact is that John Evans and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of the said claims and as between the parties the plaintiff in application 899,329 and not the defendant is entitled to a patent containing the said claims.

19. The plaintiff alleges and the fact is that the subject matter of none of claims 1-90 of application 609,764 is adequately supported by the disclosure of that application or reasonably to be inferred from the disclosure of said application as filed and the defendant is not entitled to a patent containing any of the said claims.

At the same time, the plaintiff amended its prayer for relief by substituting a new paragraph (a) asking that it be ordered and adjudged as follows:

1. As between the parties, C. W. Hansell and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims 1-13 inclusive, 33, 81, 82 and 85-89 inclusive, of application 609,764 and claims C11 and C12 and that the plaintiff is the person entitled to a patent containing the said claims or substitute claims approved by the Court.
2. As between the parties R. C. Ballard and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims 14-31 inclusive of application 609,764 and that the defendant is not entitled to a patent containing the said claims.
3. As between the parties Alda V. Bedford and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims 47-68 inclusive of application 609,764 and the defendant is not entitled to a patent containing the said claims.
4. As between the parties G. C. Sziklai and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor in respect of the subject matter of claims 69-78 of application 609,764 and the defendant is not entitled to a patent containing the said claims.
5. As between the parties John Evans and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims C5-C10 inclusive and claims 41, 42, 43, 79, 80, 83 and 84 of application 609,764 and that the plaintiff in application 899,329 and not the defendant is entitled to a patent containing the said claims.

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This is a motion to strike out the amendments so made on the following grounds:

- (a) This Court has no jurisdiction to consider issues raised by the amendments since such issues do not relate to the conflict in respect of which the proceedings were brought.
- (b) The Plaintiff is seeking relief outside the terms of Section 45(8).
- (c) The action relating to the new claims sought to be added was instituted beyond the time limit set by the Commissioner of Patents.
- (d) The Plaintiff has no status with respect to the issues sought to be raised by the amendments.

I must first deal with the application to strike out paragraphs 10 to 19, inclusive, of the Statement of Claim. Disposition of the application as far as the prayer for relief is concerned will depend upon the disposition of the application in so far as the body of the Statement of Claim is concerned except, it should be noted, that counsel for the plaintiff conceded during the course of argument that he could not support retention of the last two and one-half lines of subparagraph (5) of paragraph (a) of the amended prayer for relief.

In so far as the body of the Statement of Claim is concerned, counsel for the plaintiff conceded that paragraph 19 in its present form can only be supported if he is permitted to retain paragraphs 11 to 17 inclusive of his amended Statement of Claim. Paragraph 18 of the Statement of Claim is also a special problem in that it is an allegation by the plaintiff that neither the plaintiff nor the defendant is entitled to certain of the claims that were put in conflict by the Commissioner by virtue of the applications in conflict but that, on the other hand, the true first inventor in respect of such claim was one John Evans in respect of whose invention the plaintiff now holds a patent which describes the invention but does not contain the claims in question. (It further alleges that it has applied to add these claims to the Evans patent by way of a re-issue patent.) If this allegation is well founded, it would be a basis for a declaration under section 45(8)(b) that neither the plaintiff nor the defendant is entitled to the issue of a patent containing the claims in conflict by virtue of the applications that have been put in conflict under section 45.

Paragraph 10 of the Statement of Claim is an explanatory allegation which will follow the fate of paragraphs

11 to 17. Paragraphs 11 to 17 have this in common that each of them makes an attack on some of the 78 claims in the defendant's application which were not put in conflict under section 45 by the Commissioner. It may also be noted that all 78 of the claims in the defendant's application that were not put in conflict by the Commissioner are attacked by one or other of paragraphs 11 to 17. The respective attacks so made on the claims in the defendant's application that were not put in conflict by the Commissioner may be classified as follows:

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- (1) paragraphs 11, 13 and 16 allege that certain of the 78 claims are in conflict with the plaintiff's application by virtue of the disclosure in the plaintiff's application (the plaintiff says that Hansell and not Boothroyd and Creamer is the prior inventor of the subject matter of those claims);
- (2) paragraph 12 and part of paragraph 14 attack certain of the 78 claims on the ground that they are the same as some of those for which two patents belonging to the plaintiff were issued (one patent was for an invention by a man by the name of Bedford and the other for an invention by a man by the name of Ballard); and the plaintiff says that the applications upon which these patents were based were, at one time, co-pending with the defendant's application and that the claims in question should therefore have been put in conflict under section 45;
- (3) the remainder of paragraph 14 and paragraph 17 attack certain of the 78 claims in the defendant's application on the ground that they are for subject matter disclosed in patents belonging to the plaintiff which were issued pursuant to applications which were co-pending with the defendant's application and the plaintiff says that conflict proceedings should have been directed with regard thereto (the plaintiff says that, in the case of one of the patents, Bedford was the first inventor and not Boothroyd and Creamer and, in the case of the other patent, Evans was the first inventor and not Boothroyd and Creamer);
- (4) the remainder of the 78 claims not put in conflict by the Commissioner are attacked by paragraph 15

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of the Statement of Claim on the ground that they are for subject matter which was known or used by one Sziklai before it was invented by Boothroyd and Creamer and that Sziklai had knowledge of the said subject matter at least as early as July 1949 and made the same available to the public before the date of the defendant's application.

Before proceeding to outline the arguments with regard to paragraphs 11 to 17 inclusive, I should revert to the grounds set out in the defendant's Notice of Motion which, it will be recalled, are:

- (a) This Court has no jurisdiction to consider issues raised by the amendments since such issues do not relate to the conflict in respect of which the proceedings were brought.
- (b) The Plaintiff is seeking relief outside the terms of Section 45(8).
- (c) The action relating to the new claims sought to be added was instituted beyond the time limit set by the Commissioner of Patents.
- (d) The Plaintiff has no status with respect to the issues sought to be raised by the amendments.

While I recognize that the jurisdiction conferred on this Court by section 21 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, may not extend to such parts of paragraphs 11 to 17 as do not form the basis for a claim in respect of conflicting applications, I am of opinion that what I have to decide is not to be determined by reference to that section. In my view, section 21 confers jurisdiction on the Court where a right to relief exists, in the classes of cases therein defined, by virtue of some other statutory provision, at common law or in equity. (Unlike section 18(1)(c), section 21 does not create a right to relief as well as confer jurisdiction on the Court). In addition to the jurisdiction conferred by section 21, the Court has jurisdiction wherever some statutory provision expressly imposes on the Court a duty to hear and determine some claim for relief in classes of cases not covered by section 21. Applications for patents of invention are creatures of the *Patent Act*. No right to obtain relief from a Court in respect thereto exists except where such right has been conferred expressly or impliedly by some statute and, as far as I am aware, the only statute that deals with such applications is the *Patent Act* itself. The only provision in the *Patent Act* upon which the plaintiff has attempted to found the claims for relief contemplated by paragraphs

11 to 17 is section 45. In my view, those paragraphs must be struck out unless section 45 confers on the plaintiff a right to seek the relief contemplated thereby in this Court. The defendant's application to strike out, in such event, is sufficiently covered by the grounds contained in paragraphs (b) and (d) of the Notice of Motion.

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As the plaintiff's right to attack claims in the defendant's application that the Commissioner did not put into conflict must depend upon the correct interpretation of section 45 of the *Patent Act*, it is desirable that I review the provisions of that section as a preliminary to stating the plaintiff's argument as fairly as I can:

(a) *Subsection (1)*: This subsection reads as follows:

- (1) Conflict between two or more pending applications exists
- (a) when each of them contains one or more claims defining substantially the same invention, or
- (b) when one or more claims of one application describe the invention disclosed in the other application.

In effect, subsection (1) defines what is meant by a "conflict between two or more pending applications". There is a conflict between pending applications when each of them contains one or more claims defining substantially the same invention or when one or more claims of one application describe the invention disclosed in the other application.

(b) *Subsection (2)*: This subsection reads as follows:

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

There is a point, which may well be academic, as to whether this subsection imposes an obligation on the Commissioner to notify each of the applicants whenever a conflict exists or only when a conflict is "apparent" to him. Upon consideration, I am inclined to think that the point is academic. It must be clear that, regardless of what construction is put upon subsection (2), the Commissioner can, in fact, only send out a notification pursuant to subsection (2), when a conflict is apparent to him.

(c) *Subsection (3)*: This subsection reads as follows:

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(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in, things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

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What the Commissioner is to notify the claimants under subsection (3) is that one or more claims in the two or more applications claims an exclusive property in things or combinations "so nearly identical" that, in the opinion of the Commissioner, separate patents to different patentees should not be granted. This notice has to do with specific conflicting claims.

(d) *Subsection (4)*: This subsection reads as follows:

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

It is clear that this subsection only deals with the "conflicting claim or claims" that were the subject matter of the notice under subsection (3).

(e) *Subsection (5)*: This subsection reads as follows:

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

- (a) the date at which the idea of the invention described in the conflicting claims was conceived;
- (b) the date upon which the first drawing of the invention was made;
- (c) the date when and the mode in which the first written or verbal disclosure of the invention was made; and
- (d) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

Clearly, this subsection only applies to the conflicting claims concerning which the Commissioner has found the subject matter to be patentable under the concluding portion of subsection (4). It is only in that case that the Commissioner can require an applicant to file the material specified in a sealed envelope.

(f) *Subsection (6)*: This subsection reads as follows:

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there

continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

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This subsection clearly refers to the envelope to be filed under subsection (5) and to the affidavits to be put in the envelope under that subsection.

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(g) *Subsection (7)*: This subsection reads as follows:

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

The affidavits that the Commissioner is to study are the affidavits referred to in subsections (5) and (6) and therefore must relate to the claims which are the subject matter of the notices sent out under subsection (3) which are, of course, the "claims in conflict" referred to in subsection (7). It is only in reference to such claims that the Commissioner makes his decision under subsection (7).

(h) *Subsection (8)*: This subsection reads as follows:

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

- (a) that there is in fact no conflict between the claims in question,
- (b) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,
- (c) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or
- (d) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

Here again it is quite clear that the "claims in conflict" which are to be rejected or allowed are those which were the subject matter of action under the earlier subsections and with which the Commissioner dealt under subsection (7). (The question that arises in this case is whether the proceedings which one of the several applicants is impliedly authorized to commence "for the determination of their respective rights" are restricted to proceedings for the determination of their respective rights in respect of the "claims in conflict" or whether such proceedings may also

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extend to "their respective rights" regarding some larger class of matter.)

(i) *Subsection (9)*: This subsection reads as follows:

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

It is to be noted that the Commissioner may be required to send to the Exchequer Court the papers on file in the Patent Office "relating to the applications in conflict" and not merely to the claims that have been put in conflict. If it were not so, the present problem might have never arisen because the plaintiff might never have learned of the 78 claims in the defendant's application that were not put in conflict.

The position taken by counsel for the defendant in moving to strike out paragraphs 10 to 17, inclusive, of the plaintiff's application is that the proceedings contemplated by subsection (8) of section 45 are restricted to proceedings to determine the respective rights of the applicants in respect of the claims that have, in fact, been put in conflict by the Commissioner under the earlier subsections of section 45. The plaintiff's position, if I correctly understand its counsel, is that, in addition to the respective rights of the parties in relation to the claims that were put in conflict, those proceedings may not only deal with "the respective rights" of the applicants with respect to other conflicts that the Commissioner should have recognized as existing between the two applications and should have put in conflict<sup>1</sup>, but may also deal with their respective rights with regard to any of the claims in either of the applications in respect of which there is a dispute between the two applicants even though that dispute may arise by virtue of facts that are entirely extraneous to the conflicting applications.

Counsel for the plaintiff contended that, if subsection (8) of section 45 is not given a wider scope for which he contends, an applicant who, in fact, is the first inventor, may well be put at a serious disadvantage in relation to

<sup>1</sup>The plaintiff's counsel made a submission that section 45(2) created an inchoate right to adjudication of any conflict in fact existing between co-pending applications which right matures into an active right in respect of all conflicts whenever section 45(8) comes into play with reference to any conflict. I do not appreciate the cogency of this argument. In any event, it does not support the full breadth of the plaintiff's contention.

the other applicant who, in fact, is not the first inventor but whose claims may be processed and mature into patents if the first applicant does not have a right to an adjudication with regard to the conflict at the application stage. It is not, of course, for the Court to attempt to improve upon the scheme which Parliament has established for the determination of conflicting claims between applicants who each claim to be first inventor.

There is, as I understand it, no dispute between the parties regarding the situation that would exist if the Commissioner had not recognized that there was some conflict and brought the defendant's application into conflict proceedings. If the Commissioner had taken no action under section 45, not only would the plaintiff not be in a position to know of the existence or the contents of the defendant's application for a patent, but there is no provision in the statute under which the plaintiff could institute proceedings in this or any other Court to obtain an adjudication, before the issue of a patent to the defendant, as to whether the defendant was entitled to a patent in respect of any of the claims in its pending application.

In these circumstances, the question is whether the very special provision impliedly made by subsection (8) of section 45 for proceedings in this Court to determine the respective rights of the parties whose applications are in conflict is restricted to the respective rights in respect of the claims in conflict as dealt with by the Commissioner or whether that very special provision opens the door to an attack by either of the applicants on any of the claims set out in the other party's application no matter what the basis for that attack may be and no matter how remote such claims may be from the subject matter of the claims put in conflict by the Commissioner.

I am of opinion that proceedings under section 45(8) are restricted to a determination of the respective rights of the parties in respect of the subject matter of the claims put in conflict by the Commissioner. Giving the best consideration that I can to section 45 as a whole and reading it in relation to the other provisions of the Act, I cannot read subsection (8) as applying to anything except the claims that have been dealt with pursuant to subsections (3) to (7) inclusive.

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While, from some points of view, it might be more convenient to have all the potential disputes involving either or both of these two applications adjudicated by the Court at this time, nevertheless, as indicated above, I am of opinion that Parliament has, by the other provisions of the *Patent Act*, indicated at what stage of proceedings and in what manner conflicting claims of inventors are to be resolved, and I do not think that subsection (8) of section 45 can be interpreted in the manner proposed by the plaintiff even if that interpretation would result in a more equitable determination of the matters in dispute.

I come now to paragraph 18 of the Statement of Claim which, as it will be recalled, is an attempt by the plaintiff to set up a contention that neither the plaintiff nor the defendant is entitled to a patent in respect of certain of the claims in conflict by virtue of the applications that have been put in conflict inasmuch as the subject matter of such claims was invented by a third person who has assigned his rights to the plaintiff.

I am of the opinion that paragraph 18 of the Statement of Claim should not be struck out. In *International Mineral and Chemical Corporation v. Potash Company of America and Duval Potash and Sulphur Company*<sup>1</sup>, the Supreme Court of Canada upheld a decision by President Thorson that a third party be admitted as a party to conflict proceedings under subsection (8) of section 45 for the purpose of seeking an adjudication under paragraph (b) of subsection (8) that none of the applicants was entitled to the issue of a patent containing the claim in conflict "as applied for by him". The status of the intervening party in that case, according to the judgment of the Supreme Court of Canada, was that the grant to one of the parties to the conflict of the exclusive right to use the process which the intervening party had been using for years would "affect the legal right" of the intervening party "to continue to carry on its business". That being so, it is at least arguable that the plaintiff in this case has a status to attack the particular claims that have been put in conflict on the grounds that they belong to it by virtue of an invention in respect of which it has a pending claim for a patent. I appreciate that there is force in the defendant's contention that the result of the plea in paragraph 18 is to remove the

<sup>1</sup> (1964) 47 D.L.R. (2d) 324.

claims in question from the conflict as between the conflicting applications. See *Aktiengesellschaft Fuer Stickstoff-duenger v. Shawinigan Chemicals Limited*<sup>1</sup>. Whether this argument should prevail must be left to be decided at trial.

An order will go, therefore, that paragraphs 10 to 17, inclusive, and paragraph 19 of the Statement of Claim be struck out and that paragraph (a) of the Prayer for Relief be struck out with leave to the plaintiff to restore paragraph (a) as it was before the amendments of November 23, 1964, and also to restore the substance of subparagraph (5) of paragraph (a) in its amended form with the deletion of any reference to the plaintiff's application 899,329. The defendant will have the costs of the application, which I hereby fix at \$400, in any event of the cause.

I should say something with reference to the plaintiff's submission that I should not strike out any part of its Statement of Claim unless I am satisfied that the portion of the Statement of Claim being struck out does not admit of plausible argument. See *City of London v. Horner*<sup>2</sup> per Cozens-Hardy, M. R. Notwithstanding the fact that I have gone to considerable lengths in these reasons to examine the scheme of the *Patent Act* and to analyze the portions of the Statement of Claim which the defendant has sought to have struck out, I am of opinion that, when it is properly understood and put in perspective, the question as to whether the plaintiff is entitled to seek the relief covered by the portions of the Statement of Claim that I am striking out "is one which does not admit of plausible argument". In any event, this is not a case, such as *London v. Horner* was, where the question was whether the plaintiff had alleged facts which made out a cause of action. The question here is whether the statute provides any right to the plaintiff to seek relief of the kind here being sought. The question does not in any way depend upon the facts that may be proved at trial. If the plaintiff is not entitled to seek the relief and is nevertheless permitted to retain the allegations in question in its Statement of Claim, the number of issues which will have to be dealt with at trial will be improperly multiplied many times. In these circumstances, in my view, it is preferable that the question

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<sup>1</sup> [1936] Ex. C.R. 56 at 70.

<sup>2</sup> [1914] 111 L.T. 512.

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should be decided at the inception of the proceedings and, if necessary, finally determined by way of appeal before trial, so as to avoid the possibility of what may well be a long and complicated trial with reference to claims for relief which the Court has no right to grant.

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BETWEEN:  
HER MAJESTY THE QUEEN ..... PLAINTIFF;  
AND  
CANADIAN PACIFIC RAILWAY }  
COMPANY ..... } DEFENDANT.

*Crown—Information—Common carrier—Breach of contract for carriage of goods—Derailment of train by mud slide—Act of God—Nature of plea of act of God—Duty of railway company to guard against mud slide—Negligence—Damages.*

In this action the plaintiff claims damages for breach of a contract for the carriage of a quantity of wheat owned by the plaintiff, under the terms of which contract the defendant was to deliver the wheat to Vancouver, British Columbia, but failed to do so because the wheat was lost when the defendant's train carrying the wheat was derailed and wrecked when it collided with a mud slide covering a part of the defendant's track in the Revelstoke section in the Rocky Mountains at about 8:30 p.m. on May 11, 1961.

The evidence established that the mud slide was first detected by the train crew at a distance of about 300 feet but that, at the speed of the train at the time, 29 m.p.h., its emergency stopping distance would be 1,062 feet. The mud slide was 8 or 10 feet deep and about 100 feet in length. The evidence also established that about three hours before the collision a train had safely gone through the area of the collision, and that earlier on the same day the defendant's divisional engineer, its assistant roadmaster, a roadmaster and then its regional maintenance crew all passed along this section of track at different times.

The defendant pleaded act of God by way of defence.

*Held:* That the plea of act of God, being a plea of an exculpatory nature, it is necessarily an extreme one which must evince most if not all of the characteristic traits predicated of it. Otherwise, the expression, act of God, becomes a self-serving synonym for the negligent inaction of man.

2. That 100 feet or so from the tracks, at the point of the derailment, a watchful eye would have detected the unmistakable proof of past trouble, a pile of debris, also an ill omen of future danger.
3. That the defendant was duty bound to undertake, at regular intervals, a check by aerial photography of the "dangerous" and "potentially dangerous" mountain zones near its track. The defendant's line men, foremen and roadmasters should have occasionally left the track and

walked up the stream beds a certain distance at points opposite its bridges and culverts.

4. That even a cursory look at the heaps of debris at the location of the mud slide in question before it occurred would have put a knowledgeable person on inquiry.
5. That what was done by the defendant to prevent a derailment such as occurred in this case is well, but falls short of the entire fulfilment of its obligations as a common carrier under the circumstances.
6. That the plaintiff's claim is allowed.

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INFORMATION by the Crown to recover damages for the loss of wheat as a result of a train wreck.

The action was tried by the Honourable Mr. Justice Dumoulin at Victoria.

*H. B. Monk, Q.C.* and *R. W. Law* for plaintiff.

*F. E. Dent* and *A. G. Graham* for defendant.

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

DUMOULIN J. now (February 25, 1965) delivered the following judgment:

It is admitted in the defendant's pleadings (Statement of Defence, paras. 1 and 5) and in a Statement of Agreed Facts that, on May 11, 1961, at Mile 116.5 of the Canadian Pacific Railway's Mountain Subdivision, Province of British Columbia, one of its trains, number 73, composed of 4 Diesel locomotives, 61 loaded boxcars and 7 unloaded ones, was wrecked, at about 8:30 p.m., as a result of a mud slide.

The impact had caused the derailment of the engines and of 18 boxcars loaded with wheat "to all intents and at all times material to this action the property of Her Majesty the Queen in right of Canada". An equally agreed fact is that a quantity of wheat in the sum of \$46,199.95 was spoiled and lost in consequence of the wreck, and, therefore, never reached its destination, the City of Vancouver.

Plaintiff lays to defendant's charge a breach of duty in omitting to safely or securely carry this consignment to the above Pacific sea port, whilst the Company says "that the wreck and the consequent damage to the said wheat was the result of an act of God".

An offer of \$364, monetary value of some salvaged grain, was refused by the plaintiff.

Clause 4 of the Statement of Agreed Facts acknowledges that:

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4. There was issued by the Defendant and received by the Crown or its agents a Bill of Lading in the New Form 717 (filed as exhibit 1) in respect of each car referred to in the information whereby the Defendant acknowledged receipt of the grain and grade referred to as being shipped in that car and agreed to transport such grain and deliver the grain to agents of the Crown at Vancouver upon the terms and conditions set forth in the Bill of Lading.

Those pertinent "terms and conditions" are mainly set out in section 1 and the two first lines of section 3, hereunder quoted, the remaining conditions being only incidental in exhibit 1:

Sec. 1. The carrier of the bulk grain herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

Sec. 2. . . .

Sec. 3. The carrier shall not be liable for loss, damage or delay to the bulk grain herein described, caused by the Act of God . . .

As aforesaid, around dusk, the time, 8:30 in the evening of May 11, 1961, the trainman, Douglas Moore, of Revelstoke, B.C., in charge of train 73, was seated in the cab of the leading Diesel Electric Unit Locomotive, to the right of the engineer, C. O. Paul, this latter having at his left fireman T. A. Utheala.

At a distance of some 300 feet, Moore detected a mud slide, mud and rocks, that a curve in the roadway had prevented him from seeing before. He, at once, cried: "Slide!", whereupon the brakes were applied but "with very little effect" reports Douglas Moore, whose warning yell had been duplicated by fireman Utheala. The brakes, tested at Albert's Canyon, 12 miles back, were in good order, but at a travelling speed of 29 miles per hour, indicated on the speedometer, "the emergency appliance in so short a distance, 250 feet from the mud pile, did not and could not slow up the train in any appreciable way", testifies the engineer, C. O. Paul, whose connection with the company dates back to 1936. This witness remembers it was twilight with good visibility and fair weather.

Bruce MacDuff, supervisor of air brake equipment for the C.P.R., performed tests on a train of equal weight to that of number 73, namely 5283 tons, running along a 1% descending grade. The emergency stopping distance of such a train, at 29 m.p.h., would be 1,062 feet. To stop such a mass within 238 feet, the Divisional Engineer, A. F. Joplin having set in his evidence a distance of 236 feet as the point whence the engine driver could first notice danger ahead,

the train's speed would have to be no more than 13 m.p.h. Had the "normal brakes" not been settled at 30 m.p.h., then 200 additional feet, 1,262 in all, would be required. Douglas Moore is positive the train could not come to a full stop in a lesser run than 1,000 feet.

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Colliding against this flow of mud, rocks and rubble, approximately 8 or 10 feet deep and about 100 feet in length, toppled the engine and eighteen cars off the rails. Dumoulin J.

"A warning Page wire fence, automatically flashing a danger signal when under pressure, was installed alongside the track some days after", testifies the trainmen. This protective device appears on photo 16 of exhibit no. 3.

The engine driver, C. O. Paul, a fireman on the first section of train no. 73, Hans Hendrickson, and the Divisional Engineer, Albert F. Poplin, asserted they had never heard of previous trouble at Mile 116.5.

On the day of the accident, May 11, one Istvan Dugar, a C.P.R. machine operator, was temporary section foreman along a six-mile stretch, patrolling tracks and inspecting culverts. He went by point 116.5 at 15:30 hrs. (3:30 p.m.); everything seemed in perfect condition.

Dugar drew drinking water from the mountain freshet flowing through the culvert. The weather was clear. The witness and his crew of two men "tarried about six minutes at that spot".

After the slide, Dugar with his companions rebuilt the track, substituting a rectangular culvert to the erstwhile round one, and they also set up the electric warning fence.

Frank Minifie, the company's roadmaster between Green Mountain and Revelstoke, a distance of 61 miles, supervises every section foreman in that sector who all report to him. Minifie has charge of the care, safety and maintenance of rails and culverts over his territory, with the help of two assistant roadmasters.

Their inspections, made every day in the week and often of a Sunday, is done by "track motor" or on board regular trains. Each road foreman must inspect every foot of roadway assigned to him. On May 11, roadmaster Minifie passed point 116.5 "in his usual manner at 16:10 hrs. (4:10 p.m.) in clear weather; there was nothing untoward there at all. Whenever something seems out of order, it is immediately investigated and traced to its origin", notes the witness.

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Since no rain had fallen that day nor for some time, there was no apparent reason to anticipate trouble. The stream was not discoloured and carried no debris towards the culvert, four feet high and eight wide, "six times too large", which had been cleared the previous March.

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One hour after the accident, at 9:30 p.m., the roadmaster reached Mile 116.5. Under cross-examination by Mr. Henry B. Monk, Q.C., the witness agreed that "no steps are taken to discover areas of potential slides". When, at 4:10 p.m., that afternoon, he went past 116.5, he was travelling at 20 m.p.h. on a track motor and "paid no particular attention to water running there".

A few days later, tracking the path of the disturbance half a mile up the mountain flank, he observed traces of other slides that blocked the stream and altered its former course. Mr. Minifie's concluding words were: "It does rain in that region".

Next to enter the witness box was Albert Frederick Joplin, civil engineer by profession, defendant's divisional engineer for the Revelstoke section which includes Mileage 116.5. All structures in that division: stations, rails, culverts, bridges, etc., are under his supervision and that of an engineering staff working with him. An assistant roadmaster oversees the sector daily. "Twice yearly at least", says Mr. Joplin, "I must inspect everything on which the safety of trains depends". "Prior to May, 1961, the culvert was examined by the roadmaster and road foreman and cleaning operations undergone in March, same year."

Telltale signs of danger would be excess or shrinkage of water, discolouration of the flow, debris rolling down, trees withering, any unusual happening.

According to the witness "the Spring of 1961 was an easy one, the main water run-off had already occurred by May 11, the weather persisting generally fair during the period immediately preceding".

Around 17:30 (5:30 p.m.) or 3 hours before the "affair", a train had gone by safely at Mileage 116.5. Joplin himself passed there at 14:30 (2:30 p.m.) on the fateful day. So did the assistant roadmaster at the same time, then a roadmaster at 15:55 (3:55 p.m.) and the regional maintenance crew at 16:10 (4:10 p.m.). Finally, by 17:30 (5:30 p.m.) the first section of freight train 73 negotiated the curve.

At 9:30 p.m. the divisional engineer, told of the washout, reached the scene and measuring as best he could the mud slide, estimated it was 120 feet long and 5 feet thick at its deepest point. The track, completely torn up, had to be replaced practically where it lay before.

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A month after the derailment, engineer Joplin climbed up the creek meadow to a spot where, in his opinion, the trouble had originated, some 2,500 feet above the track. Letter X on photo, exhibit R, filed by the witness, identifies the origin of the mud slide, about three quarters of a mile from the railway.

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In reply to plaintiff's counsel, Joplin insists he ignores the cause of the accident and noticed nothing in the vicinity that called for special precautions. Yet, in spite of this assertion, he must admit "that he considered potential sources of danger could arise in that region", but took no particular preventive steps in relation to Mile 116.5.

Soon after May 11, the embankment alongside the rails was lowered with a bulldozer as appears on exhibit B. "A very costly derailment", concludes the engineer, "19 cars swept off the tracks".

I would pause a moment in order to record my impression of this evidence. It goes without saying that a thin band of steel, snaking through possibly the most precipitous mountain range on the Continent, wriggles under a constant menace from above and not from the ground. Diligent watch of the tracks, culverts and bridges, is, of course, imperative, precisely on account of the multitudinous perils: avalanches, diluvial rains, rock slides, mud slides, tumbling boulders, liable, most of them, at a moment's notice, to crash upon the line, which, therefore, stands as a passive recipient and very seldom is the initial cause of disasters.

The Assistant Regional Engineer for the C.P.R.'s Pacific Region, at the material time, a professional engineer himself, Mr. Roy Arnold Swanson, was the next witness heard. The following lines summarize his testimony. Between Field and Revelstoke, for the last 78 years, the railroad has wended its course. "Avalanches, and rock falls, are the main troubles we encounter with, also, mud slides and sewer blockages, owing to excessive rains". Patrolmen on "speeders" or on velocipedes keep watching the tracks whenever rock falls are feared. Within the 10 years preceding, the company may

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have spent \$2,750,000 on rock sheds, tunnels or soil protection, a yearly average of \$275,000.

I interrupt the résumé to remark that annual expenditures of \$275,000, in connection with a 500-mile penetration, or thereabouts, through the Rockies do not conjure up a staggering figure.

Swanson, subsequently to May 11, 1961, walked along the creek bed to an elevation of 1400 feet, and, by helicopter, flew over the so-called alpine meadow, supposedly the stream's drainage basin, two or three thousand feet higher. "It is", claims the witness, "a typical mountain stream of small size, and photograph exhibit 'O' reveals the drainage area at this creek's source. By no means is it one of the largest streams in the region. The heavy run-off had pretty well occurred 8 or 10 days before".

Occasionally, the C.P.R. makes use of soil mechanics where "cracks or other signs of movement appear". "From climatic conditions persisting on or about May 11, nothing unusual could be apprehended. Photos 'Q' and 'R' indicate traces of old slides. Generally speaking," reports Mr. Swanson, "that area had not given us too much trouble from up above". His closing declaration, when cross-examined, was that the company "never drew up an over-all program of precautions to prevent mud slides".

The evidence of Mr. Leslie R. Smith, Vice-President and General Manager, Pacific Region, affords a repetition of Mr. Swanson's testimony, save for the over-optimistic claim that "We did not experience such a slide anywhere before, not even in 1940 which was our worst water difficulty". This executive official, momentarily forgets the several mentions of an identical mud flow taking place not so far away, at Mileage 86.7 on June 24, 1958, that also toppled off the tracks the 4 diesel engines and 10 cars of a wheat convoy. This accident ultimately formed the subject matter of suit no. 153946 in the Exchequer Court of Canada, *Her Majesty the Queen and Canadian Pacific Railway*<sup>1</sup> Honourable Mr. Justice Kearney allowed plaintiff's action for the full amount, \$32,655.12.

The witness declares that soil mechanics were utilized "to stabilize curves in the line, for bridges and buildings".

<sup>1</sup> [1965] 1 Ex. C.R. 145.

Plaintiff's counsel elicited from Mr. Smith these declarations, two of them at least, not devoid of ambiguity: "So far as our records show no slide of that nature ever happened at Mileage 116.5" and, later, "Some slides or terrain slipping did occur in this area".

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The total cost of the 1961 derailment, including repairs to locomotives, to 18 cars, and replacement of signalling apparatus, amounted to \$130,000. Then came this final admission: "The risk of running into any kind of obstruction on our tracks has been considerably reduced by the precautionary measures employed. Under such conditions, the Company is willing to face that risk."

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Most, if not all, of those "precautionary measures" seem decidedly compressed within a too passive policy of "wait and see". I have expressed above my opinion about the insufficiency of limiting protective steps to a daily patrol of the tracks, when the imminent peril looms above. "*Causa sublata, tollitur effectus*: Suppress the cause, consequences disappear", would be a sound maxim to apply.

My allusion, *supra*, to a momentary forgetfulness was obviated later on, Mr. Swanson now remembering that "since 1958, only two major slides, including that of 1961, occurred in this region".

Two other witnesses closed the roster of factual deponents, as contrasted with the technical experts; they were Messrs. Leonard George Reichart, assistant Chief Engineer of the Great Northern Ry. Company, with head office at Seattle, Washington, and Edgar Stuart English, the Canadian National Railway's regional engineer for British Columbia and the entire Rocky Mountain section. Both these gentlemen, having heard the evidence so far adduced, stamped with their approval the recital of the defendant's safeguarding methods.

With the slight reservation that, usually, "the blade bears witness to the hilt", these top railway officials' corroboration of their colleagues' prudence raises a double question mark: are conditions in the hills of Washington State comparable to those obtaining around Mile 116.5? and next, did not the Canadian National Railways recently retain Doctor Hardy's services for a thorough survey of a hundred mile stretch of mountainous ground?

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Thus comes to a close the first stage of the case, consisting in a recital of the material incidents surrounding the mishap, and a mention of the daily care, inspection and general supervision, exercised by the railroad authorities, permanent way-men and roadmasters, specifically, for our requirements, over a 61-mile expanse of track, between Green Mountain and Revelstoke.

A second chapter will show, pitted one against the other, two highly reputed engineers, upon whose expert technical knowledge the litigants largely pinned their hopes.

The scientific notions expounded and natural laws at play, to be meaningful, require the assistance of numerous citations, a course of action I unhesitatingly adopted.

Dr. Robert MacDonald Hardy, specializing in soil mechanics and foundation engineering, appeared on behalf of the defendant.

In his opinion, "the slide that over-topped the railroad and caused the derailment was the result of a blockage that occurred up the stream bed about three quarters of a mile from the railroad". (trans. p. 6).

The present stream bed cut its way through the slope after an older one had become clogged by soil slipping, of much more substantial proportions.

The witness, having at hand exhibit "R", an aerial photo taken July 30, 1961, describes the local topography:

Now between A and X on exhibit R . . . it is roughly 3,000 feet, that is, from the junction of the old and the new channel . . . The sides of the creek valley in there are relatively steep, and the creek is on a fairly steep slope in that section. There has been some sloughing from the valley walls; while it is quite a sharply incised valley and the water channel occupies practically the whole width right at the bottom of the valley . . . ; there is evidence of a recent sloughing of the banks in some sections of that particular stretch . . . but my conclusion regarding those slopes was that the movements that had taken place were in the nature of just surface sloughs; they were not deep-seated movements. (trans. p. 13).

I interrupt the quotation to note this mention of an initial landslide antedating that of May 11, 1961, by an unspecified lapse of time.

Three or four thousand feet upstream from point X on exhibit R (see also photo exhibit N), looking downwards from the little alpine meadow, the source of this creek, exhibit R depicts:

A fairly steep-sided valley with the creek right in the bottom of the valley with no width for meandering to speak of, and the creek is on quite a

rapid slope. There is no evidence of recent slide scars in this section at all; there is no evidence of channel erosion in this section . . . There is one slide area in this picture, and by coincidence the sun was such that it just shows up the slide area in the upper centre of the picture, (ex. N), and that is a comparatively recent slump, but it is a shallow slump . . . This type of slide is not of the same nature (as) the slide at Point X (on ex. R) in my opinion. It is quite a shallow surface sloughing and the vegetation has been re-established on it, and . . . could not possibly have grown to that extent in the two years . . . This is a more ancient slide but it is a slough that has come down the valley side-wall. (trans. pp. 14-15).

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The “two years” above refer to Doctor Hardy’s first inspection trip, July 29, 1963.

The engineer’s attention was drawn to the exceptional conditions at the intersection of the old and new channels, a question he takes up with renewed insistence:

. . . I think we should say more, sir, about this unnatural condition at Point O on Exhibit R. Of course, that is shown in Exhibit Q which was taken ten years previously. But it is the old channel—the old channel was blocked at Point O by a very substantial pile of—or it is blocked now by a very substantial pile of debris.

The witness continues (cf. pp. 16, bottom line, and 17):

. . . there was nothing immediately around that within a hundred feet of that area that could be the source of that blockage; the only possible source is that it came down the creek and that at some stage there was a similar event to the blockage that we say occurred at Point X and that subsequently caused the trouble at the railroad. It would be a much bigger catastrophe in terms of yardage of material involved and quantity of water, but the hydraulics or the mechanics of that earlier washout, if you like, is interesting in a number of respects in relation to the one that occurred on May the 11th in 1961.

There is still a considerable slope down to the railroad, but there is a change there, and it deposited that debris up there. Where the slide occurred on May the 11th, 1961, it didn’t deposit this debris load until it got down to the culvert almost at the railroad. Well, the blockage or the debris blocked the creek and the water then forced itself into a new channel which is an artificial channel from the natural hydraulics point of view, that is the present creek bottom.

Dr. Hardy has examined the aerial photos with the hope of measuring the extent of the drainage basin and is reported, at page 20, to have testified that:

A. . . my estimate from the aerial photographs is that the area of the drainage basin is two to three square miles.

Page 20:

Question by Mr. Frank E. Dent, counsel for defendant:

Q. Did you consider that the particular area of the slide which you have described is particularly prone or susceptible to slides?

A. Well, it is mountainous area, and when you are in the mountains, you have to expect slides . . . In my judgment, based on my own

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experience in the mountainous areas, this is not a particularly active slide area. In fact, it is a comparatively stable area from the point of view of surface slides in mountainous areas.

Page 21:

Dr. Hardy comments that anyone coming "from a trip through the Kicking Horse Pass . . . or from the Fraser Canyon" will find at mileage 116.5 "no hazard here compared to that at all". An understandable observation on the part of this experienced technician, but of indifferent probative weight if one remembers that Kicking Horse Pass and the Fraser Canyon notoriously stand out as major achievements of daring mountain engineering, therefore subjected, presumably, to constant watching. Conformably to this line of comparative reasoning, Zero weather in Eastern Canada may feel mild to an inhabitant of the Arctic Circle. It is fair to say that Professor Hardy, quickly perceiving the conflicting exaggeration, at once rectified his aim, adding: "But it is relative. You are in a mountainous area and the weathering conditions are tending to bring things down to the bottom of the valley; *so you must anticipate that you are going to have slides.*" If the permanent anticipation is such, should not the corresponding watchword be: permanent caution?

The witness explains that: ". . . *between this creek and Revelstoke, there are areas where the hazard from snowslides is the greatest on the whole system on either railroads, and this is also snowslide area, and there is evidence of snowslides within a mile of this creek . . .*"

Next, referring to the picture exhibit K, taken from a helicopter, the deponent points out that ". . . in this particular location the exposure that is shown on Exhibit K indicates quite a substantial thickness, of several feet, it might be ten, fifteen, twenty feet, even, of material that is susceptible to sliding . . ." Now, one can hardly escape the thought that such a lurking threat could and should have been anticipated, investigated and obviated in the Spring of 1961.

Page 28:

To a question by the Court, the witness replies:

*If the C.P.R. had asked me for advice on what was the hazard at this particular location, I would have, I am afraid, said that they should be on the lookout for similar events to what blocked the channel at "O" on Exhibit R originally, and if they occurred they would re-establish the old channel.*

Page 35:

This expert's opinion, so far, about the utility of aerial photography is that "... in slide areas of small proportions such as the slide we are saying caused this derailment at Mile 116.5, you could not locate that sort of thing from the study of aerial photographs from this area. It would be a mere coincidence, almost, if you could".

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Nevertheless, the witness' subsequent testimony does not tend to minimize nor deprecate the assistance derived from aerial photography, as the undergoing quotations will prove, while affording also a significant instance of soil research investigations entrusted to R. M. Hardy and Associates Limited, by the Canadian National Railways over a 100 miles of line. At page 45, we read:

... Coming to railroad work, the firm of which I am a partner, R. M. Hardy and Associates Limited, have a commission right now from the Canadian National Railways to examine the conditions on about 100 miles of line ... They have slide problems that are more important to the railroad now ... On this job we first of all travelled the railroad on railroad knickers. We talked to the railroad people who had been maintaining this line for years. We looked at troublesome spots on foot. Then we studied the geology of the area and we also then got aerial photographs of the whole line and studied them in detail. Then, *we went in and drilled certain locations that we picked from the aerial photographs* and what we saw on the ground, and we did some geophysical work, and then we took all this information into the office and worked it up into a procedure for upgrading this line.

Whether or not this meticulous scanning of the terrain bordering on the C.N.R.'s right of way came as an aftermath of the incident at issue, I have no means to tell. Still, the defendant Company, aware of both this mud slide and that of June 24, 1958, which swept four diesel engines and ten freight cars off the tracks, would not have displayed excessive care had it preceded the Canadian National Railways in the use, to some degree, of similar vigilance.

Be that as it may, Dr. Hardy, when asked if the conditions he holds responsible for the slide "could have been identified beforehand", asserts that "... they could not have been identified with any standard techniques that are accepted in good engineering practice for location work originally or in connection with maintenance operations" (trans. p. 46). On the next page, (47), the witness continues thus: "Now, in hindsight, I can see how this happened, but I doubt very much if I could have logically come to the conclusion on the basis of what you can see in the past history

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of that creek that the slide just like this one that occurred and caused the derailment would have acted that way”.

Defendant's counsel then puts this question to the soil mechanics specialist (at p. 48):

... Doctor, how does the spot where the slide occurred compare with other areas in British Columbia?

... certainly (it) can't be taken as being a hazardous spot. If you identify this location as being hazardous to the railroad operation, there are literally hundreds of similar locations in the railroads in the mountains of B.C. that you would have to say are equally hazardous.

Should there be, as the witness testifies, hundreds of spots in a given area liable to trigger, in three years' time, two disturbances of such force, it follows that aerial inspection, at regular intervals, would constitute the minimum precaution expected. However, Doctor Hardy is satisfied that the railway did all it could to avoid this washout (cf. trans. p. 52).

On cross-examination by Mr. Henry B. Monk, Q.C., plaintiff's counsel, the witness was of the opinion that “. . . most of the material that blocked the culvert and filled up the ditch and went over the top was picked up at the lower end of the slide. It didn't originate in this hillside that came down first or this little slide that popped down into it . . .” (trans. p. 55).

This deduction, by Doctor Hardy, prompted the question, at p. 69:

... you agree with me, then, that the pile of debris would be some notice to a knowledgeable person that there was material further up the mountain which might come down?

the reply being:

*That is correct, if the location engineer saw that, he should be alerted.*

A query comes to mind: why didn't the location engineer locate this pile of telltale debris not so remote from the tracks or possibly fringing them?

The matter of aerial photographs came up anew. Mr. Hardy now eulogizing their usefulness in connection, particularly, with the San Guido subdivision, where “. . . we made quite extensive use of them” over “the whole hundred and one miles”. (trans. p. 72).

The objective then sought was the obtention, in quick fashion, of data about soil and embankment solidity, old

slides and river hydraulics, also for the purpose of ascertaining potential dangers. Mr. Hardy winds up this topic by observing that:

*. . . the information from the aerial photographs was very valuable in arriving at a decision as to what we were going to do in stabilization.* (trans. p. 73).

It is a part of the Company's duty to seek out the spots of prospective danger and apply the requisite correctives. Investigation of the area would turn up these facts, visually ascertainable, agrees the witness, who, on page 77, outlines what should be done:

*. . . They (the C.P.R.) have two choices—at least two choices available to them if they have a slide: They can go up and make an examination and decide that they will do something at the source to eliminate a recurrence of it, or they can do something somewhere else . . .*

Doctor Hardy believes that expectation of more landslides "is one of the factors that might have influenced" the erection of a warning fence at Mile 116.5 (trans. p. 77); he also suggests as his "rough computation" that 2000 cubic yards of earth were necessary to swell the slide that filled the ditches, a culvert four feet high by eight in width, spreading about 120 feet along the track, its mud-floe approximately five feet thick (trans. p. 79).

Sometime before 1957, the witness was requested by the Trans-Canada Highway authorities to survey this area for their purposes, namely "to tell them whether there were any particularly hazardous soil conditions" (trans. p. 82). Prior to the start of his technical task, including inspection by train and with the field parties, Dr. Hardy observed the considerable amount of work, soil boring and soil tests, already done by his clients in an area comprising Mile 116.5. He summarizes his search report to the Trans-Canada people in these words:

*My report to them was that the soil conditions were not particularly hazardous and that the stability conditions were not particularly severe, and I had in mind specifically in comparison to the stability conditions of the slopes in the Kicking Horse Pass between Golden and Field,*

*localities qualified by the expert as "extremely dangerous" (trans. pp. 82, 83, 84).*

I previously elaborated on the relative fallacy of evidence by approximations, a logical breakdown of which, presently, is that the description "not particularly hazardous" applies only as against the opposite term "extremely dangerous",

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leaving a melancholy intermediate conclusion of "hazardous enough". The 1958 and 1961 incidents do not disprove this deduction.

The impression I gathered from this testimony might be summarized in this exchange of questions and answers between counsel and witness:

Q. Would it be fair to say that it has always been recognized that there is some danger in this area?

A. That is correct.

Q. And the railway has known this all along?

A. You are in mountains, and so you have to accept that condition.

Q. Yes, and it is a question of judgment as to what steps are taken to meet the risk?

A. There is a large element of judgment in it, yes.

Q. *And there is also an element of economics in that it may be better to take the risk and pay the piper, if necessary, than spend the money to eliminate the risk?*

A. *That is one way of assessing it, yes.*

(trans. p. 78).

What precedes could well open a wider window upon the real factors involved.

Another eminent scientist, Dr. Hugh Quinton Golder, a professional engineer, interested in soil and foundation problems, as his predecessor on the witness stand, was next called upon to state his views on the matter.

His services were retained by the Crown and the Canadian Wheat Board to investigate the occurrence at Mile 116.5.

We are told that two slides happened; "a collapse of a steep till slope some distance up the creek . . . then the material in the creek moved down . . . under the influence of water", an incident classified as a debris flow (trans. pp. 7-8).

Dr. Golder made three visits at, and in the vicinity, of Mileage 116.5, on February 5, 1962, May 20 and June 17 of the same year. He examined the slide area on foot and flew over it in a helicopter.

Of special interest is a series of 18 pictures, produced in bulk as exhibit 11 but respectively bearing a distinctive number.

On photo 2 (ex. 11), an arrow topped by the numeral 2 indicates the mountain gully in line with Mile 116.5, the course followed by the mudslide.

Passing now to photo 6, we see the top end of gully #2, looking south, with the gathering ground for the waters seeping down to the creek at melting time and rushing towards the culvert at Mile 116.5.

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Photo 7, taken, like the preceding and a few others, on June 17, 1962, from a helicopter, shows, Point "A", the heap of debris where the gully branches off. Point "B" is a scar on the side-wall of the creek where falling soil traced new scrapings.

Turning now to photograph #8, of June 17, 1962, we see that the bottom of the slope has been cut and a fall of material into the creek which would probably block it.

Photo 9, of May 20, is a clear view of the water shed down gully #2. The witness says that the stream "is largely flowing on rock at this point and on the right-hand side we can see bare rock. On the left-hand side there is a certain amount of till and loose material. But at points you can see rock, the cover is very thin." (trans. p. 27).

Photo 10, of May 20, 1962, shows the pile of debris where the gully divides in two. It consists of rocks, soil, some timber and portions of trees. The witness, thinking back a couple of years, would say this pile of debris was ten or twelve feet high and perhaps a little more.

Photo 11 was taken on foot, May 20, 1962, from the top of the same pile of debris, looking down the old stream bed in a northerly direction.

Of the same date, photo 12 peers into gully #2 and it is of interest to note the material "piled up on the left, down the channel of the gully, which indicates or gives some idea of the level to which moving material rose during the actual slide". (p. 30). This height would have attained, in the witness' opinion, a level of six to eight feet above the present stream bed.

Photo 13 affords "a fairly good idea of the amount of material which must have come down the gully at the time of the slide. You can see a lot of larger rocks and a lot of finer material". (trans. p. 31).

Taken from the track, on June 17, 1962, photograph #14 illustrates the water cascading down gully #2 and, very thinly etched in the foreground, the Page warning fence set up after the mudslide of May 11, 1961.

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Photo 15, of May 20, filed separately as ex. 4, is a view of the warning fence and some of the debris left from the slide on both sides of the track. At Points "A" and "B" appear piles of rotting wheat, presumably a relic of the accident, says the witness (trans. p. 33).

The warning fence appears on photo 16, filed as ex. 3.

The culvert, at the critical spot, is visualized on photo 17 of ex. 11, taken May 20, 1962. Dr. Golder notes the culvert "is running about three parts full" possibly because some of the space is occupied by rocks and not water; due also to the fact that this culvert had not been sufficiently cleaned out, a surmise apparently borne out by photo 18 (ex. 6) showing the downstream or opposite outlet of the culvert with a considerably reduced flow of water, explainable by the presence of some obstructions at its entrance (trans. pp. 35-36).

Photo 19 is missing.

Numbers 20 and 21 are of no great interest in the case and 22 is a Dominion Government photograph of 1958 from the Archives of the Royal Canadian Air Force, indicating Twin Butte siding and sites of both gully #2 and of the mudslide.

All this evidence appears in the transcript of Dr. Golder's testimony, pp. 23 to 41 inclusive.

Three "failure zones" or "places where there had been slides" were observed in the steep till slopes, and I am told that the science of soil mechanics has adopted methods of detecting slide areas such as this. In conformity with those norms, Dr. Golder, first of all, during his inspection, looked "at the aerial photographs", since "*in an area where they are available, they are a very cheap method of getting quite a lot of information quickly*". He pursues thus: "I would insist that information obtained from aerial photographs was later checked by ground survey. There are some places where, looking at the photographs, you could say straight away in these areas there is no danger of slides" and ". . . some places where you could say . . . you most certainly will have slides . . . One could say, here is an area where you will have a supply of water, you will have till slopes into which a river is cutting or a creek is cutting and you have quite a steep grade. So that, potentially, you have the requirements or the conditions which will cause a flow at

some time . . ." (trans. pp. 46-47). A stereoscopic study of photograph 22 revealed "slight humps in the ground, each side of gully No. 2 . . ." suggesting the somewhat ominous presence of "an unconsolidated material", soil, sand or gravel. (trans. p. 47).

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Proper allowances had for the hindsight wisdom of an *ex post facto* test, this does not impugn the methods advocated.

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One of the next questions bring to the fore the matter of costs "in relation to the C.P.R.'s operation". Since economic considerations appear threaded into the skein of the problem, and cannot be readily dismissed, I deem it advisable to quote abundantly from Doctor Golder's reply; he is dealing with aerial photography:

Assuming the photographs exist and that the line is 500 miles long . . . taking photos at a scale of one inch to 1,320 feet, that is four inches to a mile, you would have one eight-inch wide photo (covering) two miles; so you would have 250 sets of photographs to examine. I have assumed that a quick examination of these might show you that in half the area there was no great danger. You have to make some sort of assumptions. I have allowed fifteen minutes for each of those photographs. In other areas where there might be some danger . . . I allow one hour for study of each pair of photographs, and that comes up with something like thirty days, and the total cost would be, I suppose, three to five thousand dollars, that sort of order. (trans. pp. 48-49).

A triple classification of the Rocky Mountain region is made by Doctor Golder: a zone of immediate danger, probably known to the railway company; one of no danger, and, lastly, a zone of potential danger such as Mile 116.5, which ". . . should be examined on the ground to see whether or not in the engineer's opinion it was necessary to do anything". (trans. p. 49).

A major reason inviting caution would be, in the witness' own words, that:

If you have a steep slope of till and you have a stream, a fairly fast stream running past the bottom, it is, I think, inevitable that sooner or later you will have a fall or a shallow rotational block slide of the till into the valley, and that is what did in fact happen. (trans. p. 53).

Just walking along the track in the vicinity of Mileage 116.5 would not reveal traces of two former land falls ". . . but, if the person had gone a little off the track or had looked at the aerial photographs before he made the reconnaissance, he would, I think, have found evidence of two slides quite readily", vouchsafes Doctor Golder (trans. p. 55), who also believes that ". . . the mechanism of the

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*slide in gully No. 2 is such that one could expect a recurrence of the slide."*

Conflicting with Professor Hardy's statement that the flow and slide were a potential danger impossible to foresee by any known technique, is the deponent's equally positive view "that the slide, the possibility of a slide, could have been foreseen". He adds: "*I would go so far as to predict that there will be other slides at this point sometime in the future.*"

Anteriorly (pp. 64, 65), the plaintiff's expert had assumed that till areas in British Columbia could be expected along 500 miles of railway line, and made "a rough guess that half the area might deserve study". A detailed schedule of remedial measures suggested by soil mechanics or foundation engineering is outlined and may be read on pages 86, 87 and 88 of the transcription.

Admittedly, I felt embarrassed at the idea of tying down the company to what might seem prohibitive costs over, possibly, a 200-mile stretch. I had in mind the evidence of Mr. Roy Arnold Swanson, plaintiff's assistant engineer for the Pacific Region, that in the last ten years a "rough estimate . . . of expense incurred by the railway" for remedial action " . . . between rock sheds, tunnel lining, slides stabilization" would be "around two and three quarter million dollars". (trans. p. 13). Dr. Golder, however, allayed my perplexity by this quite simple solution (trans. pp. 88-89):

. . . We then arrive at the point that we are not going to try to stop the slide necessarily, but we want to prevent the slide, if it takes place, from wrecking a train. So you then come to your warning devices such as the fence that has been erected at this point, and I am sure that there are other warning devices which the railway company probably know about.

Here, a responsive chord was struck of which the erection of a Page Wire Fence, automatically releasing a warning signal when any obstruction hits it, was a practical echo. It will be remembered that, since the mud slide, Mileage 116.5 is fenced off in this manner, surely not an uneconomic care, nor a superfluous precaution in view of the witness' reiterated belief thus expressed on page 108:

*I think that another slide could happen at any time in that valley, in valley No. 2, this is.*

Again, I would single out as significant of Dr. Golder's long testimony, the following questions and replies:

By Mr. Dent:

Q. Am I correct in this that you disagree with the railway company's procedures at the moment for protecting its line?

A. I don't disagree with what they do . . . *What I was going to say was it seemed to me that it might be reasonable to do something more than they do*, but I explained earlier that I do not know anything about the economics of running a railway. But as an engineer I know that that is a very important part of our problem . . . I can only say that certain procedures which I have suggested seem to me to be a reasonable approach to the problem.

Q. Regardless of the cost involved?

A. The cost of what I have suggested is quite small in terms of finance of the railway company. (trans. pp. 111, 112).

This review of the material incidents and scientific appreciation of the case, which, I hope, may be sufficiently comprehensive, now calls for a conclusion.

Defendant pleads ". . . that the wreck and the consequent damage to the said wheat was the result of an act of God".

What is considered an Act of God?

Halsbury's Laws of England Third Edition, vol. 8, p. 183, no. 317, under the caption of "What constitutes an act of God", defines it as follows:

An act of God, in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when, in other words, it does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man.

Black's Law Dictionary, Fourth Edition, 1951, Vo. Act of God, emphasizes that the event attributed to the intervention of purely natural causes ". . . could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use". (italics not in text).

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An exculpatory plea of this nature is, necessarily, an extreme one, which must evince most if not all of the characteristic traits predicated of it. Otherwise, the expression, act of God, becomes a self-serving synonym for the negligent inaction of man.

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The evidence reveals manifest traces of an initial soil movement of huge proportions, with, additionally, other slides occurring on June 24, 1958 at Mile 86.7, and the present one. Doctor Hardy, defendant's expert witness, classifies gully no. 2 as potentially dangerous; Doctor Golder, for the plaintiff, goes a step further and expects other washouts to happen any time.

A hundred feet or so from the tracks a watchful eye would have detected the unmistakable proof of past trouble, a pile of debris, also an ill-omen of future danger.

Patrolling the line, examining culverts, testing bridges, building rock sheds are essential but insufficient cares for the reasons stated previously.

Then, what else should the company have done? I believe it was duty bound, at regular intervals, to undertake a check by aerial photography of the "dangerous" and "potentially dangerous" mountain zones. Doctor Golder insisted this mode of investigation provided "a very cheap method of getting quite a lot of information quickly". I incline to think this omission, throughout, derogates from the condition just cited, not to disregard "the aid of any appliances which the situation of the party might reasonably require him to use".

In Mr. R. A. Swanson's own words: "No over-all program of precautions to prevent mud slides was ever drawn up".

I am also of the opinion that, occasionally, the line men, foremen, assistant roadmasters or roadmasters, should, opposite bridges and culverts of some size, as that at Mileage 116.5 (4' x 8'), leave the track and walk up the stream beds for a certain distance. Even a cursory look at the surrounding heaps of debris in the instant case would have put a knowledgeable person on inquiry.

The economic factor appears to wield a disproportionate influence in this attitude of hopeful and relative passivity. Professor Hardy, it will be remembered, readily admitted that one way of assessing the situation was it might be better to take the risk and pay the piper, if necessary, than

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spend the money to eliminate the risk. Defendant's Vice-President and Regional General Manager, Mr. Leslie R. Smith, did not strike a different note when he explained that: "The risk of running into any kind of obstruction on the tracks has been considerably reduced owing to the precautionary measures employed. *Under such conditions the Company is willing to face that risk.*"

Briefly stated: What is done by the company is well, but falls short of the entire fulfilment of its obligations as a common carrier under the circumstances.

I cannot reconcile the evidence with, for instance, Halsbury's text (*supra*) that "An Act of God, in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which *could not have been foreseen* (italics are mine) and which *could not have been guarded against*", nor did it exclude all probability of a recurrence. Neither do I find compliance with the standard set by Mr. Justice Duff (as he then was) *in re: Pleet vs Canadian Northern Quebec Railway Company*<sup>1</sup>. I quote:

I have come to the conclusion that the proof is not, as regards the nature of the precautions taken, *of that close knit character which a tribunal charged with the responsibility of deciding that issue might fairly require.*

Based upon an act of God, the defendant's proof primarily reveals an act of economy, a thrifty objective which, presumably, pervaded overmuch the company's line of conduct.

FOR THE FOREGOING REASONS, I would maintain the plaintiff's action for the sum of \$46,199.95, together with taxable costs.

*Judgment accordingly.*

BETWEEN:

JOHNSTON TESTERS LTD. . . . . APPELLANT;

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 Feb. 26  
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THE MINISTER OF NATIONAL }  
 REVENUE . . . . . } RESPONDENT.

*Revenue—Income—Income tax—Deductibility of expense payment made for purpose of gaining or producing income—Commutation of future annual royalty payments under patent licensing agreement—Income or*

<sup>1</sup> [1923] 4 D.L.R. at 1117.

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*capital disbursement—Pro tanto going out of business—Benefit from payment of a revenue character—Income Tax Act, R.S.C. 1952, c. 148, ss. 11 and 12(1)(a) and (b).*

This is an appeal in respect of an income tax assessment for the taxation year 1958 whereby a tax was levied on a commutation payment made by the appellant to obtain the release of an obligation to pay certain royalties on patents which obligation would otherwise have continued on an annual basis until 1972.

The two patents in question were U.S.A. patents for a main valve testing tool and a hydraulic valve tool, both of which devices were used in carrying out certain tests in the discovery and development of oil wells. The main valve testing tool patent was issued in the early 1930's to one M. O. Johnston and the hydraulic valve tool patent was issued to Johnston Testers Inc., a U.S. company of which the appellant was a wholly owned subsidiary at all material times. The main valve testing tool patent owned by M. O. Johnston was assigned in part to other members of his family and the several owners licensed the appellant and the other Johnston companies, including Johnston Testers Inc., in 1951 to use it on a royalty basis. This agreement was amended several times to extend the terms providing for royalty payments.

In 1956, Schlumberger Well Surveying Corporation purchased all the assets of Johnston Testers Inc., including all the outstanding shares of the appellant, and at the same time the appellant and Johnston Testers Inc. entered into a licensing agreement with the Johnston family under which they were licensed to use both the main valve testing tool and the hydraulic valve tool on a royalty basis, the terminal date for royalty payments being December 1, 1972. The evidence established that the purchase of the appellant and Johnston Testers Inc. by Schlumberger Well Surveying Corporation would not have been completed had the licensing agreement with respect to both devices not been entered into. This was an arm's length transaction between the parties thereto.

The appellant paid its share of the royalties under the licensing agreement from January 31, 1956, the date of the agreement, until 1958, and its payments were allowed as expenses chargeable against income in 1956 and 1957. In 1958 the appellant and Johnston Testers Inc. contracted to commute the remaining royalty payments under the agreement and the appellant's share of the commutation payment was \$146,850.18 (Can.).

Because of income tax considerations, the Johnston family sold their interest in the two patents to the Schlumberger Foundation, a charitable organization, for \$950,000, and that Foundation granted a release of the royalty agreements to the appellant and the other Johnston companies for \$1,000,000. The foundation was free from any control by Schlumberger Well Surveying Corporation or any of its associated or subsidiary companies and of any of the Johnston companies at all material times.

*Held:* That it is clear beyond doubt that the commutation payment was made for the purpose of gaining a producing income within the meaning of s. 12(1)(a) of the *Income Tax Act* using as a criterion for such conclusion that it was made based on good commercial practice, and bearing in mind that it did not have to be incurred in gaining or producing the income of the particular period in which it was expended and that no casual connection had to be established between any

particular receipt of income and this expenditure, and that it was an extraneous and non-recurring item of expenditure.

2. That in the final analysis, no one criterion adopted in the decided cases can be universally used in all cases to determine whether the payment is a capital expenditure or one chargeable against income. The business purpose of a commutation payment in each case must be analyzed carefully for the object of categorization and then one or more of the various criteria may be employed to assist in determining the correct category of such payment.
3. That by the 1956 licensing agreement the appellant acquired a capital asset, viz., the licence to use the two patents.
4. That the payment under consideration was a payment made to get rid of an annual charge against revenue in the future and was not made to get rid of a loss or apprehended loss in business after the income and expenditure had been put together, as was the case in all the instances where there was a *pro tanto* going out of business. This payment was not made in order to *pro tanto* go out of business but was made in the course of and for the purpose of a continuing business, and the appellant did in fact after this payment and still does carry on the same business.
5. That on the particular facts of this case the true business purpose of the commutation payment by the appellant, in essence, was not to get rid of a capital asset (which was a mere incidental result) but instead to get rid of an onerous annual expense in respect to a business that it proposed to and did carry on, and such payment was made in the course of such continuing business. As a result no advantage or benefit either positive or negative accrued to the capital account of the appellant, but instead all the advantage and benefit obtained was of a revenue character and, therefore, the payment was not a capital outlay within the meaning of s. 12(1)(b) of the *Income Tax Act*.
6. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Gibson at Toronto.

*H. H. Stikeman, Q.C.* and *P. N. Thorsteinsson* for appellant.

*Donald J. Wright* and *D. G. H. Bowman* for respondent.

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

GIBSON J. now (February 26, 1965) delivered the following judgment:

This is an appeal from the decision of the Tax Appeal Board dated October 28, 1963, in respect of the income tax assessment of the appellant dated December 9, 1959, for the taxation year 1958 whereby a tax in the sum of

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\$67,418.10 plus interest in the sum of \$2,792.77 was levied for the said taxation year.

The monies which are the subject matter of this appeal were a commutation payment made by the appellant in the taxation year 1958 in the sum of \$150,000 (U.S.) or \$146,850.18 (Can.). The purpose of such commutation payment was to obtain the release of an obligation to pay certain royalties on patents which obligation otherwise would have continued on an annual basis until the year 1972.

The annual royalty payments which had been made annually up to the taxation year 1958 by the appellant approximated \$20,000 per year, and the appellant charged against income the said whole payment of \$146,850.18 (Can.) made in the 1958 taxation year.

The Tax Appeal Board disallowed in part this expense, allowing as a charge against income only the accrued royalties up to January 31, 1958, which was the date of the release agreement under the terms of which the said commutation payment was made by the appellant. This allowance amounted to \$5,872.22 (Can.). The balance of \$140,997.96 the Tax Appeal Board found was an outlay of capital or a payment on account of capital the deduction of which in computing the appellant's income for the 1958 taxation year was prohibited by reason of paragraph (b) of subsection (1) of section 12 of *The Income Tax Act*.

The appellant at the material time was a wholly owned subsidiary of a United States company known as Johnston Testers Inc., of Houston, Texas, and it carried on in Canada the business of performing certain oil well tests for others and earned its income by charging such other persons, who were owners of oil wells, fees for its testing service. This service provided is called a drill stem test which the evidence discloses is a procedure whereby a sample of the hydrocarbons or other fluids from the bottom of an oil well that is in the process of being drilled are trapped in a device fixed to the end of the drilling shaft or stem and then are brought to the surface for examination and evaluation. The device in which the fluids are trapped is called a testing tool.

The drill testing tools which we are concerned about on this appeal are called firstly a main valve testing tool for

which U. S. patent No. 2,126,641 was issued to one M. O. Johnston and a hydraulic valve tool for which U.S. patent No. 2,703,696 was issued to Johnston Testers Inc., of Houston, Texas. A copy of each of these patents was filed as Exhibits 1 and 2 on this appeal.

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The main valve testing tool devised by the inventor M. O. Johnston in the early 1930's, in part was assigned by him to certain members of his family and then on June 1, 1951, M. O. Johnston and his family entered into a written contract with the appellant and the other Johnston companies including Johnston Testers Inc., whereby the latter were given the exclusive right to use the patent on this main valve tool on a royalty basis. This agreement was filed as Exhibit 3 on this appeal.

This 1951 royalty agreement was subsequently amended several times by agreements dated December 2, 1953, January 31, 1955, and August, 1955, which agreements purported to extend the terms under which the licensees would be required to pay royalty payments to the licensors. The purported reason given for these various amended agreements was that in each instance there had been an improvement to the basic patent and for each of such improvements a patent application had been made by the licensors. There was a dispute as to the precise meaning of these extension agreements in so far as the same concerned the question of whether these amending agreements in fact extended the term during which the appellant and the others were obligated to make royalty payments to the Johnston family.

In my view, however, this is not of any great significance because the important agreement in so far as this appeal is concerned is the agreement dated January 31, 1956. This agreement was entered into contemporaneously with the purchase agreement whereby a firm known as Schlumberger Well Surveying Corporation purchased all the assets of Johnston Testers Inc., of Houston, Texas, which assets included all the outstanding shares of the appellant company.

The said hydraulic valve tool patent which we are concerned with on this appeal was not licensed in the above-mentioned 1951 licensing agreement with the Johnston

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family nor was it included in any of the amending agreements to the 1951 agreement, but it was, however, included in the said agreement dated January 31, 1956.

The hydraulic valve tool, embodying the principle of the said patent for it, had in substantial measure replaced the main valve tool because it was a superior instrument and at the material time in 1956 the appellant and the other Johnston companies were in the main using the hydraulic valve tool in providing their services to their customers to earn their respective incomes. However, the main valve tool was not entirely supplanted until a year or two after the actual purchase as of the 31st of January, 1956, by Schlumberger Well Surveying Corporation.

The evidence discloses that Schlumberger Well Surveying Corporation as early as 1955 entered into negotiations for the purchase of the assets of Johnston Testers Inc., of Houston, Texas, but this early date is of no significance, and this purchase was completed as of January 31, 1956.

The relevant contract documents evidencing this transaction were filed on this appeal as Exhibits 8 and 14. In so far as this appeal is concerned, however, Exhibit 14 which is the contract amending the royalty agreement is a significant agreement. This is the January 31, 1956, licensing agreement above referred to.

By this 1956 contract the appellant and Johnston Testers Inc., of Houston, Texas, agreed to pay royalties to the Johnston family on both the main valve tool and the hydraulic tool notwithstanding the fact that by contract up to that time neither the appellant nor Johnston Testers Inc. were liable to pay royalties to the Johnston family for the use of the hydraulic tool patent. The hydraulic tool patent in fact was owned by Johnston Testers Inc. The appellant had no title to it at any time. The agreement also provided that there would be a terminal date for such obligation to pay royalties and it was fixed at December 1, 1972. The latter provision was the significant one in so far as this action is concerned.

There were many documents filed and much argument submitted for the purpose of demonstrating the reason the appellant and Johnston Testers Inc. entered into this 1956 royalty agreement with the Johnston family. Without detailing all this evidence nor referring to the submissions

made, it is sufficient for the purposes of this appeal to state that in my opinion the purchase contract between Schlumberger Well Surveying Corporation and Johnston Testers Inc. by which the former acquired the shares of the appellant company would not have been completed if this licensing agreement of 1956 had not been consummated.

And I am unable to find on the evidence that the substance of this 1956 royalty agreement is anything different than the document purports to state.

I, therefore, find that this agreement was a legal and binding contract made at arm's length between the appellant and Johnston Testers Inc. as licensees and the Johnston family as licensors to pay an annual royalty on both the main valve tool and the hydraulic valve tool until December 31, 1972.

In respect to this contract, the evidence was that after January 31, 1956, and until 1958, the appellant and Johnston Testers Inc. did pay the Johnston family royalties on these patents. The payees and payers were strangers in law and the royalties paid were allowed as an expense chargeable against the income of the appellant for the years 1956 and 1957. In 1956 such payment by the appellant amounted to \$19,433.95 and in 1957 it amounted to \$19,459.18. And the royalty payments from 1953 under the respective current agreement had consistently been about \$19,000 or \$20,000.

In 1958 the appellant and Johnston Testers Inc. entered into negotiations and did by contract commute these royalty payments. The commutation payment made by the appellant was in the sum of \$150,000 (U.S.) or \$146,850.18 (Can.) and by Johnston Testers Inc., \$850,000 (U.S.).

At first the negotiations for the release of these royalty obligations with the Johnston family had been unsuccessful. The apparent reason for this was because the proposal first made to the Johnston family would have resulted in the payment to them being categorized as income in their hands. This was unacceptable to them because of the income tax disadvantage, and so instead different arrangements were made which caused the monies received by the Johnston family to be categorized as a capital receipt in their hands.

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The Johnston family sold all their right, title and interest in these two patents (of which they only had title to one, viz., the main valve patent—any claim to the hydraulic valve patent being questionable) to a charitable organization known as Schlumberger Foundation for \$950,000; and then the Schlumberger Foundation granted the release of the royalty agreements to the Johnston companies, including the appellant, for \$1,000,000 and thereby the Foundation itself made a profit of \$50,000.

The Schlumberger Foundation being an exempt taxpayer under United States tax laws as a charitable organization kept the \$50,000 profit for its organization. (In connection with this transaction, it should be noted that the evidence disclosed that the Schlumberger Foundation at the material time was free of any control by the Schlumberger Well Surveying Corporation or any of its associate or subsidiary companies and also of the appellant or any of the other Johnston companies.)

It was argued firstly that the 1956 patent royalty agreement with the Johnston family was really part of the purchase price of the assets of Johnston Testers Inc. by Schlumberger Well Surveying Corporation, but I am unable on the evidence to find that this was so.

It was next argued that there was no necessity for the appellant to covenant in this 1956 agreement to pay any royalties in respect to the hydraulic valve tool patents because the latter in law were at that time owned by Johnston Testers Inc. In this connection there was some equivocation in the evidence of Mr. Cox, the Texas attorney of Schlumberger Well Surveying Corporation as to the reason why it was agreed to pay royalties in this 1956 agreement on the hydraulic valve tool to the Johnston family and he did not conclusively explain why this 1956 patent royalty agreement called for an undifferentiated payment of royalties, in that there was a bulk royalty payment called for, and no division was made in such payment as between the main valve tool and the hydraulic valve tool. But in so far as the appellant is concerned, this is really of no legal concern because as stated it at no time had any title to the patent for this tool, and the royalty it was called upon to pay by this 1956 agreement was reasonable according to the evidence.

The documents evidencing these transactions were filed on this appeal and in essence they demonstrate that these transactions were all made at arm's length and they establish that the Schlumberger Foundation contracted contemporaneously with the Johnston family to pay them \$950,000 for the assignment of their patent rights and with the appellant and Johnston Testers Inc. obligating them to pay it \$1,000,000 for a release from the royalty agreement of 1956 in respect to these said two patents. In other words, the Schlumberger Foundation at the material time was not obligated to complete the contract with the Johnston family unless the appellant and Johnston Testers Inc. completed their contract with it for the release of the royalty agreements.

The issue on this appeal, therefore, is whether or not the appellant in these circumstances can charge as an expense against its income for the year 1958 the sum of \$140,977.96 (being \$146,850.18 less the sum of \$5,872.22 paid in respect of royalty payments accruing to January 31, 1958).

In considering this, it should be observed that the Tax Appeal Board made one main assumption, namely, that the Schlumberger Foundation acted as agent for the Schlumberger Well Surveying Corporation, the owner of Johnston Testers Inc. and the appellant, in arranging the release agreement dated January 31, 1958, and that "the Schlumberger Well Surveying Corporation, in effect, purchased the patents in question as a capital transaction for the purpose of terminating the liability of its nominee, Johnston Testers Inc., and in turn, that of its subsidiary, Johnston Testers Ltd., the appellant herein, in respect of the royalty payments payable until December 31, 1972, under Exclusive Licensing Agreement dated 1st June, 1951."

I must respectfully disagree with this assumption and, therefore, also the opinion of the Board predicated on it. Instead, I am of the opinion that Schlumberger Foundation in this particular series of transactions was a stranger in law with the parties with whom it dealt and that no relationship of agency existed in respect to any of the transactions between it and the appellant through any of the corporate convolutions which took place in completing the same.

This finding, however, does not resolve the matter.

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The problem here is to determine on the facts of this case whether or not this commutation payment of \$140,977.96 (Can.) was a trading or income disbursement or a capital disbursement of the appellant for the income tax year 1958 on a true application of the relevant jurisprudence.

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In all cases where commutation payments are made, the application of the distinction between income disbursements and capital disbursements is difficult because such payments lie on the borderline, and the problem of assigning them to income or capital is always troublesome.

*The Income Tax Act*, R.S.C. 1952, does not define "income" nor "capital". It describes sources of income and prescribes methods of computing income. It is, therefore, necessary to find the answer in a given factual situation by reference to the decided cases; and the answer in these cases is to a question of mixed fact and law.

Counsel for the appellant referred to, mentioned or distinguished the following cases in support of their submission that the commutation payment in this case was an income disbursement: *Royal Trust Co. v. M. N. R.*<sup>1</sup>; *Anglo Persian Oil v. Dale*<sup>2</sup>; *Noble v. Mitchell*<sup>3</sup>; *Mallett v. Staveley Coal and Iron Company Limited*<sup>4</sup>; *Dain v. Auto Speedways Ltd.*<sup>5</sup>; *C.I.R. v. William Sharp & Son*<sup>6</sup>; *Bedford Overseas Freighters Ltd. v. M. N. R.*<sup>7</sup>; *B. C. Electric Railway Company Limited v. M. N. R.*<sup>8</sup>; *Falaise Steamship Company Limited v. M.N.R.*<sup>9</sup>; *Halifax Overseas Freighters Ltd. v. M.N.R.*<sup>10</sup>; *Stow Bardolf Gravel Co. v. Poole*<sup>11</sup>; *Knight v. Calder Grove Estates*<sup>12</sup>; *J. P. Hancock v. General Reversionary & Investment Co. Ltd.*<sup>13</sup>; *Shove v. Dura Manufacturing Co. Ltd.*<sup>14</sup>; *Green v. Cravens Railway Carriage & Wagon Co. Ltd.*<sup>15</sup>; *I.R.C. v. British Salmson Aero Engineers Ltd.*<sup>16</sup>; *Cowcher v. Richard Mills & Co. Ltd.*<sup>17</sup>; *West African Drug Co. v. Lilley*<sup>18</sup>.

Counsel for the respondent on the other hand in a similar manner referred to the following cases to support his sub-

<sup>1</sup> [1957] C.T.C. 32.

<sup>2</sup> 16 T.C. 253.

<sup>3</sup> 11 T.C. 372.

<sup>4</sup> 13 T.C. 772.

<sup>5</sup> 38 T.C. 525

<sup>6</sup> 38 T.C. 21

<sup>7</sup> [1959] C.T.C. 58.

<sup>8</sup> [1957] Ex. C.R. 1.

<sup>9</sup> [1959] C.T.C. 67.

<sup>10</sup> [1959] C.T.C. 71.

<sup>11</sup> 35 T.C. 459.

<sup>12</sup> 35 T.C. 447.

<sup>13</sup> 7 T.C. 358.

<sup>14</sup> 23 T.C. 779.

<sup>15</sup> 32 T.C. 359.

<sup>16</sup> 22 T.C. 29.

<sup>17</sup> 13 T.C. 216.

<sup>18</sup> 28 T.C. 140.

mission that the disbursement in this case was one of capital:

*Peters v. Smith*<sup>1</sup>; *James Snook v. Blasdale*<sup>2</sup>; *Royal Insurance v. Watson*<sup>3</sup>; *Pyrah v. Annis*<sup>4</sup>; *Associated Portland Cement*<sup>5</sup>; *Glenboig v. C.I.R.*<sup>6</sup>; *Dominion Natural Gas*<sup>7</sup>; *British Insulated*<sup>8</sup>; *Cowcher v. Richard Mills*<sup>9</sup>; *Mallet v. Stavely*<sup>10</sup>; *VandenBerghs v. Clark*<sup>11</sup>; *West African Drug v. Lilley*<sup>12</sup>; *B. C. Electric Railway v. M. N. R.*<sup>13</sup>; *C.I.R. v. Sharp*<sup>14</sup>; *Dain v. Auto Speedways*<sup>15</sup>; *DeSoutter v. Hanger*<sup>16</sup>; *Constantinesco v. R.*<sup>17</sup>; *Anglo Persian v. Dale*<sup>18</sup>; *Eagle Motors*<sup>19</sup>.

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In coming to a conclusion in this case, two questions have to be resolved, namely, (1) was the expenditure of \$140,977.96 by the appellant in the taxation year 1958 made for the purpose of gaining or producing income within the meaning of section 12(1)(a) of *The Income Tax Act*? and (2) if it was so made, was such payment an allowable expense or was it a capital outlay within the meaning of section 12(1)(b) of *The Income Tax Act*?

In this case it is clear beyond all doubt that the expenditure was made "for the purpose of gaining or producing income" within the meaning of section 12(1)(a) of *The Income Tax Act*, using as a criterion for such conclusion that it was made based on good commercial practice, and bearing in mind that it did not have to be incurred in gaining or producing the income of the particular period in which it was expended and that no causal connection had to be established between any particular receipt of income and this expenditure, and that it was an extraneous and non-recurring item of expenditure. And it should be noted that all this is true whether this expenditure be classified as an income expense or disbursement, or as a capital outlay or disbursement.

<sup>1</sup> (1963) 41 T.C. 264.

<sup>2</sup> 33 T.C. 244

<sup>3</sup> [1897] A.C. 1.

<sup>4</sup> (1957) 1 All E.R. 196 affirming  
[1956] 2 All E.R. 858.

<sup>5</sup> [1947] 1 All E.R. 68.

<sup>6</sup> 12 T.C. 427.

<sup>7</sup> [1941] S.C.R. 19.

<sup>8</sup> [1926] A.C. 205.

<sup>9</sup> (1927) 13 T.C. 216.

<sup>10</sup> 13 T.C. 772.

<sup>11</sup> [1935] A.C. 431.

<sup>12</sup> (1947) 28 T.C. 140.

<sup>13</sup> [1958] C.T.C. 21.

<sup>14</sup> (1959) 38 T.C. 341.

<sup>15</sup> (1959) 38 T.C. 525.

<sup>16</sup> [1936] 1 All E.R. 535.

<sup>17</sup> (1927) 11 T.C. 730.

<sup>18</sup> [1932] 1 K.B. 124.

<sup>19</sup> 64 D.T.C. 829.

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In determining the second question of whether this expenditure is an income disbursement or a capital disbursement various tests or criteria are employed in the cases, as are hereinafter referred to. But probably no such determination would have had to be made in this case except for the fact that the amount sought to be charged against income is very large, and except for the fact that there is no provision for amortizing commutation payment expenditures such as this, in any category under section 11 of *The Income Tax Act*, or any regulation made thereunder. However, neither comment is relevant in assisting in the solution of the problem here.

In many cases, Judges have used various criteria which have assisted them in deciding this issue, based on the respective facts of such cases. For example, the criterion afforded by the economists and used by some Judges in the solution of this issue is their differentiation between fixed and circulating capital. If the payment can be categorized as out of the former, the economists say it is a capital expenditure and if out of the latter it is an income expenditure.

The criterion of the accountants, which has been sometimes used in these cases, is their test as to whether such expenditure, in good and accepted commercial accounting practice, should be recorded in the books as a charge in the profit and loss account rather than a payment out of capital account.

Neither of these two above criteria, however, are of much assistance in determining the problem here.

The criterion distinguishing between a "once and for all" lump-sum payment made in the income account as opposed to the capital account by the House of Lords in the case of *Atherton v. British Insulated Cables Ltd.*<sup>1</sup> was put this way by Lord Cave at p. 192, "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

But Mr. Justice Rowlett in *Anglo-Persian Oil Co. Ltd. v. Dale (supra)*, considered that this finding was inconclusive, and that there was fallacy in the use of the word "enduring", and stated that "What Lord Cave is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures, not a benefit which endures in the sense that for a good number of years it relieves you of a revenue payment." And then he held that the commutation payment made in the case before him represented the future emoluments (of the agent) which were redeemed and that it was made in the course and for the purposes of a continuing business.

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Some other criteria adopted in the cases are that if the commutation payment either (a) creates a capital asset of enduring or permanent character as, e.g., plant machinery, etc.; or (b) if it is a payment in respect of a capital asset in order to *pro tanto* go out of business, it will be categorized as a capital expenditure, but if, (c), the commutation payment does not create a capital asset even though it is made in respect to a capital asset and the business or that part of it continues after such payment, and such payment was made for the purpose of such continuing business, then the payment will be categorized as an income expenditure.

In the final analysis, however, it would appear that no one criterion can be used universally in all cases. Instead, the business purpose of a commutation payment in each case must be analyzed carefully for the object of categorization and then one or more of the various criteria may be employed to assist in determining the correct category of such payment, that is, whether the payment truly is an income disbursement or one out of capital account.

In this case by the said 1956 agreement the appellant I find acquired a capital asset, *viz.*, the license to use the two patents.

Such asset could have been shown on the balance sheet of the appellant as a capital asset, in which event its value would have been recorded as nominal. Its omission from the balance sheet in this case, however, was commercially acceptable accounting practice in that such omission did not affect the integrity of the balance sheet. And when it ceased to be a capital asset of the appellant in 1956, such

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fact did not in any significant way affect the capital account of the appellant.

The acquisition of this capital asset gave the appellant the right to use the patents, as distinguished from the use or employment of the machines embodying such patents, which latter was the business carried on by the appellant by which it earned its income.

In respect to the latter only, the appellant paid the licensors of the patents annual royalties, calculated on actual use. For the former there was no actual dollar consideration paid.

The said release agreement in 1958 accomplished two things, namely, it got rid of the said capital asset, but the appellant paid no dollar consideration for this; and it got rid of the onerous annual payments of royalties to these licensors for use of the patents until 1972.

In other words this latter was a payment to get rid of an annual charge against revenue in the future. It was not made to get rid of a loss in business or apprehended loss in business after the income and expenditure had been put together, as was the case in all the instances when there was a *pro tanto* going out of business. On the contrary, the money paid in this case was not paid in order to *pro tanto* go out of business. The money was paid in the course of and for the purpose of a continuing business, and the appellant did in fact after this payment and still does carry on this same business.

It was argued that the appellant did *pro tanto* go out of business in so far as its use of the main stem valve tool was concerned because it no longer could use this machine after this release agreement was executed. And it was a fact that at that time the appellant had stopped using the main valve tool because it had been supplanted by the superior hydraulic valve tool.

But the appellant was entitled after this release agreement in 1958 to continue the use of this hydraulic valve tool by arrangements with Johnston Testers Inc. who in fact owned the patent to it, and the appellant did continue in precisely the same business as it had been in before. What it got rid of by this commutation payment in 1958 in exchange for the release agreement was the large annual royalty charge against its revenue, payable to the Johnston

family under the said 1956 agreement. And, therefore, I am unable to find that by ceasing to use the main valve testing tool in 1958 the appellant could be considered to be *pro tanto* going out of any part of its business.

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In brief, therefore, I find that the true business purpose of this commutation payment of \$140,977.96 (Can.) in 1958 by the appellant, in essence, was not to get rid of a capital asset (which was a mere incidental result), but instead it was to get rid of an onerous annual expense in respect to a business that it proposed to and did carry on, and such payment was made in the course of such continuing business; and that as a result no advantage or benefit either positive or negative accrued to the capital account of the appellant, but instead all the advantage and benefit obtained was of a revenue character and, therefore, the payment was not a capital outlay within the meaning of section 12(1)(b) of *The Income Tax Act*.

The appeal, therefore, is allowed with costs.

*Judgment accordingly.*

THE ONTARIO ADMIRALTY DISTRICT

1964  
Dec. 10

BETWEEN:

CANADA MALTING CO. LIMITED ..... PLAINTIFF;

1965  
Mar. 5

AND

THE BURNETT STEAMSHIP CO.)  
LIMITED AND CHAS. H. TRE-  
GENZA CO. LTD. .... )

DEFENDANTS.

*Shipping—Carriage of goods—Damage to goods—Transfer of risk in f.o.b. contracts—Application to add party as plaintiff—Grounds for refusing to add party as plaintiff on his consent—Expiry of limitation period for instituting action—Application to add as plaintiff principal for whom present plaintiff acted as agent—Order that party be added as plaintiff on terms—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Rule 6—Bills of Lading Act, R.S.C. 1952, c. 16, s. 1.*

This is an application brought by the plaintiff for an order adding a party, Oland & Son Limited, as a plaintiff in this action, on the consent of the party sought to be added. The defendants resisted the application on the ground that the limitation period set out in Rule 6 in the schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291 has expired and any cause of action that might have existed between the

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party sought to be added as a plaintiff and the defendants is now barred.

The evidence on the application established that the plaintiff was the consignee of a cargo of malt shipped from Port Arthur to Oland & Son Limited at Halifax on board a steamship owned by the defendant, The Burnett Steamship Co. Limited and chartered by the defendant Chas. H. Tregenza Co. Ltd. It is not clear when title to the malt passed from the plaintiff to Oland & Son Limited, the party sought to be added as a plaintiff. This action was instituted as a consequence of the damaged condition of the malt on arrival at Halifax.

*Held:* That *prima facie*, in f.o.b. contracts the general rule appears to be that the risk passes on the shipment of the goods, that is to say, as soon as they are delivered to the carrier.

2. That the bill of lading in this case indicates that it was taken by the plaintiff acting as agent for Oland & Son Limited, the purchaser of the malt. This raises the question as to who the plaintiff in this action should be.
3. That the Court is precluded from granting the order applied for only if by doing so the defendants are deprived of some legal defence which they now have or the plaintiff would thereby be permitted to set up a new cause of action, by the addition of Oland & Son Limited as a plaintiff.
4. That the bill of lading was entered into by the plaintiff as an agent and the only person for whom it could be an agent in the circumstances is Oland & Son Limited to whom the goods were being consigned. From a very short time after the cargo had been delivered in a damaged condition at Halifax the defendants knew that a claim was being asserted against them, and the addition of Oland & Son Limited as a plaintiff is merely to add and bring before the Court the real principal in the case for whom the present plaintiff acts as an agent.
5. That as agent for Oland & Son Limited the plaintiff was the contracting party and it is advisable that it should continue in the case because of that.
6. That in permitting Oland & Son Limited to be added as a plaintiff, the defendants are not being deprived of any real defence they have to this action, nor is any new cause of action being set up.
7. That there will be an order *nunc pro tunc* as of the issue of the writ permitting Oland & Son Limited to be added as a party plaintiff and for the necessary amendments to be made to the pleadings, the order being on the terms that the plaintiffs will not be entitled to any further costs against the defendants than the present plaintiff would have been entitled to if it had gone to trial and had succeeded.

APPLICATION for an order *nunc pro tunc* to join a plaintiff to the action.

The application was heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

*P. F. M. Jones* for plaintiff.

*A. J. Stone, Q.C.*, for the defendant, The Burnett Steamship Co. Limited.

*J. W. Macdonald* for the defendant, Chas. H. Tregenza.

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

WELLS, D.J.A. now (March 5, 1965) delivered the following decision:

This application was brought by the plaintiff and heard on Thursday the 10th December last for an order that Oland & Son Limited be joined *nunc pro tunc* as a plaintiff in this action and for an order amending the style of cause herein accordingly and for an order permitting the parties hereto to deliver such amended pleadings as to them seem necessary.

The material before me on this application consists of an affidavit by one Reginald James Thomas of Toronto, who is the comptroller of the plaintiff company. Mr. Thomas was cross examined on his affidavit and the facts as set out by him appear to be quite simple and are not controverted, as far as I am aware. They are that the action arises out of damage caused to a cargo of malt shipped by the plaintiff from its elevator at Port Arthur to Oland & Son Limited at Halifax, Nova Scotia on board the steamship *Tynemouth*. The plaintiff was the consignor of the said cargo, the Burnett Steamship Co. Limited is the owner of the ship *Tynemouth* and the defendant Chas. H. Tregenza Co. Ltd. was the charterer of the ship at the time. Oland & Son Limited who seeks to be added was the purchaser of the malt and is a brewer in Halifax.

Paragraph 5 of Mr. Thomas' affidavit I think sets out the gist of the matter which was before me, when he says as follows:

I am informed by my solicitors and verily believe that upon the information available to them at the time the writ was issued, it appeared that the plaintiff was the sole owner of the goods. It now appears that title to the goods may have been in Oland & Son Limited at the time of the loss, and accordingly, the presence of Oland & Son Limited is necessary in order to enable the court effectively and completely to adjudicate upon the questions involved in this action.

Oland & Son Limited has also signed a consent to being joined as a plaintiff in this action.

As I have already said Mr. Thomas was cross examined on his affidavit, but it would appear that the question of when the title in the malt, which was the subject matter

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of this dispute, passed from the present plaintiff to Oland & Son Limited in Halifax is far from clear. The cross examination on the affidavit of course, was not an examination for discovery and was not treated as such by anyone concerned. It is interesting however to look at one of the Bills of Lading which was filed as a specimen before me. What I take to be Exhibit 1 in the cross examination is a contract dated July 23, 1962, which is said to cover the purchase of malt from Canada Malting Co. Limited by Messrs. Oland & Son Limited, Halifax, Nova Scotia. The amount is Sixty Thousand (60,000) bushels Screened Old Crop Brewers' Malt at a price of \$2.01 net cash per bushel of 36 pounds, f.o.b. Port Arthur. All the malt covered by the contract was to be ordered out for delivery prior to November 30, 1962. The bill of lading is also instructive. It is dated at Port Arthur on September 24, 1962 and covers goods shipped in apparent good order and condition from the port of Port Arthur, Ontario, by Canada Malting Co. Limited as agent and forwarder for account and at the risk of whom it may concern, on board the vessel S.S. *Tynemouth* whereof Capt. J. Barrass is Master, now in the port of Port Arthur, Ontario and bound for Halifax, Nova Scotia, the property herein described to be delivered as agreed herein in like order and condition, to the order of Oland & Son Limited, or his or their assigns at Halifax, N.S., upon payment of freight and charges as noted below.

The specimen Bill of Lading which was shown to me covered 10,000 bushels or 360,000 lbs. of blended brewers malt. The bill of lading was accepted and signed by someone whose signature is illegible to me, as agent for the vessel.

Normally, apart from questions of laches there would not be much exception taken to an application of this sort, particularly in view of Section I of the *Bills of Lading Act*. However, a real objection is made by the defendants on the basis of the rules set out in the schedule to the *Water Carriage of Goods Act*, which is Chapter 291 R.S.C. 1952. These rules embody what are normally called the Hague Rules and are a series of rules relating to bills of lading and other matters which were designed to liberalize and bring up to date the Maritime Law as it then stood in several

jurisdictions. They were also designed of course to create some uniformity.

Rule 6 deals with the question of loss or damage and notice thereof and the third paragraph of that rule is as follows:

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

This loss of course, occurred in the year 1962. The writ was issued on November 27, 1963 and it would appear that if the rule does create a limitation of action, it has been greatly exceeded.

Having referred to many authorities on the subject it appears to me that the most succinct and practical statement of the principles which governs the Common Law Courts in the exercise of their jurisdiction when dealing with a Statute of Limitations, is set out by Scruton L.J. in the case of *Mabro v. Eagle Star and British Dominion Insurance Co.*<sup>1</sup> where he said this:

In my experience the Court has always refused to allow a party or a cause of action to be added, where if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute.

An examination of the contract of purchase and sale of the malt in question, of which the shipment on the *Tyne-mouth* was but a part, discloses that some 60,000 bushels were sold by the plaintiff to Oland & Son Limited, Halifax, Nova Scotia, f.o.b. Port Arthur. *Prima facie* in f.o.b. contracts, the general rule appears to be that the risk passes on the shipment of the goods, that is to say, as soon as they are delivered to the carrier. Admittedly there are circumstances which prevent the passage of ownership from the vendor to the purchaser at this point, but I am not able to say from the evidence before me whether any exists in this case or not.

P.S. Atiyah in his book "The Sale of Goods" in Chapter 19, Transfer of Property and Risk in Export Sales says at page 123 under the sub-heading F.O.B. Contracts, (he is of course dealing with the Act in the United Kingdom):

<sup>1</sup> [1932] 1 K.B. 485 at 487.

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In f.o.b. contracts the general rule is that the risk passes on shipment of the goods, that is to say, as soon as they are over the ship's rail. Although the risk usually passes with the property, the risk may well pass before the property in f.o.b. contracts. Thus if the goods are unascertained, and are shipped together with other consignments no property can pass until the goods are specifically appropriated to the particular contract, but the risk passes nonetheless on shipment. Moreover, even when the goods are specifically appropriated to the contract the property may not pass because there is a contrary intention within the meaning of Section 18, or because the appropriation is not unconditional. Thus if the seller reserves the right of disposal by taking the bill of lading in his own name Sect. 19(1) and (2) come into operation to delay the passing of the property. Sect. 19(1) has already been set out above. Sect. 19(2) provides—

“Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.”

In such a case the property does not pass until the bill of lading is transferred to the buyer.

Further he says:

Despite the fact that the Court may easily be driven to a contrary conclusion it may be said that in f.o.b. contracts the general rule is that property and risk pass together on the shipment of the goods.

In this case as I have already indicated, the bill of lading was taken by Canada Malting Co. Limited as agent and forwarder for account and at the risk of whom it may concern, on board the vessel S.S. *Tynemouth* and the stipulation was that the property herein described was to be delivered as agreed herein in like order and condition to the order of Oland & Son Limited, or their assigns at Halifax, Nova Scotia.

I think it may fairly be said that this bill of lading would indicate that the present plaintiff took it acting as agent for Oland & Son Limited the purchaser of the malt. It therefore raises the question as to who the plaintiff in this action should be. The present plaintiff made the contract with the defendant ship and in that respect reference may be made to the opinion of Lord Simonds in the House of Lords in *Scruttons Ltd. v. Midland Silicones Ltd.*<sup>1</sup> The appellants were Scruttons Ltd. and Midland Silicones Ltd. were the respondents. At page 467 Viscount Simonds, after noting that it was argued that the carrier had purported to contract for the benefit of the stevedores and it was argued that if they had done so, the stevedores could enforce the contract Lord Simonds observed:

<sup>1</sup> [1962] A.C. 446.

Learned counsel for the respondents met it, as they had successfully done in the courts below, by asserting a principle which is, I suppose, as well established as any in our law, a "fundamental" principle, as Lord Haldane called it in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*, [1915] A.C. 847, 853; 31 T.L.R. 399, H.L. an "elementary" principle, as it has been called times without number, that only a person who is a party to a contract can sue upon it. "Our law", said Lord Haldane, "knows nothing of a jus quaesitum tertio arising by way of contract". Learned counsel for the respondents claimed that this was the orthodox view and asked your Lordships to reject any proposition that impinged upon it. To that invitation I readily respond. For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament. Therefore I reject the argument for the appellants under this head and invite your Lordships to say that certain statements which appear to support it in recent cases such as *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 A11 E.R. 179 C.A. and *White v. John Warwick & Co. Ltd.* (1953) 1 W.L.R. 1285; [1953] 2 A11 E.R. 1021, C.A. must be rejected. If the principle of jus quaesitum tertio is to be introduced into our law it must be done by Parliament after a due consideration of its merits and demerits. I should not be prepared to give it my support without a greater knowledge than I at present possess of its operation in other systems of law.

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Dealing with the problem before me I venture to quote a dissenting judgment of my brother MacKay in 1962 in the case of *Board of Commissioners of Police of Corporation of Township of London v. Western Freight Lines Ltd. and Ulch*<sup>1</sup>. While in this case MacKay J.A. was the dissentient judge the case on which he relied has I think some bearing on the matters before me and I quote his judgment and the long quotation from the case of *Robinson v. Unicos* beginning at page 953.

As was pointed out in the case of *Robinson et al. v. Unicos Property Corp. Ltd.* [1962] 2 All E.R. 24, the rule that amendments will not be permitted if a statute of limitations has intervened, is not a rule applying generally to all amendments. At pp. 25-6 of the Robinson case Holroyd Pearce, L.J. said:

"... the defendant relies on the well-known words of Lord Esher, M.R. in *Weldon v. Neal* (1887) 19 Q.B.D. 394 at p. 395, where he said:

'We must act on the settled rules of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allotted setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be

<sup>1</sup> [1962] O.R. 948.

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barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.'

Those words were used in a case where the plaintiff had brought a slander action, had been non-suited, had then obtained from the Court of Appeal an order for a new trial, and then sought to amend by setting up false imprisonment, assault and other causes of action. It was, therefore, a clear case where the plaintiff was trying to set up not only a new cause of action but several new causes of action. Counsel for the defendant then referred us to *Cook v. Gill*, (1873), L.R. 8 C.P. 107 at p. 116, where Brett J. said:

"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse.'

He contends that it was in that sense that Lord Esher M.R. said that no amendment could be allowed setting up a cause of action. If that argument is right, it follows that no material fact could ever be amended or added after the period of limitation had expired. Such a narrow meaning was certainly not put on Lord Esher's words in such cases as *Collins v. Hertfordshire County Council*, [1947] 1 All E.R. 633; [1947] K.B. 598 and *Dornan v. J. W. Ellis & Co. Ltd.*, [1962] 1 All E.R. 303.

In my view the dictum of Lord Esher was not intended to lay down a rule that no material averment could ever be amended or added to after the period of limitation had expired. When he said 'a cause of action', he was, I think, referring to what is popularly known as a cause of action, namely a claim made on a certain basis. By 'a new cause of action', he meant a new claim made on a new basis."

In the case at Bar I am only precluded from making the amendment if by doing so I deprive the defendants of some legal defence which they now have, or if I permit the plaintiff to set up, by the addition of Oland & Son Limited, a new cause of action. Examining this matter I am not convinced that if the amendment is made as asked either of these things occur.

To begin with the bill of lading was entered into by the present plaintiff as an agent and the only person for whom it could be an agent in the circumstances of this case is Oland & Son Limited to whom the goods were being consigned. That is quite clear from the material before me.

From a very short time after the cargo had been delivered in a damaged condition at Halifax the defendants knew that a claim was being asserted against them in connection with this shipment of malt and the addition of Oland & Son Limited as plaintiff is merely to add and bring before the court the real principal in the case, for

whom the present plaintiff acted as agent. In doing so it was the contracting party and I think it advisable that it should continue in the case because of that. In my opinion I am not depriving the defendants of any real defence they have to this action, nor am I setting up any new cause of action. It is precisely the same cause of action which has existed since the writ was issued.

In doing all this I am also conscious of the fact that the Limitations Section with which I am dealing is one contained in the Hague Rules and in that respect I would also like to again refer to the judgment of Viscount Simonds in the case of *Scruttons Ltd. and Midland Silicones Ltd.* to which I have already referred. At page 471 he said:

In the consideration of this case I have not yet mentioned a matter of real importance. It is not surprising that the questions in issue in this case should have arisen in other jurisdictions where the common law is administered, and where the Hague Rules have been embodied in the municipal law. It is (to put it no higher) very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should, after protracted negotiations, reach agreement, as in the matter of the Hague Rules and that their several courts should then disagree as to the meaning of what they appeared to agree upon: see *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.* [1961] A.C. 807; [1961] 2 W.L.R. 278; [1961] 1 All E.R. 495, H.L. and cases there cited. It is therefore gratifying to find that the Supreme Court of the United States in the recent case of *Robert C. Herd & Co. Inc. v. Krawill Machinery Corporation*, (1959) 359 U.S. 297; [1959] 1 Lloyd's Rep. 305, not only unanimously adopted the meaning of the word "carrier" in the relevant Act, which I invite your Lordships to adopt, but also expressed the view that the Elder, Dempster decision [1924] A.C. 522 did not decide what is claimed for it by the appellants.

In respect of the matters before me I was referred to the decision of *Firestone Plantations Company v. United States of America*<sup>1</sup>. This is a judgment of the District Judge, Wilkin and at page 747 his judgment, which is quite brief, may be set out in full. It is as follows:

The motion of The Firestone Tire & Rubber Company for leave to intervene is sustained. Libellant had a right to file libel; consignor may sue for benefit of consignee. *The City of Brunswick (D. Mass)* (1934) A.M.C. 552, 6 F. Supp. 597; *Aunt Jemina Mills Co. vs. Belge (SDNY)*, (1928) A.M.C. 1635, 38 F. (2d) 398; *Northern Commercial Co. vs. Lindblom* (9CCA), 162 Fed. 250. Consignee's interest entitles it to participate. The running of the statute of limitations was stopped by the filing of the libel and therefore did not run against the motion or petition to intervene. *Holmes vs. City of New York* (2CCA), 1929 A.M.C. 216, 30 F. (2d) 366; *U.S. vs. Middleton* (E.D.S.C.), 1923 A.M.C. 148, 649; (4CCA), 1925 A.M.C. 85 3 F. (2d) 384.

<sup>1</sup> (1945) A.M.C. 746.

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Certain of the authorities relied on would seem to indicate principles of law that are somewhat at variance with those obtaining in this jurisdiction, but in view of Lord Simonds' remarks it is satisfactory that one has been able to interpret the limitations section of the Hague Rules in essentially the same manner.

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There will therefore be an order *nunc pro tunc* as of the issue of the writ permitting Oland & Son Limited to be added as a party plaintiff. If the plaintiffs should see fit to amend their statement of claim then the defendants should have the usual time under the rules to amend their statement of defence. The plaintiffs should have the usual time to make Reply. As the new plaintiff is out of the jurisdiction it may be that some question of security for costs will arise and if so, such matter may be referred to The Registrar. This is in my opinion an order that should be made on terms. They are, that the new plaintiff should agree that at the trial they will not be entitled to any further costs against the defendants than the present plaintiff would have been entitled to if they had gone to trial and had succeeded in the action they have brought. In other words, the costs are not to be increased by reason of the adding of the new plaintiff. There will be one set of costs for both plaintiffs. Costs of this motion to defendant in the cause.

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BETWEEN:

HOFFMANN-LA ROCHE LIMITED . . . APPELLANT;

AND

BELL - CRAIG PHARMACEUTI-  
CAL DIVISION OF L. D. CRAIG  
LIMITED . . . . .

RESPONDENT.

*Patents—Compulsory licence—Hearing before Commissioner of Patents—Good reason not to grant compulsory licence—Duty of Commissioner on application for compulsory licence—Objective of compulsory licence provision of Patent Act—Commissioner having regard to own knowledge when considering effect and weight of technical or professional evidence—Determination of amount of royalty payable under compulsory licence—Royalty commensurate with maintenance of research incentive and importance of both process and substance—Patent Act, R.S.C. 1952, c. 203, s. 41(3).*

This is an appeal by the owner by assignment of the Canadian patent in respect of an invention for the preparation of the drug, chlordiazepoxide or chlordiazepoxide hydrochloride, sold by it under the trade name Librium, from an order of the Commissioner of Patents made pursuant to s. 41(3) of the *Patent Act*, granting to the respondent a licence to use the invention.

Prior to the making of the order by the Commissioner of Patents both parties filed affidavit evidence with the Commissioner and a hearing was held before him at which both parties adduced *viva voce* and documentary evidence and submitted argument.

The appellant now appeals against the granting of the licence to the respondent, against the royalty fixed by the Commissioner and against other terms of the licence granted by the Commissioner.

*Held:* That even if a reason put forward by the appellant on this appeal were one which, as a matter of law, is a "good reason" why the Commissioner should not have granted the licence, the Commissioner was not manifestly wrong in failing to see it as a good reason when the appellant did not, when it was before the Commissioner, present that reason to the Commissioner for consideration.

2. That the Commissioner cannot be regarded as having been manifestly wrong in not having seen a "good reason" which was not sufficiently obvious to prompt the appellant to raise it before the Commissioner.
3. That evidence that was adduced in the proceedings before the Commissioner with regard to one issue cannot be regarded as having established a fact to which neither the Commissioner nor the parties addressed their minds at the time of the hearing.
4. That the objective of s. 41(3) of the *Patent Act* is to bring about competition.
5. That there is no duty imposed upon the Commissioner by s. 41(3) of the *Patent Act*, when he is considering whether there is "good reason" to reject an application for a compulsory licence, to conduct an investigation as to whether the prices at which the patentee has been selling the patented product are in fact "reasonable".
6. That the Commissioner is entitled, in considering the effect and weight of technical or professional evidence, to take advantage of his general knowledge of the particular subject matter acquired throughout the years of his experience as Commissioner and also, indeed, to have regard to his own professional knowledge as a chemical engineer.
7. That the statutory rule set out in s. 41(3) of the *Patent Act* to be applied in determining the amount of royalty will result in a royalty less than it otherwise would be if the only rule to be applied were the rule in s. 19 of the *Patent Act*. The general tendency of the rule must be to require that the Commissioner have regard to the desirability of making the royalty or other consideration less than market price but he must not make it so low that it is not consistent with giving to the inventor due reward for the research leading to the invention.
8. That on the one hand there is a ceiling on the royalty or other consideration to be determined by reference to the theoretical market place and, on the other hand, there is a floor, beneath which it must not be reduced from that ceiling, in that it is not to be reduced from market value to an amount that is not "commensuate with the maintenance of research incentive the importance of both process and substance".

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9. That s. 41(3) of the *Patent Act* does not contemplate or require that the patentee is entitled through payment of royalty by the licensee, in effect, to that proportion of its wholesale selling price of the sales that it will lose by virtue of the compulsory licence that medical information costs and research costs are of the total sale price of all its sales of patented drugs.
10. That in fixing the royalty or other consideration under s. 41(3) it is not right to attribute, with some show of mathematical precision, a part of research cost, or of other costs, to each part of the product manufactured pursuant to a particular invention and to conclude that, as a matter of law, that is the royalty that must be awarded.
12. That the Commissioner erred in thinking, when considering the amount of royalty to be paid under the licence, that the finished material in dosage form, packaged and labelled, was outside the scope of the patent and immaterial to him because it is precisely the same product as it is when in bulk except that it has been packaged so as to be in the form in which it has value as a merchantable commodity.
13. That the appeal is dismissed with the exception of a change in the method of calculation of the royalty to be paid.
14. That the appellant will pay to the respondent 90 per cent of its costs of the appeal.

APPEAL from an order of the Commissioner of Patents.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

*Gordon F. Henderson, Q.C.*, and *R. G. McClenahan* for appellant.

*I. Goldsmith* for respondent.

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

JACKETT P. now (March 8, 1965) delivered the following judgment:

This is an appeal from an order of the Commissioner of Patents, made pursuant to subsection (3) of section 41 of the *Patent Act*, R. S. C. 1952, chapter 203, granting to the respondent a licence for the use of an invention for the preparation of a drug, chlordiazepoxide or chlordiazepoxide hydrochloride, which is used as a tranquillizer and is sold by the appellant under the trade name Librium.

The appellant is a company that carries on business in Canada selling drugs and vitamins. A substantial part of its drug business consists in the sale of Librium, which it imports in bulk, capsulates, packages and sells in Canada.

The appellant is one of a group of related companies, hereinafter referred to as the "La Roche group". The other members of the La Roche group carry on business in other countries. Some of the other companies in the group carry on research activities in the United States of America, the United Kingdom and Switzerland. Librium is manufactured by members of the group in the United States and Switzerland and is distributed throughout the world. The appellant purchases it from members of the group who so manufacture it. As far as the evidence shows, each member of the group carries on business on its own behalf.

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The appellant is the owner of a patent (No. 612,497) under the *Patent Act*, R. S. C. 1952, chapter 203, in respect of the invention in question, apparently being the assignee of the Canadian patent rights from the inventor, Leo H. Sternbach, of Upper Montclair, New Jersey, U.S.A.

The relevant portion of section 41 of the *Patent Act* reads as follows:

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

(4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

The first branch of the appellant's appeal is against the granting of the licence to the respondent. The second branch of the appeal is against the royalty fixed by the Commissioner. The third branch relates to other terms of the licence granted by the Commissioner.

I had occasion recently, in *Aktiebolaget Astra, Apotekarnes Kemiska Fabriker v. Novocol Chemical Manufacturing Company of Canada Limited*<sup>1</sup>, to consider the Court's function on such an appeal and I do not propose to repeat here what I said in that case.

A proper appreciation of the submissions of the parties on the first branch of the appeal requires a consideration of

<sup>1</sup> [1964] Ex. C.R. 955.

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the proceedings leading up to the Commissioner's decision and it is necessary, therefore, to review such proceedings in some detail. My review of those proceedings as is follows:

(1) APPLICATION BY RESPONDENT FOR COMPULSORY LICENCE:

On August 17, 1962, the respondent filed an application with the Commissioner of Patents for a compulsory licence for the use of the invention disclosed by Patent No. 612,497 for the purpose of the preparation or production of medicinal and pharmaceutical products containing or incorporating chlordiazepoxide. The application states that the respondent was established in 1945, since which time it had carried on the business of a manufacturer and distributor throughout Canada of ethical pharmaceutical products. It gives information concerning the respondent's premises and its staff and states that it had ample facilities for the manufacture of pharmaceutical products. The application states that the respondent at all times maintained strict controls and high standards of purity fully complying with the *Food and Drug Act* and that the respondent's premises and facilities are periodically inspected by officials of the National Health and Welfare Department. The application states that the respondent's average turnover during the previous five years had been \$345,000 and that its average profits for that period before taxes had amounted to \$28,300 annually. After giving certain information concerning the patented product and process, the application states that the respondent company had a guaranteed source of supply of the "starting material" necessary for the manufacture of the patented product and that the respondent intended to manufacture the patented product at its premises by the method of manufacture described in the patent. The application gives certain information concerning the process of manufacture as set out in the patent and states that the steps referred to are standard procedures well within the capacity and ability of the respondent's facilities and personnel.

The application states that the respondent expected to be able to manufacture chlordiazepoxide at a cost of \$85 per kilo and to market the substance in tablets or similar form to be sold to the public at prices specified in the application, for example, 10 mg. capsules or tablets

at \$7.75 per hundred. The application states that, to the best of the respondent's information and belief, the appellant is the only supplier of chlordiazepoxide in Canada, that the appellant sells such compounds under the trade name Librium at specified prices, for example, 10 mg. capsules at \$12 per hundred and that, accordingly, if a licence were granted to the respondent, the latter would be in a position to make chlordiazepoxide available to the Canadian public at prices substantially lower than those at which it was then being sold.

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(2) COUNTERSTATEMENT FILED BY APPELLANT:

On January 25, 1963, the appellant filed with the Commissioner of Patents, a document entitled "Counter-statement".

By paragraph 2 of the Counterstatement the appellant asserted that "The public interest would not be served by granting the licence for which the Applicant has applied". Paragraphs 3 to 14, inclusive, state in detail the position of the appellant as stated in general terms in paragraph 2.

Paragraph 3 states that Librium is the first specific medication for the symptoms of anxiety and tension and that previously available medications would relieve the symptoms of anxiety and tension, but either to a lesser extent than Librium, or by also producing undesirable side effects, such as habituation or addiction. It states that Librium is light sensitive and will readily break down into derivatives if not properly controlled, that some of the derivatives are more potent than the parent compound and would cause an overdosage producing undesirable side effects, that some of the derivatives are less potent which would render the substance ineffective, and that others are "definitely toxic".

Paragraph 4 states that the applicant is not qualified to manufacture chlordiazepoxide and has neither the competence nor the facilities to reproduce the process of the patent "safely". The paragraph states that it is apparent, from the application, that the respondent did not comprehend the magnitude of the process and did not appreciate the facilities, equipment and personnel required and the hazards and risks that are involved. Paragraphs 5 to 10, inclusive, elaborate in some detail

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the appellant's reasons for alleging that the respondent is not qualified to manufacture chlordiazepoxide safely or to manufacture a product which it would be safe to put on the market from the point of view of the user.

Paragraph 11 of the Counterstatement alleges that the respondent's statements in its application concerning the prices at which the appellant sells Librium are incorrect, the suggestion concerning the prices at which chlordiazepoxide manufactured by the respondent could be marketed is misleading and that "Quality is a more important criterion of public interest than is the price of a drug".

Paragraph 12 of the Counterstatement says that, in addition to the issues of "competence, facilities, public interest and public safety" there is a further issue involving the reputation of a most beneficial product. It states that if a product of inferior quality is produced by the respondent, the reputation of "Librium" could be destroyed and, by virtue of a loss of reputation, a very valuable drug may be denied to the public and that, in addition, the reputation of the appellant is in issue in that "Librium" is now associated in the public mind with the appellant and any inferior product would have a detrimental effect upon the reputation of the appellant.

In paragraph 13, the appellant comes back to the question of the respondent's ability to manufacture a product which it is safe to market. In this paragraph, the appellant says in effect that the appellant makes its own starting material and therefore is in a position to be sure that its ultimate product will be satisfactory and suggests that the respondent cannot be sure, if it uses a starting material acquired from someone else, that there will not be impurities in it which "may react with other ingredients of the process causing other toxic by-products in the final substance".

Paragraph 14 of the Counterstatement refers to paragraph 17 of the application where the respondent states that it expected to be able to manufacture chlordiazepoxide at a cost of \$85 per kilo and states that the appellant, from its own knowledge, knows that the manufacture of the starting material alone will cost in the neighbourhood of \$85 per kilo if properly made.

## (3) REPLY:

On March 26, 1963, the respondent filed a document entitled "Reply", which contains the respondent's answers to some of the allegations in the Counterstatement. There is no need to review such answers for the purposes of this appeal. The Counterstatement contains, in addition, a statement that the respondent had, then, for the first time, obtained a firm quotation for the starting material and that, based on that quotation, its cost of manufacturing chlordiazepoxide should not exceed \$150 per kilo. (It will be remembered that the costs were estimated in the application at \$85 per kilo.)

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## (4) HEARING:

On August 21, 1963, the Commissioner of Patents gave to each of the parties an opportunity of adducing evidence and of presenting argument. The respective parties were represented before the Commissioner by the counsel who represented them on the hearing of the appeal in this Court. The parties adduced evidence by way of sworn testimony and by way of documentary exhibits. I have reviewed the transcript of the hearing before the Commissioner and it seems clear that each of the parties restricted its proof and argument to supporting the contentions in the material it had previously filed and attacking the contentions in the material previously filed by its opponent. I have been able to find no indication that either of the parties asked the Commissioner to consider any submission not set out in the documents filed before the hearing. In particular, I have not been able to see that the appellant, at any time, asked the Commissioner to make any finding on the question of "good reason" to refuse the licence other than those contemplated by the Counterstatement. I am confirmed in this view by a review of the transcript of the argument made by counsel for the appellant before the Commissioner. At pages 53-4 of the transcript of the argument, counsel for the appellant summed up the submissions he had made to that point as follows:

In relation, then, to this particular prescription drug, I submit:

- (1) The applicant is not technically qualified:
  - (a) He has not had experience in the manufacture of chemicals.
  - (b) In particular, he has not had experience in the manufacture

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of chemicals having the type of reaction which is entailed here, involving the type of material which must be handled: on the contrary, he has shown a lack of understanding of this material and a lack of competence to deal with it.

(c) He has shown that he does not have the personnel, he is not himself equipped, and he intimates that he must send his engineer over to learn—over somewhere. And, as I have said, he has no contract which would give rise to an assurance that something is going to be obtained.

In view of all this, I submit that this country ought not to be delivered to the vagaries of the Italian will. In short, he has no know-how, he has no experience, he has no personnel. I say he is not qualified.

(2) The applicant is not qualified from the point of view of facilities.

His present building is a menace to the community and I say this—and I repeat it—in Mr. Craig's presence. If he carries out this process he does it at his risk in those premises, and one can only say: Be it on his own head. I say that to carry out an explosive type of reaction such as he proposes to carry out in premises of this kind, with the volatile materials he proposes to use, and in a residential neighbourhood, is a real risk—and I am speaking in terms of the product he is seeking to produce and under the conditions contemplated.

I have no knowledge of what he is producing now. I am not criticizing what he is doing now, I repeat, because I have no knowledge of what he is doing now; I am speaking in the context of what he is asking you to allow him to do in the premises he has now, and in that context I say he would be operating not only [sic] but at his neighbour's risk as well.

Counsel then dealt with the contention that the respondent's premises and equipment were not suitable for the manufacture of the drug and, commencing at page 58, he developed his contention that the obligation to make the substance available to the public at a reasonable price must be considered in the light of the fact that the drug is a prescription drug which must be considered "in terms of risks in use". At page 59, counsel made the submission that "private rights are not to be ignored" and that if the product should lose its reputation in the market then the long term benefits from the drug may be lost and, on page 60, he submitted that, as the drug was still in the formative stage, this worked "in favour of control from a single source". On pages 60-1, he justified the appellant's refusal to make public its "controls", and on pages 62-3, he came back to the adequacy of the respondent's organization and qualifications. At page 63, he turned to the question of royalty.

On July 6, 1964, the Commissioner delivered his decision. He dealt with the question as to whether or not a compulsory licence should be granted to the respondent in that part of his decision which reads as follows:

The application has been opposed by the patentee on the grounds that the applicant is not technically qualified, that he does not have the proper facilities in the way of housing and equipment and that the use of the invention involves the handling of extremely dangerous materials.

I have heard many such cases before and it is always a common ground of attack by the patentee to dwell on the lack of competency of the applicant and it is my duty to analyze the facts very carefully in order to arrive at a decision which is in conformity with the true intent of the legislation.

In this case it has been argued that many volatile, explosive and corrosive substances are involved and that a great many things concerning the process are known by the patentee which are not known by the applicant.

That the patentee, who has had several years of experience in dealing with the process, knows a great deal more about it than any applicant for licence, is obvious. It cannot normally be otherwise; however, if an applicant has to know nearly as much as the patentee concerning a patent, the purpose of the licencing provisions would be defeated.

Section 36 of the Patent Act requires that an applicant shall fully describe his invention in such full clear, concise and exact terms as to enable any person skilled in the art to which it appertains, or to which it is most closely connected, to make, construct, compound or use it. I must take it for granted that the patentee has fulfilled the requirements of the Act in describing his invention and he cannot at this time come and say, Oh no! with the specification alone you cannot do it. It may be true that the patentee has since learned much about the process, but what he has learned can also be learned by others. Reference could appropriately be made here to the statement of Thorson, P. in the Exchequer Court in the case of *Minerals Separation North American Corporation v. Noranda Mines Limited*, [1947] Ex. C.R. 306 at pages 316 and 317:

Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor, and with respect to each the description must be correct and full. The purpose underlying this requirement is that when the period of monopoly has expired the public will be able, having only the specification, to make the same successful use of the invention as the inventor could at the time of his application. The description must be correct; this means that it must be both clear and accurate. It must be free from avoidable obscurity or ambiguity and be as simple and distinct as the difficulty of description permits. It must not contain erroneous or misleading statements calculated to deceive or mislead the persons to whom the specification is addressed and render it difficult for them without trial and experiment to comprehend in what manner the invention is to be performed. It must not, for example, direct the use of alternative methods of putting it into effect if only one is practicable, even if persons skilled in the art would be likely to choose the practicable method. The description of the invention must also be full; this means that its ambit must be defined, for nothing that has not been described may be validly claimed. The description must also give all information that

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is necessary for successful operation or use of the invention, without leaving such result to the chance of successful experiment, and if warnings are required in order to avert failure such warnings must be given. Moreover, the inventor must act *uberrima fide* and give all information known to him that will enable the invention to be carried out to its best effect as contemplated by him.

I have studied the specification very closely and I have not detected any particular difficulties in carrying out the process of the claims. The reaction is not carried out at any high temperatures or high pressures. It is a heterogeneous reaction which, I admit, may present some problems, but nothing in the specification points out to any unknown necessary procedure of control. The patentee has stressed the dangers involved in the handling of the chemical substances which are used in the process. Out of eight such substances said to be so dangerous I say that seven of them are used in a great many synthetic organic reactions as reactants, solvents, agents of precipitation or crystallizing media and are found in mostly all research laboratories and manufacturing plants of organic chemicals. Most organic chemists are thoroughly familiar with such common substances as methanol, ethanol, acetone, ether, petroleum ether, methylene chloride and methyl amine. Dealing with quinazoline, I have not found in the chemical literature any warning concerning such severe skin irritating properties as ascribed to it by the patentee. Considering the statements made by a witness for the patentee concerning the dangers of the other substances mentioned above and the careful way the statements were made, while in essence they were true, they would lead a person who is not conversant with chemistry to a very distorted impression of the behavior of such substances. In the case of quinazoline, the irritating properties, which I do not deny, may also have been slightly overstressed. A great many organic chemical substances are fluffy and dusty and can produce irritation of the skin or of the mucous membranes when people come in contact with them or inhale them. I believe that any chemist with a reasonable knowledge of organic chemistry and observing the rules of safety is qualified to work the process of the claims. There may be a considerable amount of know-how to be learned, but this can be acquired by a newcomer, the same as it was acquired by the patentee.

The applicant has in his employ one chemical engineer one pharmacist, three chemists and one bacteriologist. With such a staff, I have no doubt that the process described in the patent can be well understood and that the necessary precautions can be taken particularly in view of the severe warnings given by the patentee during these proceedings.

Objection has also been taken to the fact that the applicant does not have the proper plant and equipment. Here again, it is not fair to expect an applicant to spend considerable sums of money before he knows whether he is going to have a licence or not.

In view of the above considerations I find that a licence should be granted to the applicant.

The Commissioner then dealt with the question of royalty in a part of his reasons to which I will refer at a later stage of these reasons.

By notice of appeal dated July 21, 1964, supplemented by a further notice of appeal dated October 15, 1964, the appellant appealed from the Commissioner's decision.

On August 11, 1964, an application was made to this Court to stay proceedings in relation to the Commissioner's decision, the purpose of the application being to obtain from this Court an order postponing the effective date of the compulsory licence pending disposition of the appeal. I dismissed that application<sup>1</sup> and gave the following reasons for so doing:

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The only ground, of those that have been urged upon me, upon which I would consider granting a stay, if I have authority to grant a stay, is that the Court might conclude, upon the disposition of the appeal, that the Commissioner of Patents erred in *not* forming the opinion that the risk of danger to the public inherent in permitting the respondent to manufacture the patented substance was good reason for refusing the licence.

In that connection, I refer to a statement by Thurlow J. in *Hoffman-La Roche Limited v. Delmar Chemicals Limited* (27 Fox P.C. 178; [1965] 1 Ex. C.R. 611), concerning the duty of the Commissioner in dealing with an application under ss. (3) of s. 41, as follows:

But, as I read the section, neither the ability of the particular applicant to produce the food or medicine safely nor his ability to produce a safe food or medicine is a matter which the Commissioner is concerned to ensure.

Having regard to that statement, with which I agree, I cannot conclude that there is a probability that this Court will dispose of this appeal upon the ground that the Commissioner erred in *not* forming the opinion that the risk of danger to the public inherent in permitting the respondent to manufacture the patented substance was good reason for refusing the licence.

Furthermore, I am not satisfied that this Court, in an appeal under ss. (3) of s. 41, has any authority to affect the operation of the Commissioner's order prior to disposition of the appeal.

The appellant applied to a judge of the Supreme Court of Canada for leave to appeal from that decision, but such leave was refused.

On the argument of the branch of the appeal having to do with the Commissioner's decision to grant the licence, counsel for the appellant indicated that the appellant was not abandoning the public safety point but, in view of the opinion so expressed on August 11, he would not make submissions in this Court with regard to that point.

On the branch of the appeal having to do with the Commissioner's decision to grant a licence, while it was put in various ways from time to time during the course of a long argument, the appellant, in effect, based the major portion of its attack on one principal ground. There was in addition one relatively minor ground for the attack that was quite separate from that principal ground.

<sup>1</sup> [1965] 1 Ex. C.R. 179

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The principal ground can, I think, be summarized as follows:

- (a) it is admitted that section 41(3) requires the Commissioner to grant the licence applied for by the respondent "unless he sees good reason to the contrary",
- (b) the purpose of the provision is to ensure that the medicine is made available to the public at the lowest "possible" price,
- (c) the lowest possible price at which the medicine can be made available to the public is a price that is reasonable having regard to all the necessary costs of discovering, producing and making available to the public, drugs of this particular kind,
- (d) the appellant did, by its evidence before the Commissioner, establish that the drug was already being made available to the public at such a reasonable price, which is therefore "the lowest possible price"<sup>1</sup>, and there was no evidence upon which the Commissioner could have found that there was a likelihood that the respondent would be able to make the drug available to the public at a lower price,
- (e) it having been established that the drug is already being made available to the public at the lowest possible price, it follows that the grant of a compulsory licence will serve no useful purpose in this particular case,
- (f) the grant of a licence to a person such as the respondent to manufacture and distribute the drug in question will be contrary to the public interest

<sup>1</sup> It was accepted for purposes of the hearing before the Commissioner that the respondent could produce chlordiazepoxide in bulk (variously referred to as the "crude", "basic" or "active" material) for \$150 per kilo and that there would be an additional cost of \$250 per kilo for capsulating and of \$60 per kilo for bottling and packaging, making a total cost for putting the material in usable dosage form of \$460 per kilo. It was also common ground that, at the price of \$7.75 per 100 of the 10 mg. dosage size, at which the respondent claimed it could enable the product to be supplied to the public, the respondent would net about \$3,500 per kilo after allowing for retailer's margin, wholesaler's margin and taxes. At the appellant's suggested list price to the public of \$12 per 100 of the same size, making the same allowances, the appellant netted about \$5,405 per kilo but its average price per kilo was \$4,600. The difference between the cost of \$460 per kilo and the appellant's realization of \$4,600 per kilo appeared, on the evidence, if it could be taken to give a complete and balanced picture, to be no more than adequate to cover costs of research and medical information, other necessary overhead expenses and a modest profit.

- (i) because it will deprive the appellant of the monopoly rights essential to its recovering the costs of discovering such new and useful drugs and making them available to the public and will thus tend to deprive the public of the possibility of similar discoveries of new and useful drugs in the future, and
- (ii) because it will deprive the public of the advantages which flow from the appellant's programme of gathering and distributing medical information with reference to the drug, which is still in a formative stage, which programme can only be carried on with real advantage to the public if the appellant is the sole manufacturer of the drug so that it can ensure that all of the drug distributed to the public is maintained in accordance with a constant standard of purity;
- (g) the Commissioner should have seen that the facts outlined above constituted good reason for not granting the licence pursuant to the appellant's application and he was manifestly wrong in not seeing it.

Put slightly differently, but amounting to the same thing, the appellant contended that

- (a) on the one hand, the purpose of providing for a compulsory licence is to ensure that the particular drug is sold at a reasonable price and this reason for granting the licence was negatived once it was shown that the appellant sold the drug at a reasonable price, and
- (b) on the other hand, it is in the public interest that these new drugs—referred to in the business as “winners”—be discovered and, therefore, that the essential research and medical information be paid for, and it is also in the public interest that the full potentialities of the drug be developed and placed at the service of the public and these objectives can only be achieved by leaving to the patentee the full scope of his monopoly so that he may recover such essential costs and have the required conditions of guaranteed standards of purity of the drug for its development by the medical information services:

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and the Commissioner was manifestly wrong in not having recognized such obvious facts and conclusions as being "good reason" for not granting the licence.

There are many possible answers to the appellant's complex submission, which I have endeavoured to summarize as fairly as I can. It will be sufficient for my purpose to indicate three of them, each of which I am satisfied is an adequate answer, and to indicate that I am not to be taken otherwise to have accepted any part of the submission.

The first answer to this submission, in my view, is that, even if the reason put forward now were one which, as a matter of law, is a "good reason", the Commissioner was not manifestly wrong in failing to see it as a good reason when the appellant did not, when it was before the Commissioner, present that reason to the Commissioner for consideration<sup>1</sup>. It has to be recognized that all the propositions outlined in the paragraphs I have lettered (b) to (f) above have to be taken together to constitute a single "good reason" which, in the appellant's submission, the Commissioner should have seen. The appellant contended, but without too much assurance, that it had presented this to the Commissioner as a "good reason". Alternatively, it contended that, whether or not a submission had been made to the Commissioner with regard thereto, the Commissioner was manifestly wrong in not having seen it himself because it was to be gleaned from an examination of the evidence presented to the Commissioner. In my view, the Commissioner cannot be regarded as having been manifestly wrong in not having seen a "good reason" which was not sufficiently obvious to prompt the appellant to raise it before the Commissioner.

My second reason for rejecting this submission on behalf of the appellant is that I am not satisfied that the facts which, according to the submission, were clearly established by the evidence were, in fact, so clearly established or, indeed, established at all. For example, no issue was raised by the respondent's Application or the appellant's Counter-statement as to whether the appellant's prices were reasonable and the evidence adduced before the Commissioner was not therefore adduced with regard to such an issue. I cannot

<sup>1</sup> There is some doubt in my mind whether a situation could ever arise where the Commissioner would be wrong in law in not seeing a particular reason as a "good reason" providing he has complied with the rules of natural justice.

agree that evidence that was adduced with regard to some other issue can be regarded as having established a fact to which, as far as I can ascertain, neither the Commissioner nor the parties addressed their minds at the time of the hearing. If such evidence had been given for the expressed purpose of establishing the facts upon which the appellant now relies, it might have been supplemented or qualified by cross-examination or by other evidence. Furthermore, there are many attacks that could be made upon the evidence as it stands from the point of view of whether it establishes that the price at which the appellant sells its product in Canada is the "lowest possible price" and, therefore, a reasonable price. The very fact that, according to the evidence, the drug appears to have been sold by the La Roche group at different prices in different countries and, indeed, at different prices in Canada, and that no evidence was adduced as to actual prices, but only as to averages, raises some question as to whether it is being sold in Canada at the "lowest possible price". As suggested by the respondent, it would have been interesting to know the group's prices in countries where it has no patent for the drug and to have been able to compare such prices with prices in Canada. The more fundamental difficulty with the evidence, as I understand the case that the appellant now tries to make out, is the assumption that, in respect of certain matters, the world costs of the La Roche group should be spread evenly over all the patented drugs sold by all the companies forming that group for the purpose of determining what is a "reasonable" price at which to sell in Canada and that other costs incurred by the appellant company itself in Canada should be spread evenly over the drugs sold by the appellant in Canada for the same purpose. Even where a tribunal is set up to regulate the prices of a statutory monopoly, such as a transportation company, it is not usual, and certainly not legally necessary, to determine "reasonable" prices in such an arithmetical way. I am not satisfied that, as a matter of law, such a formula must be applied to determine "reasonable" prices for the sale of goods under a monopoly conferred by a patent and this, in effect, is what the appellant contends. In fact, of course, the appellant does not recover its research and medical information costs evenly from all its sales. It sells the drug in the dosage form at prices that

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vary as widely as from \$3,450 per kilo, at which price it sells to hospitals, to \$5,405 per kilo, which appears to have been its ordinary wholesale price in Canada.

My third reason for rejecting the appellant's main submission in support of its appeal against the granting of the licence is that, in my view, it is based upon a fundamental misconception as to the legislative intention embodied in section 41(3). The appellant's contention, as I understood it, is that the fundamental, if not the sole, objective of section 41(3) is to ensure that the particular product is sold at a reasonable price or, "at the lowest possible price" which, according to his interpretation, is the reasonable price having regard to the costs of the patentee. He deduces from this that it is the Commissioner's duty under the section to determine whether or not the patentee's prices are reasonable because that must, as a matter of law, be a very important factor in determining whether there is "good reason" for rejecting the application for a licence. In my view, the objective of the provision is to bring about competition. On balance, in most fields, competition is regarded by Parliament as being in the public interest because competition regulates prices in the public interest and also because competition tends to bring about greater efficiency, better service, and further research. The monopoly granted to an inventor is an exception to this general principle in our law. Section 41(3) was passed because, in the field to which it applies, "the specific public interest in free competition" was deemed to be more important than the maintenance of the patentee's monopoly rights. Compare *Howard Smith Paper Mills, Limited v. The Queen*<sup>1</sup>. Just as it has been consistently held that it is no answer to a charge of a breach of the Canadian laws against combines to show that, in a particular case, the prices at which the goods have been sold have been "reasonable" so, in my view, there is no duty imposed upon the Commissioner by subsection (3) of section 41 of the *Patent Act*, when he is considering whether there is "good reason" to reject an application for a compulsory licence, to conduct an investigation as to whether the prices at which the patentee has been selling the patented product are in fact "reasonable".

For the above reasons, I reject what I have referred to as the appellant's "principal" attack on the Commissioner's decision to grant a licence.

<sup>1</sup> [1957] S.C.R. 403.

The other ground upon which the appellant attacks the Commissioner's decision to grant a licence is that the Commissioner, in considering the submissions that were made to him by the appellant with regard to the ability of the respondent to make the drug in question, went outside the evidence that was before him and relied upon material which the appellant was given no opportunity to answer<sup>1</sup>. To appreciate the weight that should be given to this submission, reference should be made to the whole of the passage in the Commissioner's reasons in which is found the particular statement upon which the appellant founds its objection. That passage reads as follows:

I have studied the specification very closely and I have not detected any particular difficulties in carrying out the process of the claims. The reaction is not carried out at any high temperatures or high pressures. It is a heterogeneous reaction which, I admit, may present some problems, but nothing in the specification points out to any unknown necessary procedure of control. The patentee has stressed the dangers involved in the handling of the chemical substances which are used in the process. Out of eight such substances said to be so dangerous I say that seven of them are used in a great many synthetic organic reactions as reactants, solvents, agents of precipitation or crystallizing media and are found in mostly all research laboratories and manufacturing plants of organic chemicals. Most organic chemists are thoroughly familiar with such common substances as methanol, ethanol, acetone, ether, petroleum ether, methylene chloride and methyl amine. *Dealing with quinazoline, I have not found in the chemical literature any warning concerning such severe skin irritating properties as ascribed to it by the patentee.* Considering the statements made by a witness for the patentee concerning the dangers of the other substances mentioned above and the careful way the statements were made, while in essence they were true, they would lead a person who is not conversant with chemistry to a very distorted impression of the behaviour of such substances. In the case of quinazoline, the irritating properties, which I do not deny, may also have been slightly overstressed. A great many organic chemical substances are fluffy and dusty and can produce irritation of the skin or of the mucous membranes when people come in contact with them or inhale them. I believe that any chemist with a reasonable knowledge of organic chemistry and observing the rules of safety is qualified to work the process of the claims. (The emphasis is mine.)

The appellant's objection to the Commissioner's treatment of this subject is related particularly to the words "Dealing with quinazoline, I have not found in the chemical literature any warning concerning such severe skin irritating

<sup>1</sup> As this attack relates to the portion of the Commissioner's reasons where he was dealing with the "public safety" point, concerning which the appellant made no submission in this Court, I would be bound to reject it, even if it were otherwise sound, because, in my view, the Commissioner should have, and would have, rejected "public safety" as a "good reason" regardless of his finding on the facts.

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properties as ascribed to it by the patentee". In support of his objection to the fact that the Commissioner resorted to chemical literature, the appellant relied upon *Hughes v. Lancaster's Steam Coal Collieries*<sup>1</sup> per Tucker, L. J. at page 558. In that case, a compensation board had rejected evidence of an expert nature concerning the characteristics of hernia by reason of evidence received by the board in other cases and Tucker, L. J. said that "The Judge clearly went wrong, as he is not entitled to reject the uncontradicted evidence before him by reason of his preference for evidence that had been given by other witnesses in other cases . . ." This, in my view, is not the same sort of case. In this case, the Commissioner was appraising the weight to be given to the evidence which he was discussing and was not rejecting the evidence in favour of evidence which he had found outside the record. His conclusion was that "In the case of quinazoline, the irritating properties . . . may also have been slightly overstressed". There can, in my opinion, be no doubt that the Commissioner was entitled, in considering the effect and weight of technical or professional evidence, to take advantage of his general knowledge of the particular subject matter acquired throughout the years of his experience as Commissioner and also, indeed, to have regard to his own professional knowledge as a chemical engineer, which, I understand, is his profession. This is supported, in my view, by the balance of the sentence in Tucker, L. J.'s judgment, from which I have already quoted. That sentence concludes ". . . although, no doubt, he is perfectly entitled to use the knowledge that he has acquired in this class of case in order to understand and test the evidence of the witnesses who are called before him".

The appellant also attacked the Commissioner's reference to chemical literature as constituting a failure to observe the principle of natural justice which was applied by the House of Lords in *Ridge v. Baldwin*<sup>2</sup>. Possibly, the most favourable statement of the rule in question, from the point of view of the appellant, is the statement of Lord Parmoor in *De Verteuil v. Knaggs*<sup>3</sup>, where he said that the person who there had the duty of making a decision had ". . . a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may

<sup>1</sup> [1947] 2 All E.R. 556.

<sup>2</sup> [1963] 2 All E.R. 66.

<sup>3</sup> [1918] A.C. 557.

desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice". I doubt very much that this rule operates in any way in this case in favour of the appellant. In the first place, the issue in this case was whether there was "good reason" why a licence should not be granted to the respondent and the appellant was in the position of making allegations with regard thereto to the prejudice of the respondent<sup>1</sup>. In the second place, I have not been able to find any case in which the rule has been applied so as to require that the person making a complaint against someone else, or indeed the person against whom a complaint has been made, be given an opportunity of seeing and commenting on all the material ultimately placed before the officer having to make the decision. (In *De Verteuil v. Knaggs, supra*, the rule was held to have been observed by reason of the fact that the person against whom the complaint was made had been informed of the substantive allegations made against him and was given an opportunity of answering them.) In any event, in my view, the rule does not detract from the right of the tribunal to "understand and test" the evidence of the witnesses having regard to the general body of knowledge available to the tribunal concerning the technical subject to which the evidence relates.

The second branch of the appeal against the Commissioner's decision has to do with the amount of the royalty.

The sole reference to royalty in the appellant's Counter-statement was paragraph 15 which reads as follows:

If, contrary to the submission herein, a licence is granted to the applicant, the royalty paid thereon should be commensurate with the maintenance of research incentive and with the importance of both the process and the substance involved.

At the hearing before the Commissioner, the appellant put in a large volume of evidence concerning the cost of the research operations carried on by the La Roche group and relating such costs to the total volume of sales of patented drugs by those companies. Evidence was also given designed to show that this group of companies did not make unreasonable profits on its sales of patented drugs. There was also evidence establishing the importance of the drug

<sup>1</sup> It would seem that, having formed a tentative appraisal of the appellant's evidence, the Commissioner turned to the textbooks to make sure that there was nothing there to invalidate his conclusion. This process does not involve an "allegation" to the prejudice of either party.

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Librium to the general public. No evidence was offered as to the amount of royalty for which a licence would be granted by a willing patentee to a person willing to enter into a contract for such a licence. It appears, from the evidence that it is improbable that any meaningful evidence could have been found on that point.

Evidence was put in that was designed to show that the annual research costs of the La Roche group amounted to 17.8 per cent of annual sales by those companies of patented drugs and that a reasonable return on the capital invested in those research activities amounted to 7.12 per cent of such annual sales of patented drugs. Evidence was further put in designed to show that the medical information operations of the Canadian company (i.e., the appellant) amounted to 39 per cent of the appellant's sales of patented drugs and that a reasonable return on its investment of capital in medical information services would amount to 12.5 per cent of such sales. The total of these four items is 76.4 per cent. Evidence was also put in to show that the appellant's average selling price of the drug in Canada was \$4,600 per kilo. The appellant contended before the Commissioner, on the basis of this evidence, that the royalty should be 76.4 per cent of \$4,600 per kilo, or \$3,528.37 per kilo.

The Commissioner dealt with the question of royalty in that part of his reasons reading as follows:

The next question to be determined is that of royalty. The patentee brought, as a witness to the hearing, a Chartered Accountant who has an extensive experience in business practices and who has a thorough knowledge of the pharmaceutical industry. He gave us a detailed explanation of the way the pharmaceutical industry figures out what part of each sales dollar goes to the different items of expenditure that have to be accounted for before profits can be determined.

The purpose was to arrive at a royalty figure. However, the royalty arrived at through his method would amount to the fantastic sum of three thousand five hundred and twenty eight dollars per kilo of bulk active material which costs approximately one hundred and fifty dollars to make. Of course that was based on the cost of the complete and sustained research program undertaken by the patentee company, the overhead, return on capital invested, depreciation, sponsoring, advertising, and keeping the physicians' interest in the drug, all figured out on the sales of the product when capsuled, sealed and labelled, ready for patient's consumption.

In all these considerations the patentee forgets that I am dealing with a patent covering a process. He has no exclusive right to the bulk active material per se, except when made by the particular process of the patent. Anyone is free to make and sell the product if he can develop a different process or somehow obtain it legally. I am therefore concerned with the

process only. Much less has he any exclusivity on the finished material in dosage form, packaged and labelled. This is outside the scope of the patent and it is immaterial to me. Reference can be made to the case of *Fine Chemicals Limited v. Parke, Davis & Co.* where I followed the same reasoning, (1957, Vol. 16 Fox Patent cases p. 38). The Commissioner's decision was affirmed in the Exchequer Court, (1957, Vol. 16, Fox Patent cases p. 173) and in the Supreme Court (1959, Vol. 18 Fox Patent cases p. 125). The principle I have established of fixing the royalty on the sale price of the bulk material has not been disturbed by the courts. In the Supreme Court, Mr. Justice Martland said at page 134 (Fox) "The Royalty as fixed is, therefore, to be determined upon the wholesale price and has no relationship to the ultimate selling price of the medicine to the consumer." He went on to question the adequacy of the royalty but not the principle. Although the product per se is not actually patented the royalty payments have to be calculated on the amount of product made by the process, because it would be next to impossible to assess the value of a process except on the basis of the extent of its use to make a product which in turn can be evaluated in terms of dollars and cents.

In the case at hand the patentee has arrived in his calculations at a royalty of \$3,528 37 per kilo but this figure includes all the irrelevant factors that I have in the past refused to consider and which are not part of what is covered by the patent.

\* \* \*

On the basis of past experience and upon considering the wide acceptance of the product, I will fix the royalty at 15% of the net selling price of the bulk active material made by the licensee and sold to others, or should the licensee process all of its production for sale as finished medicine ready for patients consumption, the royalty payments should be based on what would be a fair selling price of the bulk material to others.

My understanding of the argument of counsel for the appellant in this Court with reference to royalty, while it was put in various ways at different times during the course of argument, may be summarized as follows:

- (a) the La Roche group, like other groups of companies in the same class of business, carry on continuously a very expensive research programme and the general experience is that it is only once in ten to twenty years that such a research programme results in a discovery of a new drug which is of sufficient general importance in the world to enable the companies to recoup research expenses—such a drug is known as a "winner";
- (b) if such a group of companies is going to be able to continue the sort of research programme that is calculated to produce new important drug discoveries in the future, they must be able to sell a winner at a high enough price to enable them to recoup the research expenses of their whole research operation;

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- (c) mere discovery of a new and important drug is not sufficient to give to the public the advantage of its therapeutic value—as long as such a drug is in a state of development, it is essential to provide medical information services by means of which
- (i) doctors throughout the world are supplied with information concerning the drug so that they can appreciate its value as a new drug and know how to use it for the benefit of their patients, and
  - (ii) a continuing service is provided of gathering information from all the doctors in the world who are using the drug, co-relating the information and making available to the doctors of the world the conclusions drawn therefrom;
- (d) before the La Roche group can obtain any reimbursement of its research costs out of the price for which it sells its winners, it must first recover the cost of the aforesaid medical information services, and of course, before it can recover the cost of the medical information services, it must recover the actual cost of producing, packaging and distributing the drug,
- (e) out of each dollar of sales of the drug, the company must therefore first recover an appropriate amount in respect of its costs of medical information and have left over 24.92 per cent. to apply in respect of its research costs,
- (f) as the demand for the drug is inelastic the appellant, for all practical purposes, will lose sales in Canada substantially equal to those made by the respondent after it gets into production and starts to distribute the drug,
- (g) as it is by virtue of the compulsory licence that the appellant will lose that volume of sales and consequently the ability to obtain recoupment of its medical information costs and research costs, the royalty paid in respect of the compulsory licence should be equal to the amount of such costs that the appellant will not be able to recover by the sales so lost to it, or in other words, 76.4 per cent. of the appellant's selling price in Canada of \$4,600 per kilo<sup>1</sup>.

<sup>1</sup> While I do not return to the accuracy or cogency of the individual statements and arguments in this review of the appellant's position concerning royalty, I must not be taken as having accepted their accuracy or cogency.

The appellant takes the position in effect that, if it is not allowed a royalty of 76.4 per cent. on its wholesale price of \$4,600 per kilo, it will not have a royalty "commensurate with the maintenance of research incentive" as is required by the decision of the Supreme Court of Canada in *Park, Davis & Co. Ltd. v. Fine Chemicals of Canada, Ltd.*<sup>1</sup>

The statutory rule which has to be applied is that part of subsection (3) of section 41 of the *Patent Act* which reads as follows:

... In settling . . . the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the . . . medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.<sup>2</sup>

Where, under section 19 of the *Patent Act*, the Government has a statutory right to use a patented invention and the Commissioner's duty is to fix "a reasonable compensation for the use thereof", such reasonable compensation is to be determined by what, under normal conditions in the market, would be paid to a willing licensor by a willing licensee bargaining on equal terms. See *The King v. Irving Air Chute Inc.*<sup>3</sup> Presumably, the same rule would apply in determining royalty or other consideration under subsection (3) of section 41 if the portion of that subsection that I have just quoted did not require the Commissioner to "have regard" to "the desirability" of making the medicine available at the lowest possible price "consistent with . . . due reward for the research . . ." The general purport of this rule is, in my view, that the royalty or other consideration is to be less than it otherwise would be if the only rule to be applied were the rule in the *Irving Air Chute* case. Only

<sup>1</sup> [1959] S.C.R. 219.

<sup>2</sup> Counsel for the appellant rested much of his argument regarding the royalty that should have been fixed upon *J. R. Geigy S.A.'s Patent* [1964] 141 R.P.C. 391. Whether or not the decision in that case determines how a direction to fix terms so as to make a patented medicine available to the public at the lowest prices consistent with the "patentees" deriving "a reasonable advantage from their patent rights" must be applied on facts such as those in this case, I cannot agree that it determines how royalty or other consideration must be fixed when the direction is to have regard to the desirability of making the patented drug available to the public at the lowest possible price consistent with giving to the "inventor" due "reward for the research leading to the invention". In any event, there does not appear to have been any controversy in the *Geigy* case as to the method to be followed or any adjudication with regard thereto. The parties differed as to certain details in the application of the method followed by each of them and the adjudication concerned such details.

<sup>3</sup> [1949] S.C.R. 613.

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by making the royalty less than it otherwise would be could the Commissioner be said to have regard to the desirability of making the medicine available to the public at the lowest possible price. The general tendency of the rule must, therefore, be to require that the Commissioner have regard to the desirability of making the royalty or other consideration less than market price. However, there is a qualification upon this direction that, in having regard to the desirability of making the price as low as possible, the Commissioner must not make the royalty or other consideration so low that it is not consistent with giving to the inventor due reward for the research leading to the invention. The result of the statutory direction, for practical purposes, as interpreted by the Supreme Court of Canada in *Parke, Davis & Co. v. Fine Chemicals of Canada, Ltd.*, *supra*, is that the royalty is to be "commensurate with the maintenance of research incentive and the importance of both process and substance".

On the one hand, as I see it, there is a ceiling on the royalty or other consideration to be determined by reference to the theoretical market place and, on the other hand, there is a floor, beneath which it must not be reduced from that ceiling, in that it is not to be reduced from market value to an amount that is not "commensurate with the maintenance of research incentive and the importance of both process and substance".

In this case, the only attack on the Commissioner's decision with reference to royalty is that it is too low. It has not been suggested that it is higher than it should be. As I see the problem, therefore, the only question is whether the royalty fixed is commensurate with the maintenance of research incentive and the importance of both process and substance. I cannot accept the appellant's proposition that the appellant is entitled, in effect, to that proportion of its wholesale selling price of the sales that it will lose by virtue of the compulsory licence that medical information costs and research costs are of the total sale price of all its sales of patented drugs. As I read section 41(3) of the *Patent Act*, it does not contemplate or require any such result. What the statute says is that the Commissioner shall "have regard" to "the desirability" of a certain result and this has been interpreted by the Supreme Court of Canada to mean that the Commissioner shall fix a royalty "commensurate

with the maintenance of research incentive and the importance of both process and substance." In my view, this is not something that can be determined by applying some arithmetical rule to ascertainable facts. Relevant facts must be taken into account but, when they are ascertained as well as they can be, there is a necessity for the exercise of judgment just as there is whenever any person or authority has a responsibility of laying down a general rule for the future designed to accomplish a certain result. The problem is not unlike the problem facing Parliament or some branch of the executive when it has to fix remuneration for persons in the service of the state, such as cabinet ministers, members of Parliament, judges, soldiers or civil servants. In fixing such remuneration, regard must be had to the necessity of making the offices or positions attractive to persons of the requisite ability and experience and to the importance of the duties to be performed by the respective officers or functionaries. It is important, in making such a decision, to know what it costs a person to accept such an office or position (i.e., what alternative earnings in private industry he will probably forgo by accepting the offer) and it is necessary to make an evaluation of the importance of the particular office or position to the state. When, however, such facts have been evaluated as well as may be, and ordinarily this can only be done in a very general way, the person or authority responsible for making the decision must, of necessity, make a more or less arbitrary decision which, while it takes the relevant facts into account, must reflect his judgment as to what amount will meet the requirements of the situation. Similarly, in fixing the royalty or other consideration under section 41(3), it is not right to attribute, with some show of mathematical precision, a part of research cost, or of other costs, to each part of the product manufactured pursuant to a particular invention, and to conclude that, as a matter of law, that is the royalty that must be awarded. On the other hand, information as to what research in the particular field costs is a relevant factor to be taken into consideration just as is information as to the importance of the particular invention. Having those factors in mind, however, the Commissioner is nevertheless faced with the task of making a more or less arbitrary decision reflecting his judgment as to what amount of royalty or other consideration is "commensurate with the

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maintenance of research incentive and the importance of both process and substance”.

I therefore reject the appellant's argument that the royalties should be \$3,528.37 per kilo and I also reject his argument as to the manner in which the royalties must, as a matter of law, be computed. (If I accepted his argument that the royalties must, as a matter of law, be computed in that manner, I would refer the matter back to the Commissioner for a new hearing during which the Commissioner and the parties would be directing their minds to the issues of fact raised by that method.)

Having regard to the decision of the Supreme Court of Canada in *Parke, Davis & Co. Ltd. v. Fine Chemicals of Canada, Ltd. supra*, I must nevertheless consider whether the evidence before the Commissioner was adequate to enable him intelligently to arrive at a royalty which would give due weight to all the relevant considerations, for, if it was not, it would appear that the matter must be referred back to the Commissioner for reconsideration.

In this case, it is to be noted, that the appellant gave much consideration and thought to the preparation of a case, which it placed before the Commissioner, concerning the amount of the royalty and, while I have rejected the appellant's submissions as to the conclusions to be drawn from that evidence, nevertheless that evidence was calculated to give the Commissioner a very clear idea as to the general burden of research costs on the drug industry and, particularly, on the La Roche group.<sup>1</sup> That evidence was also calculated to give the Commissioner a clear idea as to the value and importance of the drug which is the subject matter of the patent and made it clear that it is practically impossible to segregate out the costs of the “research leading to the invention” of this particular drug. Having regard to the fact that there is no question of the royalty as fixed by the Commissioner being too high, I find it very difficult to envisage what further evidence the parties could place before the Commissioner if the matter were referred back to him for further consideration. As the appellant made no submission in this Court that the evidence before the Commissioner was inadequate to enable

<sup>1</sup> I am relieved, by a concession made by the respondent on the facts of this case, from having to decide whether such costs are relevant when it appears clear that neither the patentee (the appellant) nor the inventor bore any part of the costs “leading to the invention”.

him to determine the compensation or royalty and as I cannot conceive of any other class or type of evidence that might have been placed before the Commissioner, I do not think that I am justified in referring the matter back to the Commissioner for a further hearing as to the quantum of royalty or other consideration. In this connection, I also have in mind that portion of Mr. Justice Rand's judgment in *Parke, Davis & Co. Ltd. v. Fine Chemicals of Canada, Ltd. supra*, at page 223, where he said:

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... Once the Commissioner decides the case to be one for licence, it lies with the patentee, by whatever means are open to him, to present substantial support for the royalty which he claims; in the absence of that he will be in a weak position to complain of any holding by the Commissioner.

The appellant here did not have an opportunity to establish the amount of the royalty *after* the Commissioner had decided that the case was one for a licence. However, the appellant was prepared to put in his case before the Commissioner on the question of royalty at the same time as it put in its case on its opposition to the grant of a licence and it was, at that time, afforded full opportunity to do so. That being so, I am of opinion that, to use Mr. Justice Rand's words, the appellant is "in a weak position" to complain of the royalty fixed by the Commissioner on the ground of the adequacy of the material before the Commissioner.

That, however, does not complete my task concerning the question of royalty. Throughout the consideration of this appeal, I had difficulty with that part of the Commissioner's reasons where he speaks of "the principle I have established of fixing the royalty on the sale price of the bulk material" as not having been disturbed by the Courts. I do not understand the intrinsic merit of a principle that requires that the royalty be fixed on the sale price of the bulk material. The royalty should be so fixed that it complies with the rule in the last half of section 41(3). To achieve that result, presumably, a lower percentage rate would have to be chosen if a formula were adopted that called for application of a percentage rate to the wholesale price of the product in dosage form than that which would have to be chosen if a formula were adopted that called for application of a percentage rate to the sale price of the bulk material. I should have thought that there is nothing intrinsically right or wrong with either type of

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formula<sup>1</sup> and I do not understand that Mr. Justice Martland in the case of *Parke, Davis & Co. Ltd. v. Fine Chemicals Ltd.* gave approval to any such "principle" as that suggested by the Commissioner. On the contrary, there is, in my view, a strong indication in that judgment that, on facts such as were present in that case and are present in this case, the real monetary indication of the value of the patented medicine is in the price at which it sells in dosage form. As I understand the facts, the medicine is distributed to the public in dosage form and not in the bulk form, which, so far as its use as a medicine is concerned, is merely an intermediate stage in the creation of a merchantable form of the product.<sup>2</sup> I have come to the conclusion that the Commissioner fell into error in thinking that "the finished material in dosage form, packaged and labelled" was "outside the scope of the patent" and "immaterial" to him. On the contrary, the drug in the dosage form, if it was made in accordance with the patented process, is just as much the subject matter of the patentee's monopoly as it is when it is sold in bulk. It is precisely the same product as it is when it is in bulk except that it has been packaged so as to be in the form in which it has value as a merchantable commodity.<sup>3</sup>

Rather than send the matter back to the Commissioner and put the parties to the expense of a further hearing, I have come to the conclusion that I should allow the appeal and change the royalty as fixed by the Commissioner to a royalty of 15 per cent. of the licensee's selling price when it sells the patented drug in dosage form to persons with whom it is dealing at arm's length. I do this, not only because I have the impression that the Commissioner would have so fixed the royalty himself if he had not thought that he was constrained by principle to choose the lower base but, more particularly, because, giving the matter the best consideration I can, and having regard to my understanding of the correct approach as set out above, it is my judgment of a consideration that is "commensurate

<sup>1</sup> cf. *The King v. Irving Air Chute Inc.* [1949] S.C.R. 613 at pages 625, 629 and 635.

<sup>2</sup> It will be recalled that the application stated that the respondent expected to market the substance "in tablets or similar form".

<sup>3</sup> cf. *Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd.* [1937] S.C.R. 36 at pages 40-1.

with the maintenance of research incentive and the importance of both process and substance" having regard to the evidence. (In reaching this conclusion, I have in mind that this allows a much larger incentive for research than the appellant company, which does no research, is required to contribute to the other members of the La Roche group that do the research. It buys bulk material that has a cost of production of from \$50 to \$100 per kilo for \$294.87 per kilo. This means a contribution of not more than \$150 per kilo for research although income tax considerations, I should have thought, would keep the inter-company price reasonably realistic.)

In making this change in the royalty formula as fixed by the Commissioner, I have no reason to think that it is a very substantial change. There is no evidence as to the price for which the material would sell in bulk but we do know that it would probably be sold by the respondent in dosage form for \$3,500 per kilo and that the cost of converting from bulk form to dosage form is only \$310 per kilo. There is no reason to think that the respondent would sell in bulk form at a price very much less than it could get for it after converting it to dosage form at such a relatively minor cost.<sup>1</sup>

The third branch of the appeal relates to the terms of the various provisions in the licence as settled by the Commissioner.

It was apparent to both parties that the paragraph numbered 1 in the licence requires some change in wording in order to carry out the obvious intention of the Commissioner. That paragraph reads as follows:

The Licensee shall pay to Hoffmann-La Roche Limited a royalty of fifteen percent (15%) on its net selling price to others of the active product in its crude form, prepared or produced pursuant to this licence and sold by it.

The term "net selling price" employed herein shall mean the price actually received by the Licensee from the sale of the product prepared or produced by it pursuant to this licence, less any allowances for returns and any sales tax or other tax forming part of the sale of such product and required to be remitted by the Licensee to any taxation authority.

As so framed, paragraph 1 is deficient in that it only provides for payment of royalty on the product when

<sup>1</sup> It may be that the respondent will sell some in crude form to other drug companies who sell to retail druggists. In such case, it might sell at a difference in price that would reflect not only the cost of capsulating, packaging, etc., but also the cost of selling to retailers as opposed to merely selling to wholesalers.

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actually sold in the crude form (i.e., in bulk) and also because it contemplates computation of the royalty by reference to the price at which it is sold in the crude form even when it is sold to a person with whom the licensee does not deal at arm's length.

I may say that the Commissioner invited the parties to endeavour to agree on the terms of the licence and the appellant took the position that it was not prepared to attempt to reach any agreement with the respondent concerning such terms. Similarly, I invited the parties to endeavour to agree on the terms of a revision of paragraph 1 on the assumption that the royalty award would be unchanged. In the absence of any agreement by counsel for the parties, I have, tentatively, come to the conclusion that the paragraph might be revised to read somewhat as follows:

1. (a) The licensee shall pay to Hoffmann-La Roche Limited, in respect of the patented product that is prepared or produced pursuant to this licence and sold by it in the pharmaceutical dosage form to a person or persons with whom it was dealing at arm's length, fifteen per cent. (15%) on the net selling price at which it was so sold.
- (b) The term "net selling price" employed in this paragraph means the price actually received by the licensee from the sale of the product prepared or produced by it pursuant to this licence, less any allowances for returns and any sales tax or other tax forming part of the sale of such product and required to be remitted by the licensee to any taxation authority.
- (c) The licensee shall pay to Hoffmann-La Roche Limited, in respect of the patented product that is prepared or produced pursuant to this licence to which subparagraph (a) does not apply fifteen per cent. (15%) of what would be the net selling price if the product had been sold in the pharmaceutical dosage form by the licensee to a person with whom it was dealing at arm's length.

If this revision of paragraph 1 is not acceptable to either or both of the parties, the matter may be spoken to before the minutes of judgment are settled.

With reference to the other terms of the licence, the appellant made a number of submissions as to changes which should be made therein but, in each case, the submission amounted to a request that I interfere with the substantive terms as settled by the Commissioner for no good reason other than that the interests of the appellant would be better served if the change were made and I have not been able to detect any good reason why I should interfere with the terms as settled by the Commissioner. However, counsel for the respondent did indicate that the

respondent was prepared to have a term added to the licence by which the licensee would be required, upon request by the appellant, to advise the patentee promptly whether or not it had sold the licensed product to a named purchaser and if so the date and quantity of such sale. If the appellant elects to have such a term added to the licence, a term may be included in the minutes of judgment amending the licence accordingly.

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The appeal will be allowed to the extent of making the indicated changes in the licence as granted by the Commissioner. Subject thereto the appeal is dismissed. As the appellant has been completely unsuccessful on the first branch of the appeal, has been unsuccessful in the main portion of its appeal as to royalty (only being successful to the extent of a relatively small increase based on quite a different principle from that which it advocated) and has not obtained anything on the third branch of the appeal that it would not have been able to obtain had it accepted the Commissioner's invitation to cooperate in setting the terms of the licence, the appellant will pay to the respondent 90 per cent, of its costs of the appeal.

*Judgment accordingly.*

BETWEEN:

THE MINISTER OF NATIONAL  
 REVENUE .....

APPELLANT;

AND

HIGHWAY SAWMILLS LIMITED .....RESPONDENT.

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*Revenue—Income—Income tax—Sale of timber limit after removal of merchantable timber—Capital cost allowance calculation where asset sold in taxation year—Depreciable property—Deduction of proceeds of disposition from undepreciated capital cost—Income Tax Act, R.S.C. 1962, c. 148, ss. 11(1)(a), 20(5)(a) and (e)—Income Tax Regulations 1100(1)(e), (2), (3) and (3)(a), 1101, 1102(2) and 1105, and Schedules B and C.*

This is an appeal from a decision of the Tax Appeal Board with respect to the assessment for income tax of the respondent for the taxation year 1957.

The respondent owned a timber limit in the District of Malahat, British Columbia, which it sold to Alaska Pine and Cellulose Company

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Limited on March 4, 1957, at which time the undepreciated capital cost of the limit was \$49,370.30. The sale price was \$28,800 and the net proceeds to the respondent of the sale were \$22,620. The appellant assessed at \$26,759.30 the undepreciated capital cost to the respondent of the timber limit at the end of its taxation year, September 30, 1957, arriving at that amount by subtracting the net proceeds of the sale from the \$49,379.30, the undepreciated capital cost of the timber limit before the sale on March 4, 1957.

The issue was whether or not the disposal price of bare land, denuded of all merchantable timber, must be deducted from the undepreciated capital cost of the limit immediately prior to its sale to determine its undepreciated capital cost after the sale.

*Held:* That a timber limit is a property in respect of which a taxpayer is entitled to a deduction under s. 11(1)(a) of the *Income Tax Act* and it is therefore "depreciable property" by virtue of s. 20(5)(a).

2. That where "depreciable property" has been disposed of the proceeds of disposition are to be deducted from the amount that would otherwise be the undepreciated capital cost of property of that class in order to determine undepreciated capital cost within the meaning of that expression as defined by s. 20(5)(e) of the *Income Tax Act*.
3. That the respondent can deduct under Regulation 1100(2) of the *Income Tax Act* only the amount that would otherwise be the undepreciated capital cost of the limit at the end of the year as determined under s. 20(5)(e).
4. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Victoria.

*D. M. M. Goldie, R. A. C. McColl and G. F. Jones* for appellant.

*K. E. Meredith* for respondent.

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

DUMOULIN J. now (March 9, 1965) delivered the following judgment:

The Minister of National Revenue has appealed from a decision of the Tax Appeal Board, dated May 10, 1963, respecting an income tax assessment for the respondent's 1957 taxation year.

The appellant asserts that, during its 1957 taxation year, the respondent owned a timber limit, consisting of several blocks east of the Sooke River, District of Malahat, B.C., which had an undepreciated capital cost of \$49,379.30, immediately prior to a sale of these holdings to Alaska Pine

and Cellulose Company Limited, on March 4, 1957 (cf. exhibits Z-7 and Z-8).

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The sale price was \$28,800 (cf. ex. Z-8) which, after deducting commission and sundry selling expenses, the Minister estimated, in net proceeds, at \$22,620, a valuation uncontested by respondent in paragraph 3(e) of its Reply to Notice of Appeal.

In consequence of the disposal aforesaid, Highway Sawmills, at the end of 1957, no longer retained any proprietary title in this limit, a fact that induced the appellant to assess at \$26,759.30 the "undepreciated capital cost" to respondent company of this timber limit at the end of the taxation year which terminated on September 30. The above figure of \$26,759.30 was reached by subtracting the sale price—net proceeds—of \$22,620 from \$49,379.30, undepreciated capital cost of the timber limit before the transaction of March 4, 1957.

Highway Sawmills' claim of \$45,411.42 capital cost allowance for its timber limits during taxation year 1957 was disallowed and, in lieu thereof, a deduction of \$26,759.30 was permitted.

The appellant relies, *inter alia*, upon sections 11 and 20 of the *Income Tax Act*, R.S.C. 1952, chapter 148, and upon section 1100 and Schedule C of the *Income Tax Regulations*. (Notice of Appeal, para. 5).

Paragraphs 6 and 7 of appellant's pleadings respectively set out the twofold basis of this appeal, namely: that the respondent, having sold the timber limit prior to end of its 1957 taxation year, was not entitled, in computing its income, to any deduction under regulation 1100(1)(e) and Schedule "C" (Notice of appeal, para. 6); but, on the other hand, that respondent was entitled to and allowed a \$26,759.30 deduction, pursuant to regulation 1100(2), the latter amount representing, in the Minister's estimation, the undepreciated capital cost of the timber limit as of September 30, 1957, closing date of Highway Sawmills' fiscal year. (para. 7)

Conflicting with this view, the respondent asserts that it had purchased certain timber limits anteriorly to 1957 "for the purpose solely of logging timber therefrom . . . and the price therefor was fixed with reference to the value of the timber thereon with no allowance whatsoever for land" (Reply to Notice of Appeal, para. 3(c).) In paragraph 3(d)

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the company goes on to say that: "Between the years of the acquisition of the said Blocks and the end of the fiscal year of the Respondent 1957, the Respondent logged all the merchantable timber from the timber limits aforesaid . . ." and, consequently, the full purchase price of those lands was deducted from income as capital cost allowance. Paragraph 3(e), after mentioning the sale for \$22,620 to Alaska Pine and Cellulose Ltd., during 1957 (March 4), specifies Highway's basic interpretation of the transaction, which would have been: ". . . entirely fortuitous insofar as the Respondent was concerned, the Respondent considering at all material times that the land had no value . . . save, of course, that of the timber growing on it, and, therefore, the sum brought in by the sale of the bare ground . . . constituted a capital receipt . . . and a windfall." (This last quotation excerpted from para. 7.)

The respondent, attaching a different meaning to sections 11 and 20 of the Act, relies on those statutory enactments and also upon Regulations 1101, 1105 and Schedules B and C thereof.

Unravelling the interplay of the pertinent legal provisions herein, albeit lucidly drafted, is by no means a simple task and calls for a considerable degree of concentration in order to distinguish what to a layman might seem Ariadne's clew. In point of fact, the issue narrows down to deciphering which Regulations and Schedule should govern, but, as we shall see, a rather intricate statutory skein must be unwound before the labyrinth's exit is reached. Once again, let us bear in mind the question awaiting a solution: whether or not the disposal price of bare land, denuded of all merchantable timber, must be deducted from the undepreciated capital cost of the limit immediately prior to its sale to determine its undepreciated capital cost after the sale.

The respondent was entitled, during the years following the purchase of the timber limit, to deduct capital cost allowance under the following provisions:

- (1) section 11(1)(a) of the *Income Tax Act* which authorizes a deduction in computing a taxpayer's income for a taxation year of "such part of the capital cost to the taxpayer of property . . . as is allowed by regulation";
- (2) Regulation 1100(1)(e) which provides for an allowance under paragraph (a) of section 11(1) of "such amount as he may claim not exceeding the amount

calculated in accordance with Schedule C in respect of the capital cost to him of a timber limit. . .”;

- (3) Schedule C to the Income Tax Regulations which sets out a formula for determining the amount of the annual deduction in respect of the capital cost of a timber limit.

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During the 1957 taxation year, the respondent disposed of the timber limit (which, by virtue of Regulation 1101(3) is a prescribed class) and was therefore entitled, by virtue of Regulation 1100(2), (*infra*), to a deduction “equal to the amount that would otherwise be the *undepreciated capital cost* of property of that class at the expiration of the year”.

Regulation 1101(3) enacts the following:

(3) For the purpose of this Part and for the purpose of Schedules C and D

- (a) a timber limit or a right to cut timber from a limit shall be deemed to be a separate class of property . . .

Undepreciated capital cost is defined by section 20(5)(e) of the *Income Tax Act*:

- (e) “Undepreciated capital cost” to a taxpayer of depreciable property of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of
- (i) the total depreciation allowed to the taxpayer for property of that class before that time,
  - (ii) for each disposition before that time of property of the taxpayer of that class, the least of
    - (A) the proceeds of disposition thereof,
    - (B) the capital cost to him thereof, or
    - (C) the undepreciated capital cost to him of property of that class immediately before the disposition, and
  - (iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

It may be worthwhile to note that since the decision by this Court of *Caine Lumber Company v. Minister of National Revenue*<sup>1</sup>, April 16, 1958, affirmed by the Supreme Court of Canada<sup>2</sup>, April 28, 1959, paragraph (a) of s. 20(5) was amended in 1959 (S.C. c. 45, s. 6 (1)) by closing the quotation marks after the word “property” in the first line rather than as formerly after the word “taxpayer”, same line. Similarly, para. (e) of s. 20(5) was amended (1959, S.C. c. 45, s. 6(3)) by closing the quotation marks after the word “cost” in the first line, rather than, as previously,

<sup>1</sup> [1958] Ex. C.R. 216.

<sup>2</sup> [1959] S.C.R. 556.

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after the word "property" in the same line. Possibly those slight variations intended bringing the definitions closer to the current acceptance of the bracketed terms and more in line with the remarks of Mr. Justice Locke, at p. 561 of the *Caine Lumber* case (*supra*).

Once more, let us look at the deductions allowed in computing income particularly at paragraph (a) subsection (1) of section 11, providing for fiscal allowances in relation to capital cost of property:

- (a) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation.

This refers the matter to Part XI of the Regulations, entitled "Allowances in Respect of Capital Cost", under which appear Regulation 1100, subsection (1) and paragraph (e), this latter disposition captioned "Timber Limits and Cutting Rights"; I quote:

1100. (1) Under paragraph (a) of subsection (1) of section 11 of the Act, (dealing with capital cost of property) there is hereby allowed to a taxpayer in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

. . . .

- (e) such amounts as he (the taxpayer) may claim not exceeding the amount calculated in accordance with Schedule C in respect of the capital cost to him of a timber limit or a right to cut timber from a limit.

Next in line as affording a general direction are subsections 2, 3 and 3(a) of Regulation 1100, hereunder:

(2) Where, in a taxation year, otherwise than on death, all property of a prescribed class that had not previously been disposed of or transferred to another class has been disposed of or transferred to another class and the taxpayer has no property of that class at the end of the taxation year, the taxpayer is hereby allowed a deduction for the year equal to the amount that would otherwise be the undepreciated capital cost to him of property of that class at the expiration of the taxation year.

Paragraph (3) hereunder also bears the specific title of "Timber Limits or Cutting Rights":

(3) For the purpose of this Part and for the purpose of Schedules C and D

- (a) a timber limit or a right to cut timber from a limit shall be deemed to be a separate class of property . . .

I might also mention regulation 1102(2) to the effect that:

(2) The classes of property described in Schedule B shall be deemed not to include the land upon which a property described therein was constructed or is situated.

Before passing on to Schedule C, it may be of some interest to ascertain the nature of the transactions between

Highway Sawmills Limited and Alaska Pine Company as stated in exhibits 7 and Z-8.

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Exhibit 7, dated July 26, 1956, is an option "open for acceptance by the Optionee" (Alaska Pine Co.) until the 24th day of September 1956, whereby for the sum of \$30,000 the Optionor (Highway Sawmills Ltd.) promises to sell "the lands and premises (description follows) . . . together with all timber (except as herewith provided) . . .", an exception of no indifferent significance, reserving to Highway Sawmills ". . . the right to cut and remove free of charge all merchantable timber on said lands for a period of two years from the date of such acceptance, together with all necessary rights-of-way over any roads crossing said lands whether presently in existence or constructed by the optionor or the optionee during said two-year period".

Exhibit Z-8, dated the 4th day of March, 1957, is the deed of sale whereby Highway Sawmills, for a price of \$28,800, conveys unto Alaska Pine Company the full ownership in fee simple of certain designated lands in the Malahat and Otter Districts, Vancouver Island, "save as set out in Schedule "A" hereto . . ." The grantor company thereby reserved to itself "the right to enter upon all or any part of the lands described . . . for the purpose of felling, cutting and removing all merchantable timber now standing, lying or being on the said lands and for such purposes to use any existing roads on the said lands and to construct and use such other roads on the said lands as the Grantor may deem necessary, provided however that the Grantor shall conduct its operations in such a manner as to minimize any damage to other timber growing on the said lands; and the rights hereby reserved to the Grantor shall terminate on the 20th day of September, 1960, or so soon as the Grantor shall have removed . . . all merchantable timber now standing, lying or being thereon . . .".

Mr. John Williams White, office manager of Highway Sawmills (in voluntary liquidation since 1960), testified his company "had no intention of selling logs over lands, but being offered \$15.00 an acre for 2,002 acres we nevertheless decided to accept that windfall". The witness explains that his firm "hoped to get rid of the ground for unpaid taxes after cutting all merchantable timber".

It remains uncontested that immediately prior to the disposal deed of March 4, 1957 (exhibits Z7 and Z8) the

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undepreciated capital cost was \$49,379.30. Then, at the date aforesaid, the respondent, reserving to itself during three years and six months, viz. March 4, 1957, September 20, 1960, the right to cut and remove the entire timber crop, sold the land and received therefor a price of \$22,620. Under such circumstances it would be difficult, I believe, to deny the applicability of subsection (2) of Regulation 1100, next repeated for convenience's sake, with some deletions:

1100. (2) Where, in a taxation year, . . . all property of a prescribed class . . . has been disposed of . . . and the taxpayer has no property of that class at the end of the taxation year, the taxpayer is hereby allowed a deduction for the year equal to the amount that would otherwise be the undepreciated capital cost to him of property of that class at the expiration of the taxation year.

The appellant has set at \$49,379.30 the undepreciated capital cost to respondent of the limit immediately prior to its disposal, a figure undisputed and exceeding the capital cost allowance of \$45,411.42 claimed by Highway Sawmills for 1957. Out of the valuation of \$49,379.30, a fraction, or \$22,620, was paid into the company's coffers. The agreed figure of \$49,379.30 remains undisturbed, save that the respondent received an important portion of it. The sale price of \$22,620 plus the deduction allowed of \$26,759.30, add up to \$49,379.30.

In brief, applying section 20(5)(e)(ii) (*supra*) the Minister deducted the proceeds of sale from the undepreciated capital cost as it was before the sale and determined that "the undepreciated capital cost of property of that class at the expiration of the year", deductible under Regulation 1100(2), was \$26,759.30.

The respondent contends that Regulation 20(5)(e)(ii) does not apply when what was disposed of was, in effect, bare land. He contends that there is a principle that land is not depreciable property.

The only principle of law concerning land in respect of capital cost allowance is Regulation 1102(2) which reads as follows:

(2) The classes of property described in Schedule B shall be deemed not to include the land upon which a property described therein was constructed or is situated.

This provision concerning land applies only to property described in Schedule B to the Income Tax Regulations. It has no application to property described in Schedule C.

The respondent also claims that land is not a "depreciable

asset” but is a “depletable asset”. The answer to that contention is that a timber limit is a property in respect of which a taxpayer is entitled to a deduction under section 11 (1)(a) and it is therefore “depreciable property” by virtue of section 20(5)(a), which reads:

(a) “depreciable property” of a taxpayer as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for that or a previous taxation year;

It is clear where “depreciable property” has been disposed of, that the proceeds of disposition are to be deducted from the amount that would otherwise be the undepreciated capital cost of property of that class in order to determine undepreciated capital cost within the meaning of that expression as defined by section 20(5)(e). Each timber limit is a prescribed class of depreciable property. The respondent’s claim to deduct \$45,411.42 is based on section 11(1)(a) of the Act and the Regulations made thereunder. It follows that it can only deduct under Regulation 1100(2) the amount that would otherwise be the undepreciated capital cost of the limit at the end of the year as determined under section 20(5)(e).

For the reasons above, the Court reaches the conclusion that the respondent’s 1957 taxation year was properly assessed, and would therefore allow the appeal with costs in favour of the appellant.

*Judgment accordingly.*

BETWEEN:

CANADIAN NATIONAL RAILWAY }  
 COMPANY ..... }

PLAINTIFF.

AND

ELMER J. PALMER ..... DEFENDANT.

*Expropriation—Compensation for expropriation—Increase in value of expropriated lands before expropriation—Value of land at time of expropriation—Injurious affection—Railway spur line splitting land into two parcels—Exchequer Court Act, R.S.C. 1952, c. 98, s. 49—Expropriation Act, R.S.C. 1952, c. 106 s. 48.*

On September 21, 1960 the plaintiff expropriated certain lands owned by the defendant on Tilbury Island, Municipality of Delta, British Columbia, the said lands being 11.92 acres in area. A further 7.35 acres of land were agreed to be treated as expropriated, making a total of 19.27 acres. The defendant was left with two parcels of land,

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one of 18.6 acres lying to the south of the spur line subsequently built by the plaintiff, and the other of 44.13 acres lying to the north of the spur line.

The lands were purchased in two parcels, 42 acres purchased on December 31, 1957 at \$1,000 per acre, and 40 acres purchased on April 3, 1959 at \$2,225 per acre. On or about April 7, 1959 the plaintiff committed itself to construct a spur line to service a new plant to be built and operated by Dow Chemical Company, and this necessitated the subsequent expropriation of the defendant's lands.

The main issue to be determined is whether the enhancement in value of the defendant's lands should be considered as having occurred on or about April 7, 1959, when the plaintiff committed itself to Dow Chemical Company to built the spur line, or only after the railway had duly implemented this commitment in early April 1961, i.e., subsequent to the expropriation date.

*Held:* That the land in question appreciated in value to \$3,000 per acre as industrial land, from \$2,000 per acre as agricultural land, when the plaintiff committed itself to construct the spur line for Dow Chemical Company, which it did well before the date of expropriation, and, accordingly, the land expropriated had a value of \$3,000 per acre at the time it was taken.

2. The governing principle set out by the Supreme Court of Canada in *Fraser v. The Queen* (1963) 40 D.L.R. (2d) 707 at 726 is applicable to the instant case.

The action was tried by the Honourable Mr. Justice Dumoulin at Victoria.

*K. E. Meredith* and *C. J. Irwin* for plaintiff.

*R. C. Bray* for defendant.

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

DUMOULIN J. now (March 12, 1965) delivered the following judgment:

The Canadian National Railway Company, plaintiff, expropriated, on September 21, 1960, certain lands of the defendant situated on Tilbury Island, Municipality of Delta, Province of British Columbia.

The parties agree on the extent of the land taken, 11.92 acres, plus 7.35 acres agreed to be treated as expropriated, a total of 19.27 acres.

This area was taken for the purpose of establishing a right-of-way for the C.N.R., called the Tilbury Spur.

The defendant, Elmer J. Palmer, engaged in the lumber trade, owned, prior to September 21, 1960, in the aforesaid sector, 82 acres more or less, which the building of the spur line severed in two portions, one to the south, comprising 18.6 acres, and a northerly one containing the remaining 44.13 acres.

In para. 8 of its statement of claim, plaintiff stated its willingness to pay for the land and for any loss or damage caused to the defendant by reason of the taking, a total compensation of \$47,430 with interest. This offer was refused, the defendant setting out thus the indemnity sought:

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19.27 acres taken at \$3,000 per acre .....	\$57,810
18.6 acres, located south of the right-of-way, for injurious affection and severance at \$1,000 per acre ..	18,600
	\$76,410

At the start of the trial, counsel for plaintiff withdrew the amount offered pretexting that, even though compensation for 19.27 acres at \$2,000 an acre and indemnity for injurious affection to 18.6 acres might reach the figure of \$57,140, this was fully set off by a sum of \$62,730 resulting from a \$1,000 per acre increase in value to 62.73 acres after the trackage extension over Palmer's land. This withdrawal was based upon s. 49 of the *Exchequer Court Act*, 1952 R.S.C. c. 98, of which more later.

The Court is asked to determine three questions:

- (a) the value of 19.27 acres expropriated;
- (b) injurious affection to 18.6 acres severed from the remaining property owned by the defendant, south of the railway track;
- (c) whether the set off contemplated in s. 49 applies in this case.

Palmer acquired his Tilbury Island holdings by means of two purchases. He first bought 42 acres on December 31, 1957, at a price of \$1,000 an acre, from one Beintima, a foreigner who, retiring from business, agreed to sell at a rather low price. The remaining portion, 40 acres, was obtained on April 3, 1959, from a local resident, Kabal Singh, at the increased cost of \$2,225 an acre. When the deals were concluded, the best possible use for these lands was agriculture. Palmer acknowledges that his aim in the transactions was a speculative one, and surely no blame attaches to so normal an expectation.

It so happened, as the Court is told by J. A. Duff, manager of industrial development for the Canadian National Railway Company, that, on or about January 13, 1959, an important industrial concern, Dow Chemical Company, "approached us (the C.N.R.) in confidence advising that they were proposing to set up a phenol plant in the Greater

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Vancouver area and were looking for property of around 100 acres, and they indicated that they would require property serviced by power, gas, deep sea and rail, and they particularly stressed the rail angle". (transcript, p. 78)

The witness emphasizes the fact that "Dow had indicated to (him) that trackage was . . . absolutely essential". (p. 79). The railway agreed to this proposition and definitely committed itself to put in a line connecting Brownsville in the east to a C.N.R. ferry slip built on Tilbury Island on the west side.

Dow Chemical, according to the witness' recollection, was officially advised of this decision "on or about April 7, 1959", and agreed to pay for the trackage on their own property. Some time after the expropriation of September 21, 1960, the spur line was installed and the large industrial plant constructed.

The experts practically agree on the value of the expropriated property at all material times, their assent bearing upon the following points:

- (a) prior to the assurance given in April of 1959 by the C.N.R. to Dow Chemical Co., that trackage would be installed as aforesaid, the value of the subject property was \$2,000 per acre;
- (b) immediately after the above commitment between plaintiff and Dow Chemical, the value of the subject property increased to \$3,000 per acre;
- (c) after the taking, September 21, 1960, defendant's land continued to be worth \$3,000 an acre.

At page 3 of plaintiff's written argument appears an admission that the expropriated right-of-way intersecting "the Dow property . . . now serves the Dow plant. It further serves the Tilbury ferry slip of the Plaintiff. It will in future serve the purposes of any heavy industry which may be established on the land of the Defendant".

The promotion of defendant's property from agricultural to industrial brackets remains uncontested but the parties disagree about the interpretation of this material improvement.

The plaintiff seemingly rests its case on a "before and after" outlook, claiming it should be entitled to treat the "before" as prior to the assurance of trackage to Dow Chemical Co. in 1959, and that "after" should apply only from September 21, 1960. Were this argument accepted,

the result would completely defeat the possibility of an award to the defendant for 19.27 acres taken from him and for the injurious affection to 18.6 acres severed from his remaining property.

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Then, should the enhancement in value of \$1,000 be considered as intervening on or about April 7, 1959, when the C.N.R. advised Dow Chemical of its promise to build a spur line connecting the proposed plant to the Tilbury Island ferry slip, or only after the railway had duly implemented this commitment in early April, 1961, subsequently to the expropriation date, September 21, 1960?

The plaintiff contends (cf. Argument, p. 5) that:

The land in the present case is particularly well adapted to the use of heavy industry . . . . The property had, therefore, something more than an agricultural potential. Its potential was for heavy industry as there was a possibility of rail. It is in this condition that the land was worth \$2,000.00 per acre. *Once the railway was assured the potential for industrial use was realized and the property increased in value by \$1,000.00 to acquire a value of \$3,000.00 per acre.* The plaintiff says that this realization of the potential is the very factor which must be excluded when the value of land for expropriation purposes falls to be determined for it is an advantage "due to the carrying out of the scheme for which the property was compulsorily acquired". (italics added)

And, now, this conclusion:

It would be patently unfair that the railway should be required to pay for the very advantage that it is bestowing upon the property.

In contradistinction with this viewpoint, the defendant argues, on p. 4:

That the railroad had for all intents and purposes become a reality in 1959 (April 7) when it was committed to go into the Dow Chemical plant by the C.N.R., *and that the increase in value to the subject property from \$2,000.00 to \$3,000.00 per acre took place at that time. It is therefore submitted that at the date of expropriation (September 21, 1960) the value of the subject property was \$3,000.00 per acre* and that no benefit accrued to the Defendant as a result of the railroad severing the Defendant's property. (italics have been inserted)

Since the material factors are, as previously noted, undisputed, I may at once review the precedents on whose authority the litigants mainly rested their submissions.

The plaintiff company considered as particularly illuminating a passage from the case of *Sidney v. North Eastern Ry. Co.*<sup>1</sup> appearing in the judgment of Rowlatt, J. quotation:

But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the require-

<sup>1</sup> [1914] 3 K.B. 629 at 636.

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ments of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

Special adaptability is an expression which is wide enough to include special adaptability for any purpose, but where the special adaptability is for purposes other than those of the compulsory purchaser it is merely an element in the calculation of the probable competition for the land, that is, an element in its general value. It only gives rise to a question in compensation law, where, existing for the purposes of the promoters, its consideration seems at first sight to infringe the principle that value due to the scheme is to be excluded. For example, a piece of land may have special value for a particular crop, for a particular sort of building scheme, or for a reservoir, or for several of these purposes. But if it is going to be taken for an artillery or rifle range, or for a railway, these are elements of general value only and raise no question. Suppose, however, it is to be taken for a reservoir, its special suitability for that purpose (being the purpose of the scheme) does raise the question how far that can be taken into consideration without infringing the rule against giving value due to the scheme.

Referring to special suitability for "the purpose of the scheme", in the language of Rowlatt, J., and avoiding, I trust, the danger of a play on words, it might not appear unreasonable to entertain the possibility of a special suitability in defendant's land for plaintiff's particular purposes. Had it not offered the shortest, most economical route to the C.N.R.'s ferry slip, why then this recourse to the exceptional power of expropriation?

The leading case supporting the proposition put forth by the defendant is the recent Supreme Court decision of *Fraser v. The Queen*<sup>1</sup>, and particularly this passage of Mr. Justice Ritchie's pronouncement when speaking for the majority:

When the property in question was taken from the Appellant by the Province of Nova Scotia in 1950, the potential market for the rock which it contained was still a matter of speculation, as no decision had been finally made about the causeway, but when the lands were re-acquired by the Appellant on July 2nd, 1952, the years of speculation, study and planning concerning the building of the causeway had already culminated in the letting of a contract for its construction, which contemplated the use of an estimated nine million tons of rock from these lands, and the potential market for this commodity had thus become a reality before the lands were re-acquired by the Appellant. It was these lands with this potentiality which were expropriated by the Dominion Government, and it is their value at the time of that expropriation which is required to be assessed of (for) the purpose of compensation. (italics are mine)

I would immediately note and repeat the plaintiff's clear and explicit acknowledgement that "*the potential for industrial use was realized and the property increased in value by \$1,000.00 to acquire a value of \$3,000.00 per acre once the*

<sup>1</sup> (1963) 40 D.L.R. (2d) 707 at 726.

*railway was assured*", a year and a half prior to the expropriation. That the C.N.R.'s determination remained a confidential matter between itself and Dow Chemical is not even hinted at. On the contrary, this assured development became a matter of general knowledge in the vicinity, with the sure result that from April 7, 1959, up to September 21, 1960, all concerned could appreciate the enhanced real estate value.

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Owing to the plaintiff's binding undertaking to run a spur line for the use of the chemical factory and with a view of expanding its own affairs, the instant case bears a close resemblance to that of *Fraser v. The Queen (supra)*, wherein the decisive factor was "the letting of a contract" for the construction of the causeway. Then and now, "the potential market" had become a reality long before expropriation. Such a potential market existed in April, 1959, when Palmer paid \$2,225 per acre to his vendor, Kabal Singh. It would be sheer insanity to dispute that these rates astronomically overshoot farm land prices, usually averaging a hundred dollars or so an acre. Any sane man buying 40 acres at \$2,225 apiece, has something in mind other than growing parsnips. In all likelihood, Palmer, from the day of his acquisition, April 3, 1959, would have waived aside any offer below \$3,000 per acre.

The equitable norm obtaining is fittingly suggested by the following quotation from Cripps on Compulsory Acquisition of Land, 11th ed., p. 692, where it is said:

The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the purchaser had secured any powers or acquired the other object which made the undertaking a realized possibility.

Section 46 of the *Expropriation Act*, 1952, R.S.C. c. 106 prescribes a similar rule in these terms:

46. The Court in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work or for injury done to any land or property shall estimate or assess *the value* or amount thereof at the time when the land or property was taken or the injury complained of was occasioned.

Conformably with the statutory prescription above, the Court finds that "at the time when the land was taken", its value was \$3,000 per acre, or, for 19.27 acres, \$57,810, a compensatory sum due to the defendant, Elmer J. Palmer.

There now remains to be determined a claim of \$18,600 for injurious affection to 18.6 acres on the south side of the

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railroad tracks, thus severed from the major portion of property still owned by the defendant, and now cut off from direct access to deep water.

The railway company is adamant in its contention that the entire property automatically benefited by a one thousand dollar increase in value through its decision to extend rail service to the Dow plant.

I am not so sure that such is the true situation, especially after hearing the plausible explanations afforded by Messrs. D. C. McPherson and T. J. Boyle, two experienced realtors associated with well-known Vancouver real estate firms.

Mr. McPherson believes that none but a "big plant" might consider buying the residue of the property and would look unfavourably upon the necessity of having its men and material crossing the tracks at every moment of the day. He appraises this disadvantage at approximately \$1,000 per acre.

The other realtor, Mr. T. J. Boyle, also called by the defendant, sees an element of injurious affection in that "the property south of the railway . . . is now severed from the deep sea . . .". For this reason, it is very unlikely that "one user" might be interested in purchasing the whole site in despite of the severance.

An accurate assessment of the damage thereby occasioned is something quite difficult, says the witness, who would suggest a depreciation of certainly \$500 per acre, a figure reasonably borne out by the evidence. Therefore, the indemnity granted for 18.6 acres, at \$500 a unit, will be \$9,300.

A last proposition to determine consists in the plaintiff's argument that s. 49 of the *Exchequer Court Act* foresees a set-off the application of which would wipe out the defendant's demand for compensation accruing from injurious affection to the severed remnant.

The allotment just made would excuse me from discussing this objection if I did not look upon it as worthy of consideration.

Section 49 directs that:

49. The Court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit special or general, accrued or likely to accrue, by the construction and operation of the public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected.

A similar point was raised *in re Molly James et al. v. Canadian National Railway Company*<sup>1</sup>, and decided by Mr. Justice Cattanach, with whose pronouncement I fully agree. After citing s. 49, the learned Judge's comments read thus:

I do not need to decide this question as, on my reading of section 49, even if it is applicable to a Canadian National expropriation, it has no application to the facts of this particular case. The application contemplated by the parties was that section 49, if applicable, requires that the Court, in determining compensation to be paid to the plaintiffs for the 292.4383 acres injuriously affected by the construction of the new railway project, take into account and consideration by way of set-off any advantage or benefit likely to accrue by the construction and operation of the railway project to those 292.4383 acres of land. What the section says, however, is that what is to be taken into account is the advantage or benefit likely to accrue "in respect of any lands" held by the plaintiffs "with the lands so . . . injuriously affected". There were no such lands here and, therefore, section 49 has no application.

I readily adopt those reasons.

The sum total, granted as indemnity for land expropriated, \$57,810, and compensation for injurious affection to the residue, \$9,300, amounts to \$67,110.

There will, therefore, be judgment declaring that the property described in paragraph 3 of the Statement of Claim, and also that mentioned in paragraph 5, to an agreed total of 19.27 acres, is vested in Canadian National Railway Company as from September 21, 1960; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of \$67,110 with interest at 5% per annum from September 21, 1960, to the date of this judgment. The defendant is entitled to recover his costs.

*Judgment accordingly.*

THE QUEBEC ADMIRALTY DISTRICT

BETWEEN:

DELANO CORPORATION OF AMERICA, . . . PLAINTIFF;

AND

SAGUENAY TERMINALS LIMITED, . . . DEFENDANT.

*Shipping—Trial of an issue—Contract of carriage of goods—Damage to goods in transit—Bill of lading—Demise clause in bill of lading—Privity of contract between owner of goods and charterer of ship—Charterer of ship as agent of owner of ship—Charterer by demise—*

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*Failure of charterer to inform owner of goods that it is not owner or charterer by demise of the ship.*

*Practice—Trial of an issue question of law—Exchequer Court Rule 149.*

This hearing resulted from a motion by the defendant to have an issue tried and decided before the trial of the action herein, the issue being whether or not paragraphs 1 and 2 of the Statement of Defence are well founded in law, that is, whether or not there was a contractual relationship or privity of contract between the plaintiff and the defendant in respect of the carriage of the plaintiff's goods in the m.v. *Sunamelia*.

The action resulted from the carriage of 500 bags of potatoes owned by the plaintiff from Halifax, Nova Scotia to Maracaibo, Venezuela on the m.v. *Sunamelia*, the plaintiff alleging that the potatoes were damaged beyond use while in the care and possession of the defendant, which is liable to the plaintiff therefor in contract and for negligence.

The defendant alleged that the Bills of Lading which were signed by one G. Cooke, the defendant's representative, contained provisions that unless the defendant was the owner or charterer by demise of the vessel in which the goods were being carried the Bills of Lading would take effect only as a contract with the owner or demise charterer, the defendant being agents only and under no personal liability.

*Held:* That in circumstances such as those under which the Bills of Lading on which the plaintiff's action is based were signed, the Time Charterer (the defendant) being neither the owner of the vessel nor its possessor under a demise charter, in signing the Bills of Lading acts only for and is the agent of the owner of the vessel.

2. That the contract clearly stipulates that if the defendant was neither the owner nor the charterer by demise there was to be no contractual relationship between the plaintiff and the defendant in regard to the carriage of the plaintiff's merchandise, the mere fact that the defendant was neither the owner nor the charterer by demise being all that is necessary to make this so. The defendant was not required to notify or make the plaintiff aware that it was neither the owner nor the charterer by demise.
3. That the plaintiff, by accepting the Bills of Lading in the terms in which they were drawn is bound by the condition excluding privity of contract as between the plaintiff and the defendant in the case where the defendant was neither owner of the vessel nor in possession of it under a demise charter.
4. That it is an express condition of the contract of carriage to which the plaintiff was a party that unless the defendant was either the owner or the charterer by demise it was not to be considered as acting in its own name and the contract was deemed to be one between the plaintiff and the owner of the vessel.
5. That since there was no privity of contract as between the plaintiff and the defendant in respect of the contract of carriage, the Court would be obliged to maintain the defence in law and dismiss the plaintiff's action, if this were the sole issue involved.
6. That paragraphs 1 and 2 of the defendant's Statement of Defence are declared to be well founded.

MOTION to have an issue tried and decided before trial.

The motion was heard before the Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

*William Tetley* for plaintiff.

*L. S. Reycraft, Q.C.* for defendant.

SMITH, D. J. A. now (March 22, 1965) delivered the following decision:

The Court, having heard the parties by their respective Attorneys in regard to the question of law as to whether the defendant's plea, that there is an absence of privity of contract between the parties, is well founded, having examined the proceedings and exhibits filed and duly deliberated:

By its action the plaintiff claims the sum of \$2,375.00, alleged to represent the value of a shipment of 500 bags of potatoes entrusted to the defendant for carriage in the m.v. *Sunamelia* from Halifax, Nova Scotia to Maracaibo, Venezuela.

The plaintiff's action is based mainly upon an alleged Contract of Carriage evidenced by two Bills of Lading dated Halifax, December 18, 1954 and signed by the defendant's representative, one G. Cooke, (Exhibit D-2).

The plaintiff alleges that the said goods were so damaged as to be rendered a total loss, while in the care and possession of the defendant who, in virtue of the said Contract of Carriage, as well as by reason of its fault and negligence, is legally responsible to the plaintiff for said loss.

One of the principal grounds of defence raised is that there was no contractual relationship or privity of contract between the plaintiff and the defendant in view of the terms of the said Bills of Lading, which expressly provide that unless the defendant was the owner, or charterer by demise, of the vessel in which the goods were being carried said Bills of Lading would "take effect only as a contract with the owner or demise charterer", the defendant being agents only, and under no personal liability.

This ground of defense is raised by paragraphs 1 and 2 of the Statement of Defence which are in the following terms:

1. In answer to paragraph 1 of the Plaintiff's Statement of Claim the defendant states that Bills of Lading Nos. 28 and 29 dated December 18th, 1954, at Halifax Nova Scotia, and not dated September 18th, 1954, as stated

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in the Plaintiff's Statement of Claim, comprise the contract of carriage and that said Bills of Lading speak for themselves, and the Defendant invokes all the terms, conditions and exceptions of said Bills of Lading and, more particularly, paragraph 17 of the Conditions of Carriage, which reads as follows:—

17. PARTIES TO CONTRACT:—If the Ship is not owned by, or chartered by demise to Saguenay Terminals Limited (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal, made through the agency of the said Saguenay Terminals Limited, who act as agents only, and who shall be under no personal liability whatsoever in respect thereof. otherwise the allegations contained in said paragraph are denied.

2. The Defendant further states that said Bills of Lading Nos. 28 and 29, dated at Halifax, Nova Scotia, on December 18th, 1954 were signed on behalf of and under the authority of the Master of the S.S. *Sunamelia* and that under the terms and conditions of the said Bills of Lading, as the said vessel was not owned by or chartered by demise to the Defendant, the said Bills of Lading took effect only as a contract between the Plaintiff and the Owner of the S.S. *Sunamelia* as the carrier and the Defendant further states that there is no privity of contract between the Plaintiff herein and the Defendant.

On December 18, 1959 Counsel for the defendant gave Notice of Motion presentable December 22, 1959 (the case having previously been set down for that date) asking that the issue of privity of contract raised by paragraphs 1 and 2 of the Statement of Defence be first heard and decided and the trial of all other issues be postponed.

The trial did not take place on December 22, 1959 and the defendant's motion was held in abeyance.

On September 23, 1963 the plaintiff made a motion to have a date fixed for the trial which motion was heard on October 2, 1963 and the case set down for trial on February 25, 1964.

For some reason, which does not appear, the trial did not proceed on February 25, 1964 but on or about September 25, 1964 Counsel for both parties attended before me with respect to the setting down for trial of a number of cases including this one. The defendant's motion to have the question of privity of contract heard and decided prior to the trial of the other issues was discussed and Counsel agreed that the said question of law should be argued and decided prior to the trial of the other issues, and the Court, considering that the adoption of such a course would be in the interests of justice, ordered that the hearing on the said question of law should take place on January 8, 1965.

On January 8, 1965 Counsel for both parties appeared before me and although Counsel for the plaintiff, at that

time, indicated a certain reluctance to proceed on the question of law he appears to have withdrawn his objection and he participated in the proceedings without further objection or reserve and submitted written argument in respect of the said issue of law.

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In ordering that the said question of law should be argued and decided prior to the trial of the other issues the Court acted, not only in virtue of the agreement of Counsel, but in accordance with the discretion vested in it by rule 149 of the Exchequer Court Rules.

The sole issue therefore which is at present before the Court is whether or not paragraphs 1 and 2 of the Statement of Defence are well-founded in law. The Court is required to decide whether or not there was contractual relationship or privity of contract between the plaintiff and the defendant in respect of the carriage of the plaintiff's goods in the m.v. *Sunamelia* on the voyage above-mentioned.

There were produced in the record, without objection or reserve, the Time-Charter under which the said vessel was being operated by the defendant, as well as the Bills of Lading upon which the plaintiff mainly bases its action. The execution of these documents has not been challenged and the issue of law now before the Court must, in my opinion, be decided on the basis of these documents.

The two Bills of Lading (Exhibit D-2) are dated Halifax, Nova Scotia, December 18, 1954. At the top of each is printed the heading "Bill of Lading" and on the line immediately beneath this is the name "Saguenay Terminals Ltd., Montreal".

Both documents are signed with the printed name "Saguenay Terminals Ltd." and on the line immediately beneath that appears the signature of one "G. Cooke", below which appears the designation "Master or Agents".

Apparently "G. Cooke" was an employee of the defendant who signed in virtue of the written authority executed by the Master of the m.v. *Sunamelia* on November 9, 1953 (Exhibit D-3).

Immediately above the signature appears the following clause:

In accepting this Bill of Lading the shipper, consignee, owner of the goods and the holder of the Bill of Lading expressly agrees to all its terms, conditions and exceptions, whether written, printed, stamped or incorporated.

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Therefore Clause 17 of the Bills of Lading, hereinabove quoted contains terms and conditions which are binding upon the plaintiff.

The Charter-Party entered into between the owners of the vessel and the defendant contains the following provisions:

8. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The Owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account.

On behalf of the defendant it is submitted that, since it was neither owner nor charterer by demise of the m.v. *Sunamelia* it must, in virtue of the foregoing clause, be held to have signed said Bills of Lading solely in a representative capacity as agent for the owner, and there is no lien de droit or privity of contract between the parties, in so far as the alleged contract of carriage is concerned.

The plaintiff, in its written argument, submits that there are two contradictory judgments relating to the point at issue, one rendered by this Court in the case of *Apex (Trinidad) Oilfield Ltd. v. Lunham & Moore Shipping Ltd.*<sup>1</sup> and the other rendered in the United States, namely *Epstein v. U.S.A.*<sup>2</sup> In fact however, there are several other judgments or authorities bearing on the issue, to at least some of which references were made in the *Apex* case. They are as follows:

*Hassneh Insurance Co. Ltd. et al. v. Sargena Company et al.* Civil case no 152/66 in the District Court of Haifa and in the Supreme Court, Court of Appeals no 328/58. It is noteworthy that Clause 17 of the Bill of Lading involved in that case was in terms almost identical to those of the Clause 17 of the Bills of Lading relied upon in the present case.

*The Aristo*<sup>3</sup>.

Under Canadian Law, governing a voyage from Canada to Bermuda, the sub-charterer who signs bills of lading (with or without its own printed name) for Master and Owners or "for the Master without disclosure that the vessel is chartered and that claims must be enforced solely against the ship and Ship-owner, does not thereby become bound as a carrier; the ship-owner, being the carrier; hence the sub-charterer is not liable for loss of cargo by negligent stranding and the question of whether the vessel was seaworthy or whether due diligence had been used to make her so does not arise in a suit against the sub-charterer.

<sup>1</sup> [1962] 2 Lloyd's Rep. 203.

<sup>2</sup> (1945) A.M.C. 1598.

<sup>3</sup> (1941) A.M.C. 1744.

*Patterson Steamship Limited v. Aluminum Co. of Canada*<sup>1</sup>.  
*Valkenburg, K-G v. SS. Henry Benny No. 9*<sup>2</sup>

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It appears to be now settled therefore that, in circumstances such as those under which the Bills of Lading on which the plaintiff's action is based were signed, the Time Charterer, being neither the owner of the vessel nor its possessor under a demise charter, in signing said Bills of Lading acts only for, and is the agent of, the owner of the vessel.

The contract clearly stipulates that if Saguenay Terminals Ltd. was neither the owner nor the charterer by demise there was to be no contractual relationship in regard to the carriage of the plaintiff's merchandise between the plaintiff and the defendant. The mere fact that the defendant was neither the owner nor the charterer by demise is all that is necessary to make this so. There is nothing which required Saguenay Terminals Ltd. to notify or make the plaintiff aware that it was neither the owner nor the charterer by demise. Had the plaintiff wished to know the identity of the owner of the vessel or whether the defendant was in possession of it under a demise charter, it could have insisted upon being supplied with this information prior to accepting these Bills of Lading. It did not do so however. On the contrary it accepted the said Bills of Lading including the clause which expressly excluded privity of contract as between the plaintiff and the defendant in the case where the defendant was neither owner of the vessel nor in possession of it under a demise charter. The plaintiff, by accepting said Bills of Lading in the terms in which they are drawn is bound by this condition. The case is not to be assimilated to that of a mandatory acting in his own name (Article 1716 CC). It is clear from the Bills of Lading (Clause 17) that it is an express condition of the Contract of Carriage to which the plaintiff was party, that unless the defendant was either the owner or the charterer by demise, it was not to be considered as acting in its own name and the contract was deemed to be one between the plaintiff and the owner of the vessel.

The Court therefore reaches the conclusion that there was no privity of contract as between the plaintiff and the defendant in respect of the Contract of Carriage alleged and that paragraphs 1 and 2 of the Statement of Defence are

<sup>1</sup> [1951] S.C.R. 852, Rand J. at p. 854.

<sup>2</sup> (1961) A.M.C. 2221.

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well founded, and if this were the sole issue involved, the Court would be obliged to maintain the defence in law and dismiss the plaintiff's action.

However, on behalf of the plaintiff it was argued that the plaintiff's action is based not merely on allegations of contractual fault but also contains allegations of fault and negligence which, if proven, would entitle the plaintiff to succeed. A careful examination of the allegations of plaintiff's Statement of Claim satisfies me that such is the case. There are various allegations of fault and negligence, some of which at least, if proven, might conceivably engage the personal liability of the defendant even if, it was acting solely as an agent of the owner.

An agent, even though acting as such, may nevertheless render himself personally responsible towards third persons for loss or damage occasioned to them by his fault or negligence. CC 1053, CC 1106, CC 1709 *et seq.*, and CC 1715 *et seq.*

The Court concludes therefore that the issue of law raised by paragraphs 1 and 2 of the defendant's Statement of Defence must be decided in favour of the defendant and the defence of lack of privity of contract upheld.

On the other hand, it finds that the Statement of Claim contains allegations of delictual fault which, if proved, might well engage the responsibility of the latter even although it may have been acting for and on behalf of the owner.

On the present proceedings therefore in so far as they relate solely to the question of whether or not there was privity of contract between the plaintiff and the defendant the Court concludes that this issue must be decided against the plaintiff.

CONSEQUENTLY, paragraphs 1 and 2 of the defendant's Statement of Defence are declared to be well founded and the costs of the present proceedings on the issue of law are assessed against the plaintiff.

ENTRE :

LE MINISTRE DU REVENU }  
NATIONAL ..... }

APPELANT ;

1963  
Avril 26  
1965  
février 5

ET

ROLAND COUTURE ..... INTIMÉ.

*Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu. S.R.C. 1962, ch. 148, art. 12(1)(a)—Gain de capital—Revenu non imposable—Appel rejeté.*

L'intimé est propriétaire d'une usine depuis 1945. Il fait affaires sous le nom de «Carnegie Locknit Reg'd», transformant des marchandises, i.e., soie brute, viscosse, nylon et terylene en certaines pièces surtout utilisées dans la production de la lingerie pour dames.

Vers le milieu de 1956, il fut approché par un nommé F. J. Marcotte de F. J. Marcotte Cie Ltée et par un M. McCarthy de Canadian Chemical and Cellulose Co. Ltd., vendeur de soie brute, viscosse, nylon et terylene, qui tous deux lui proposèrent de lui vendre à meilleurs comptes que d'autres, toutes marchandises ou machinerie dont il pourrait avoir besoin dans son usine.

D'après l'intimé, Marcotte avait le contrôle de la production et de la vente des marchandises de C. Co. et M. McCarthy en était l'un des vendeurs.

L'intimé, dans le cours de l'année 1956, acheta sa marchandise exclusivement de F. J. Marcotte et Cie Lté de Montréal, P.Q.

Cependant, après six mois, soupçonnant de la part de Marcotte et de McCarthy des agissements louches envers lui, l'intimé découvrit qu'il s'exposait involontairement à être considéré comme prenant part à une conspiration et mit fin à ces anomalies en cessant d'acheter ses marchandises de Marcotte.

Le prix des marchandises que l'intimé avait achetées de la Cie Marcotte s'élevait à la somme de \$11,126.25.

Sur refus par Couture (Carnegie) de payer ce compte, et pour cause, la Cie Marcotte lui intenta une action en justice pour \$11,126 25.

La Cie Marcotte négligea de payer le prix des marchandises achetées de Canadian Cellulose Co. Ltd. et vendues et livrées à Carnegie (R. Couture, intimé). Requête par C. Co. de lui transférer sa créance contre l'intimé, elle accepta.

Plus tard, une entente par écrit, intervint entre Cellulose Co. et Carnegie (23 décembre 1957) et, par concessions réciproques, les parties mirent fin à une action, en premier lieu originairement instituée par la Cie Marcotte et, en second lieu, à une menace de poursuite judiciaire faite par l'intimé contre C. Co.

La somme de \$11,126.25 représente le prix de certaines marchandises que l'intimé ne paya jamais puisque cette créance fut annulée et remise.

Le Ministre du Revenu national s'est cru justifié d'ajouter cette somme de \$11,126.25 au revenu autrement imposable de l'intimé pour l'année 1957.

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L'intimé en appela de cette imposition à la Commission d'Appel d'Impôt qui décida que le montant de \$11,126.25 dont l'intimé a bénéficié en raison de la susdite remise de compte constitue un gain de capital et non un revenu imposable provenant de son entreprise.

De là d'un pourvoi devant cette Cour.

*Jugé*: Ce montant de \$11,126.25, annulé et remis à titre de dommages doit être considéré comme un gain de capital.

2. L'appelant n'a pas établi, conformément à la cause de «Goldman v. Minister of National Revenue ((1953) 1 S.C.R. 211)» que le bénéfice dans la présente cause a été reçu pour services rendus.
3. La preuve indique clairement que Canadian Chemical and Cellulose Co. Ltd. tenait à acheter sa paix et que pour ce faire, elle a payé, par voie de remise de dette, l'équivalent de \$11,126.25 afin d'empêcher une action en dommages que l'intimé entendait instituer contre elle. Les dispositions de la dite transaction sont telles que prévues aux articles 1918, 1919 et 1920 du Code Civil.
4. L'intimé était justifié d'utiliser le montant de \$11,126.25 qu'il devait récupérer de C. Co. comme dommages et, c'est pour cette raison qu'il entra dans son état financier, sous le titre: «Conciliation of Capital Accounts» comme surplus de capital, pour liquider une somme identique (\$11,126.25) mais payable pour marchandises reçues.
5. Le montant dû, soit \$11,126.25, inclus comme achats et coût de ventes dans le rapport de l'intimé intitulé: «Profit and Loss Statement» fut, avec raison, traité par conciliation comme un compte payé.
6. La remise de créance ne constitue pas, en l'espèce, un rabais ou abattement, mais bien deux dettes distinctes et pour un montant identique; c'est un gain de capital, donc non imposable.
7. L'appel est rejeté et la décision de la Commission d'Appel d'Impôt est maintenue; l'intimé était justifié d'utiliser le montant de \$11,126.25, comme surplus de capital.

APPEL d'une décision de la Commission d'Appel de l'Impôt.

L'appel fut entendu par l'Honorable Juge Kearney à Montréal.

*Paul Boivin, c.r. et R. Boudreau* pour l'appelant.

*Stanley Steinman* pour l'intimé.

Les faits et questions de droit sont exposés dans les motifs de la décision que rend maintenant (5 février 1965) monsieur le JUGE KEARNEY:

Il s'agit ici d'une décision de la Commission d'appel de l'impôt sur le revenu en date du 13 décembre 1951<sup>1</sup>, maintenant l'appel de l'appelant contre une cotisation par laquelle le Ministre ajouta une somme de \$11,126.25 au revenu autrement imposable de l'intimé pour l'année 1957.

<sup>1</sup> 28 TAX A.B.C. 358.

Ce montant ainsi ajouté représente le prix de certaines marchandises (principalement de la soie brute) achetées de l'un de ses fournisseurs par l'intimé et que ce dernier ne versa jamais, puisque subséquemment, par consentement mutuel intervenu entre l'acheteur et le vendeur ou ses ayants-droit, cette créance fut annulée et remise.

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La Commission, par sa décision, décida que le montant dont l'intimé a bénéficié en raison de la susdite remise de compte constitue un gain en capital et non un revenu imposable provenant de son entreprise.

Les procureurs au dossier ont déclaré mutuellement qu'ils s'entendaient pour offrir dans cet appel comme preuve celle produite devant la Commission d'appel de l'impôt, telle que contenue dans la copie de la transcription de la preuve qu'ils produisent ainsi que le dossier.

Les allégations principales de l'avis d'appel se lisent comme suit:

#### A. EXPOSÉ DES FAITS

1. L'intimé a produit une déclaration de son revenu pour l'année d'imposition 1957;
2. Dans ladite déclaration, l'intimé a déduit des profits bruts de son entreprise pour l'année 1957 un montant de \$11,126.25 comme coût de marchandises;
3. Cette dette de \$11,126.25 encourue pour l'achat de marchandises n'a jamais été payée et n'est plus exigible;
4. L'appelant a refusé de reconnaître comme déduction des profits le montant de \$11,126.25 et a cotisé l'intimé en conséquence en ajoutant ledit montant à ses profits.

#### B. DISPOSITIONS STATUTAIRES ET RAISONS À L'APPUI DE L'APPEL:

1. Le montant de \$11,126.25 ne peut être réclamé comme dépense encourue pour gagner le revenu aux termes de l'article 12(1)(a) de la *Loi de l'impôt sur le revenu*;
2. L'appelant a tenu compte de la somme de \$11,126.25 dans le calcul du revenu du contribuable en conformité des dispositions des articles 3 et 4 de la *Loi de l'impôt sur le revenu*.

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Ce qui suit est en partie la réponse de l'intimé au susdit avis d'appel:

A. EXPOSÉ DES FAITS

1. L'exposé des faits contenus dans les paragraphes 1, 2, 3 et 4 semblent être véridiques.
- B. 1. Les allégations contenues aux paragraphes 1 et 2 de la partie "B" de l'appelant, sont niées par l'intimé.
- D. ET POUR PLUS AMPLE RÉPONSE, L'INTIMÉ DIT:
  2. L'intimé s'oppose à cette décision pour les raisons suivantes:
    - a) Cette somme de \$11,126.25 ajoutée à son revenu ne peut être considérée comme un revenu imposable parce qu'il ne peut être question d'un ajustement de prix de la part de Canadian Chemical & Cellulose Co. Ltd., la marchandise ayant été achetée de F. J. Marcotte Co. Ltd.
    - b) A la suite d'une entente avec F. J. Marcotte Reg'd datée du 24 août 1956, l'intimé fut placé dans une position telle qu'il ne pouvait plus acheter directement de Canadian Chemical & Cellulose Co. Ltd., et tous ses achats devaient être faits chez F. J. Marcotte Co. Ltd.
    - c) Après enquête, l'intimé découvrit qu'un officier de la compagnie Canadian Chemical & Cellulose Co. Ltd. était associé à monsieur F. J. Marcotte; ce dernier livrait à l'intimé des marchandises de première qualité au prix de celles de bonne ou seconde qualité.
    - d) Craignant pour sa réputation et pour sa position vis-à-vis la compagnie Canadian Chemical & Cellulose Co. Ltd., qui pouvait être celle d'un conspirateur, l'intimé attira l'attention des autorités de la Canadian Chemical & Cellulose Co. Ltd. à plusieurs reprises, mais sans succès.
    - e) A la suite du refus de l'intimé de payer le solde du compte dû à F. J. Marcotte Co. Ltd. des procédures furent prises par cette dernière compagnie en recouvrement du compte; les événements se sont précipités et avant l'audition de cette cause en Cour Supérieure, F. J. Marcotte Co.

Ltd. fit cession de ses biens et entre autres céda à Canadian Chemical & Cellulose Co. Ltd. le 20<sup>e</sup> décembre 1957 le solde du compte réclamé par l'action en recouvrement.

- f) Le 23 décembre 1957, cette créance fut annulée par Canadian Chemical & Cellulose Co. Ltd. en considération des renseignements que l'intimé avait fournis à Canadian Chemical & Cellulose Co. Ltd. sur les relations existantes entre l'officier de la compagnie, congédié à la suite de ces faits, et F. J. Marcotte Co. Ltd.
- g) Comme cette remise de créance ne constitue pas un rabais sur marchandises, l'intimé considère ce montant comme un gain de capital n'étant pas imposable."

Je dois dire immédiatement qu'à mon avis le point décisif de la cause réside dans la détermination de la nature de la prétendue remise de dette susdite s'élevant à \$11,126.25.

Je ne crois pas que les mots «annulation» ou «remise de dette» décrivent avec exactitude une situation où deux parties ayant des droits et intérêts opposés règlent leurs différends sur une base de *quid pro quo*.

Pour les raisons susmentionnées, je crois qu'il est important d'examiner les principales circonstances qui ont conduit à la prétendue annulation ou remise de compte.

Il y a eu peu de contestation quant aux faits et—sujets à certaines modifications non essentielles que je mentionnerai plus tard—on trouve ces faits dans le témoignage de l'intimé, le seul témoin appelé par son procureur.

Depuis 1945 ou 1946, l'intimé était le propriétaire d'une compagnie faisant affaires sous le nom de Carnegie Locknit Reg'd. (ci-après appelée «Carnegie»), en la cité de Sherbrooke, P.Q. L'intimé, peu de temps après avoir ouvert son usine, a commencé à acheter de Canadian Chemical & Cellulose Co. Ltd. (ci-après appelée «C. Co»), dont le bureau principal était situé à Montréal, P.Q., sa marchandise (soie brute, viscose, nylon et terylene), pour la transformer en certaines pièces surtout utilisées dans la production de la lingerie pour dames. L'intimé déclara que vers le milieu de 1956, il fut approché par un nommé F. J.

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Marcotte, un M. McCarthy et une troisième personne dont il ne se rappelle pas le nom, qui l'informèrent que s'il cessait de faire affaires directement avec C. Co., ils achèteraient eux-mêmes, directement de cette compagnie, toutes les marchandises ou machinerie dont il pourrait avoir besoin dans son usine et qu'ils seraient prêts à les lui revendre à des conditions plus favorables que celles que l'intimé obtenait à ce moment. D'après l'intimé, Marcotte avait le contrôle de la production et de la vente des marchandises de C. Co. et M. McCarthy était un directeur de cette dernière compagnie. L'intimé accepta la susdite proposition et, dans le cours de l'année 1956, il acheta sa marchandise exclusivement de F. J. Marcotte de Montréal, P.Q., qui plus tard fit affaires sous le nom de F. J. Marcotte Enr., laquelle firme fut par la suite connue sous le nom de F. J. Marcotte Cie Ltée (ci-après appelée «Compagnie Marcotte»). Ce n'est qu'à l'expiration de six mois que l'intimé soupçonna qu'il y avait quelque chose de louche, lorsqu'il se rendit compte que les marchandises qu'il achetait directement de la Compagnie Marcotte et qui étaient transportées à Sherbrooke dans des camions portant le nom de C. Co. n'étaient pas apportées directement à l'usine de l'intimé mais étaient d'abord livrées à une firme locale, Hodge's Trucking Depot qui les transféraient sur leurs camions pour les transporter finalement à la place d'affaires de l'intimé.

L'intimé déclara aussi, en ce qui a trait aux expéditions de soie brute, que 50 à 75 pour cent de ces livraisons comportaient une marchandise de première classe qui était chargée au compte de l'intimé au même prix que s'il s'était agi d'une marchandise de deuxième classe. L'intimé à un certain moment s'inquiéta de ces anomalies et craignit de s'exposer involontairement à être considéré comme prenant part à une conspiration. Il déclara également que MM. Marcotte et McCarthy lui suggérèrent de se porter acquéreur d'un intérêt de 25 pour cent dans la Compagnie Marcotte, ce qu'il refusa de faire.

Les factures que l'intimé recevait de Marcotte portaient toutes le même numéro, soit le numéro 518, et il déclara qu'il écrivit à M. McCarthy lui demandant, après lui avoir mentionné le numéro en question, d'expliquer les anomalies susmentionnées se rapportant à la livraison et à l'achat des

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marchandises. Comme il ne reçut aucune réponse à sa lettre, il communiqua alors avec M. McCarthy de C. Co. par télégrammes et par lettres recommandées, mais sans plus de succès. Il essaya ensuite de rejoindre M. McCarthy par appels interurbains et, au cours de l'une de ses vaines tentatives, il réussit à parler à M. Keith, le président de C. Co., à qui il fit part de ses soupçons lui disant qu'il était convaincu qu'«il a quelque chose de croche qui marche» quant à ses achats de Marcotte, mais le président, dit-il, lui donna à entendre que, si tel était le cas, c'était lui (l'intimé) qui était «croche», et il refusa de faire quoi que ce soit à ce sujet. L'intimé consulta alors son avocat et celui-ci l'avisait de refuser les paiements dus à la Compagnie Marcotte, pour marchandise vendue et livrée (ci-après désignée «la marchandise»), s'élevant à \$11,126.25. Peu de temps après, la Compagnie Marcotte institua des procédures judiciaires contre lui, mais—pour des raisons que j'expliquerai plus tard—l'action fut retirée.

Le procureur de l'intimé envoya ce qui est communément appelé «une lettre d'avocat» au président de C. Co., réclamant des dommages pour un montant excédant de beaucoup le montant de \$11,126.25, prix des marchandises vendues, et provoqua la visite d'un M. Marshall, avocat, qui était aussi alors secrétaire de C. Co., à Sherbrooke, où il y rencontra l'intimé et son avocat. Pendant cette visite, M. Marshall—à qui copies des lettres et télégrammes susmentionnés furent montrées et sur preuve des appels téléphoniques—déclara que la Compagnie n'avait jamais été mise au courant ni des lettres, télégrammes ou même des téléphones et il semble bien que ces communications furent interceptées par M. McCarthy, qui fut plus tard congédié.

D'autres événements survinrent par la suite. La Compagnie Marcotte négligea de payer la marchandise achetée de C. Co. et subséquemment vendue à Carnegie, et la Compagnie Marcotte, à la demande de C. Co., lui transféra sa créance contre l'intimé. Il semble aussi que la réclamation comprenait deux machines pour le tricot, dont le prix n'a pas été indiqué (voir Ex. R-1). Je dois ajouter qu'en ce qui regarde ces deux machines les procureurs des parties ont déclaré qu'elles ne sont pas en litige et que l'on ne doit pas en tenir compte.

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Peu de temps après, la Compagnie Marcotte fit cession volontaire de ses biens. Le 23 décembre 1953, pour régler leurs différends, une entente par écrit (Ex. A-1) intervint entre C. Co. et Carnegie, laquelle se lit comme suit:

December 23, 1957

Canadian Chemical & Cellulose  
Company Ltd.,  
2035 Guy Street,  
Montreal 25, Quebec.

Dear Sirs:

F. J. Marcotte Company Ltd. have at present a claim against us in the amount of \$11,126.25 which is alleged to represent balance of payment due on goods delivered by them to us.

By separate agreement you have arranged for the assignment of this claim from F. J. Marcotte Company, Ltd. to Canadian Chemical & Cellulose Company Ltd., and although it was our intention to contest this claim, we hereby agree to the said assignment and hereby acknowledge the claim.

In consideration for such action on our part, you have agreed upon completion of such assignment to cancel the said claim of \$11,126.25. In consideration for such action on your part, we hereby waive any and all claims which we might have against the said F. J. Marcotte Company Ltd. or against Canadian Chemical & Cellulose Company, Ltd. by reason of the assignment from F. J. Marcotte Company Ltd.

Yours very truly,  
Carnegie Locknit Reg'd.  
per: Roland Couture

Canadian Chemical  
& Cellulose Company, Ltd.  
(signature illisible)

Il est évident, à mon avis, que l'exhibit A-1 comporte un double but, étant donné que les parties y mentionnées, en faisant des concessions—chacune d'elles possédant une valeur reconnue de \$11,126.25—ont mis fin en premier lieu à une action originalement instituée par la Compagnie Marcotte contre l'intimé, mais cédée par la Compagnie Marcotte à C. Co., et, en second lieu, à une menace de poursuite judiciaire faite par l'intimé contre C. Co. Les dispositions dudit contrat sont telles que prévues dans les articles 1918, 1919 et 1920 du Code civil:

1918. La transaction est un contrat par lequel les parties terminent un procès déjà commencé, ou préviennent une contestation à naître, au moyen de concessions ou de réserves faites par l'une des parties ou par toutes deux.

1919. Ceux là seuls qui ont la capacité légale de disposer des objets compris dans la transaction peuvent en transiger.

1920. La transaction a, entre les parties, l'autorité de la chose jugée en dernier ressort.

Au paragraphe 3 de l'avis d'appel, l'intimé allègue que la dette de \$11,126.25 encourue par l'intimé pour l'achat de marchandises n'a jamais été payée et qu'elle n'est plus exigible, mais dans mon opinion, comme conséquence de la susdite transaction, la dette de l'intimé, en fait et en droit, a été aussi effectivement payée que si chacune des parties y afférentes s'étaient mutuellement remis un chèque de \$11,126.25.

Comme je l'ai déjà dit, la question la plus importante à déterminer est celle-ci: le bénéfice que *l'intimé a reçu* en raison de l'entente par écrit Ex. A-1, par laquelle l'intimé avait le droit de recevoir un crédit pour ladite somme de \$11,126.25, constitue-t-il un revenu taxable?

Si l'on pouvait dire avec justification, conformément à la cause de *Goldman v. Minister of National Revenue*<sup>1</sup>, que le bénéfice dans la présente cause a été reçu pour services rendus, je n'hésiterais pas à maintenir le présent appel. Le paragraphe f) de la réponse à l'avis d'appel pourrait, jusqu'à un certain point, être invoqué en faveur de cette soumission, lequel paragraphe—dans le but de sauver du temps—il est bon, je crois, de répéter:

f) Le 23 décembre 1957, cette créance fut annulée par Canadian Chemical & Cellulose Co. Ltd. en considération des renseignements que l'intimé avait fournis à Canadian Chemical & Cellulose Co. Ltd. sur les relations existantes entre l'officier de la compagnie, congédié à la suite de ces faits, et F. J. Marcotte Co. Ltd.

Le procureur de l'appelant a compris l'importance de cette question et, à mon avis, s'est donné beaucoup de peine, mais en vain, pour établir que le bénéfice reçu par l'intimé a été accordé à ce dernier pour services rendus, tel qu'il appert du témoignage de Clifford Malone, secrétaire de C. Co., entendu de la part de l'appelant. En réponse à la question «Was it (the debt) cancelled to avoid legal proceedings?» le témoin a dit:

A. It was, to the best of my knowledge, for many reasons; one of which was a threatened suit by Carnegie Locknit against Canadian Chemical based on certain alleged commitments made by one of our salesmen to Carnegie.

Q. Was it cancelled as a reward or as a donation to Mr. Couture for services he rendered to your company?

<sup>1</sup> [1953] 1 S.C.R. 211.

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A. No.

Q. It was not as a reward for services he rendered to your company?

A. No.

De plus, en transquestion (p. 48, *in fine*) le procureur de l'intimé demanda au témoin Malone de produire comme Exhibit R-2 une lettre qui se passe de commentaires et qui se lit comme suit:

CSM-424-60

July 29, 1960.

Department of National Revenue,  
 Taxation Division,  
 50 Couture Street,  
 Sherbrooke, P.Q.

Attention: Mr. G. Thivierge, Appeal Section.

Dear Sirs:

In reply to your letters of June 16th and July 13th and further to our telephone conversation of yesterday, I wish to advise as follows with respect to the claim of Canadian Chemical & Company, Limited against Carnegie Locknit Reg'd. in the amount of \$11,126.25. In this regard I also advise that Canadian Chemical & Cellulose Company, Limited has now been wound up and any residual matters are being handled by Canadian Chemical Company, Limited.

In 1957 Chemcell Fibres Limited, a then subsidiary of Canadian Chemical & Cellulose Company, Limited, discovered that one of its salesmen was downgrading goods being sold to F. J. Marcotte Co. Ltd., which company in turn sold such goods to Carnegie Locknit Reg'd as first grade goods but at reduced prices. At the same time our salesman assured Carnegie of a continuous supply of such goods at similar reduced prices.

Chemcell Fibres in effecting settlement with the F. J. Marcotte firm for the true value of the goods sold received a claim of Marcotte against Carnegie in the amount of \$11,126.25.

However, Carnegie at that time indicated the possibility of instituting legal action against Chemcell Fibres because of the above mentioned undertaking of the salesman, Carnegie having made commitments to its customers based on a continual supply of goods at reduced prices. Accordingly, it was decided that it was in the best interest of Chemcell Fibres not to enforce collection of the \$11,126.25 and upon the undertaking of Carnegie that legal action would not be commenced such claim was cancelled.

We trust that the above fully answers your request and we would ask that this information be treated in confidence.

Yours very truly,  
 (signature) C. S. Malone,

CSM/os

Secretary

En ce qui a trait à la lettre Exhibit R-2 précitée, le témoin Malone a témoigné comme suit (p. 49):

Q. Referring to that letter, could you say you cancelled that amount from your books as a normal course of business or was it extraordinary?

A. It was extraordinary, it is not normal.

Q. What did you do to cancel that amount from your books?

A. There were several reasons, and one of which was that we were threatened with a suit by Carnegie against our company, and another one was that we could not maintain the sale or yarn at those prices and maintain the market for the yarn. Thirdly, we wished to close up the matter, it was an unhappy affair as far as our company was concerned, and we were quite happy to close it off and we wished to maintain business relations with Mr. Couture.

Je réitère que le témoignage de Roland Couture ne s'accorde pas tout à fait avec celui de Marcotte. En effet, si on se réfère à la preuve et si on lit la lettre Exhibit R-2, il semble qu'au paragraphe 2 de cette lettre Marcotte y a désigné McCarthy comme étant un vendeur à l'emploi d'une filiale de C. Co., en 1957, alors que l'intimé, lui, l'a désigné comme étant un directeur de cette dernière compagnie. Je crois, toutefois, que cette différence a peu d'importance.

A mon avis la preuve indique clairement que C. Co. tenait à acheter sa paix et que, pour ce faire, elle a payé, par voie de remise de dette, l'équivalent de \$11,126.25 afin d'empêcher une action en dommages que l'intimé entendait instituer contre elle.

Le procureur de l'appelant a mis de l'avant un argument additionnel, à savoir: que même si l'on admet que l'intimé a reçue \$11,126.25 à titre de dommages et que ce montant peut être considéré comme un gain de capital, les entrées qui apparaissent dans les livres de compte de l'intimé sont erronées.

La prétendue erreur dont le procureur de l'appelant se plaint est suffisamment résumée dans la transcription de son argument; je cite:

. . . lorsqu'il y a eu cancellation de dette, le montant de \$11,126 25 aurait dû être déduit du compte d'achats et aussi déduit des comptes payables. Mais monsieur Couture a toujours laissé dans ses livres le montant de \$11,126.25 au lieu de le diminuer du compte d'achats; il l'a transféré aux comptes payables, ce qui veut dire que pour l'année 1957 il réclame toujours une dépense de \$11,126.25 dans ses livres, dette qui lui a été annulée, pour quelque raison que ce soit et comme je l'ai dit tantôt . . .

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La susdite prétention de la part de l'appelant ne peut pas prévaloir, parce qu'à mon avis il ne s'agit pas en l'espèce d'un rabais ou abattement, mais bien de deux dettes distinctes et pour un montant identique, l'une par laquelle C. Co. est endettée envers l'intimé par suite des dommages qu'il aurait subis et l'autre représentant la valeur de certaines marchandises vendues et payables par l'intimé à C. Co., le débiteur, dans les deux cas, ayant reconnu sa responsabilité.

Je considère que l'intimé était justifié d'utiliser le montant de \$11,126.25, qu'il devait récupérer de C. Co. pour dommages et qu'il entra dans son état financier sous le titre «Conciliation of Capital Account» comme surplus de capital, pour liquider une somme identique (\$11,126.25), mais payable, pour marchandises reçues.

Je suis également d'opinion que le dit montant dû, soit \$11,126.25, qui est inclus comme achats et coût de ventes dans le rapport de l'intimé intitulé «Profit and Loss Statement», fut avec raison traité, par conciliation, comme un compte payé. Je crois que s'il avait été traité de la façon suggérée par l'appelant ceci aurait eu pour résultat d'accroître les profits de l'intimé d'une somme de \$11,126.25 en se servant de l'expédient injustifiable de cotiser un gain provenant de la réalisation d'un capital de même montant.

Comme je l'ai déjà fait remarquer, à mon avis l'intimé était justifié de faire dans ses livres les mêmes entrées qu'il aurait pu faire si les deux, l'intimé et C. Co., avaient suivi la formalité de s'échanger chacun leur chèque pour un même montant, viz. \$11,126.25.

Je ne puis, par conséquent, tenir pour justifiée la cotisation de l'appelant par laquelle \$11,126.25 a été ajouté au revenu autrement imposable de l'intimé.

PAR CES MOTIFS, il s'ensuit que les \$11,126.25 que l'intimé, ainsi qu'il a été admis, avait droit de recevoir ne constituent pas un revenu découlant d'un commerce, ni un paiement pour services rendus, mais un gain afférent à la réalisation d'un capital, et n'est pas par conséquent imposable.

L'appel est donc rejeté avec dépens.

*Jugement en conséquence.*

ENTRE:

PIERRE RABY ..... APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL . . . . INTIMÉ.

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 mars 8  
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*Revenu—Impôt sur le revenu—Loi de l'Impôt sur le Revenu, S.R.C., 1952, ch. 148, articles 85E(1)(a)(b), 99(1), 139(1)(e)—Vente de fonds de commerce avec profit—Affaire de nature commerciale—Appel rejeté.*

L'appelant était un entrepreneur de construction. Pour l'exploitation de son entreprise il s'était associé à Roger Pilon et tous deux faisaient affaires sous les nom et raison sociale de «Global Construction Company.» Cette société avait construit une centaine de maisons d'habitation dans le secteur Roxboro, en banlieue de Montréal.

Devenu sérieusement malade, l'appelant, sur le conseil de son médecin, se retira des affaires et convint de dissoudre la société et de vendre les intérêts qu'il y détenait. L'appelant toucha une somme de \$27,191.40, profit qu'il réalisa pour sa part de l'entreprise. L'estimation des biens de Raby fut établie à \$92,000 assujettie à une dette hypothécaire de \$64,808 60 laissant une part réelle de \$27,191.40.

Dans son rapport d'impôt pour l'année 1957, il omit d'inclure ce montant de \$27,191.40, prétendant être exempt de l'imposition fiscale, vu que, selon lui, cette somme représentait une plus-value non imposable de capital.

Le Ministre différa d'opinion. Il décida que Pierre Raby, l'appelant, était soumis à l'impôt sur le revenu selon les dispositions des articles 3, 4 et 139(1)(e) de la Loi. Il le cotisa donc pour une somme supplémentaire de \$8,382.52 afférente à un profit de \$27,191.40 que Raby avait réalisé pendant l'année d'imposition 1957.

De cette décision Pierre Raby interjeta appel à la Commission d'Impôt sur le Revenu qui maintint la cotisation susdite. Il se pourvoit maintenant en appel devant cette Cour.

*Jugé:* La transaction faite avec profit par Pierre Raby, qui céda sa part dans une entreprise de construction à la firme Alain Construction Inc., alias Roger Pilon, constitue *une affaire de nature commerciale*, soit une cession de biens portés à l'inventaire social et, de ce chef, soumise à l'impôt sur le revenu selon les dispositions des articles 3, 4 et 139(1)(e) de la Loi (ch 148, S. R. du C. 1952).

2. La vente, conclue le 4 octobre 1957, entre Global Construction (Pierre Raby) et Alain Construction, démontre de façon certaine que la part du cédant Raby se composait d'une moitié «des biens compris dans l'inventaire de l'entreprise» jadis exploitée conjointement avec Roger Pilon.

3. L'appel est rejeté sans frais pour les raisons que l'intimé à qui l'article 99(1) de la Loi fiscale imposait la divulgation «des dispositions statutaires et raisons» sur lesquelles il avait l'intention de s'appuyer, n'a fait aucune mention, dans sa réponse, de l'article 85E(1), raison essentielle du débouté.

APPEL d'une décision de la Commission d'Appel de l'Impôt sur le Revenu.

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L'appel fut entendu par l'honorable juge Dumoulin, à Montréal.

*A. J. Rosenstein*, c.r. pour l'appelant.

*Paul Boivin*, c.r. et *Paul Coderre* pour l'intimé.

Les faits et points de droit sont exposés dans les motifs de la décision que rend maintenant (8 mars 1965) l'honorable JUGE DUMOULIN:

Il s'agit d'un pourvoi devant cette Cour de la décision rendue le 1<sup>er</sup> mars 1963, par la Commission d'appel de l'impôt, approuvant une cotisation supplémentaire de \$8,382.52 afférente à un profit de \$27,191.40, réalisé par l'appelant pendant l'année d'imposition 1957.

Bien que les procédures littérales soient rédigées en anglais, l'enquête et les plaidoiries orales furent entendues en français; je rédigerai donc mon jugement dans cette langue qui, du reste, est celle de Pierre Raby.

Dans un exposé très minutieux des faits, l'appelant déclare que, par le truchement d'une firme, Global Construction Company, dont il était propriétaire, il avait construit une centaine de maisons d'habitation dans le secteur Roxboro, en banlieue de Montréal. Certaines complications de nature financière et municipale ralentirent les opérations au printemps de 1956, mais, à l'été de cette même année, Pierre Raby, alias Global Construction Company, accepta de s'associer avec un dénommé Roger Pilon pour faire l'acquisition de lots à bâtir.

Il fut aussitôt procédé à l'achat de six lopins de terre, puis, le 17 décembre 1956, la société Raby-Pilon souscrivit une promesse de se porter acquéreur, au prix de \$63,366, de terrains appartenant à Remi Realty Ltd., engagement exécuté peu après selon l'aveu de Roland Bigras, alors secrétaire-trésorier de cette compagnie.

Au mois de juillet 1957, Raby devint sérieusement malade, et sur le conseil de son médecin, convint de se retirer des affaires et de dissoudre la société récemment formée.

Pour faciliter la réalisation de ce dessein, Raby, qui aurait préféré le retrait pur et simple de sa moitié de l'actif social, consentit, cependant à la contre-proposition de Roger Pilon désireux d'acheter la part de son associé dans les terrains communs à un taux dont on conviendrait, puis de compléter

l'érection de certaines maisons selon les termes et conditions de l'ancienne société. Dans sa formulation anglaise cette entente se lit comme il suit :

(m) Pilon, desirous of continuing the partnership's business, proposed that he acquire Appellant's interest in the partnership's land assets, at a price to be agreed upon and that the houses in course of construction be completed on the prevailing partnership basis.

A ce stade, la société Raby-Pilon possédait environ 92 lots à construire.

L'estimation des biens à laquelle il fut alors procédé établit la demie de l'appelant à \$92,000, assujettie, toutefois, à une dette hypothécaire de \$64,808.60, laissant une part nette de \$27,191.40.

Incapable d'acquitter d'un coup cette obligation et de poursuivre son entreprise de construction, Pilon eut recours à des moyens assez compliqués afin de se procurer les ressources nécessaires.

Le plan échafaudé fut que Pierre Raby vendrait sa part des lots à une entreprise du nom de Alain Construction Inc., pour \$92,000; que cette dernière, après avoir purgé l'hypothèque de \$64,808.60, détenue par Remi Realty Inc., et payé \$27,191.40 à Raby, revendrait ces mêmes terrains, avec profit, à Roger Pilon, au prix de \$115,000.

L'admission par l'intimé de tous les faits permet, dorénavant, de supprimer le fastidieux récit des transactions multiples qui suivirent.

En bref, cette somme de \$27,191.40 fut versée à l'appelant en 1957, qui omit de l'inclure dans son rapport d'impôt de l'année susdite pour le motif que—et je citerai textuellement :

4. The profits brought to tax are not properly taxable income and consisted of capital appreciation and enhancement not taxable within the meaning of the *Income Tax Act*.

Il s'agirait donc dans la persuasion de l'appelant d'une plus-value de capitaux.

Par ailleurs, l'appelant, dans l'article 3 de la partie B (page 4) de son avis d'appel qualifie cette vente dans les termes ci-après :

3. The sale was in effect the disposal of the capital of the Appellant's undivided one-half of the partnership's land *which, in effect, was assimilable to a stock-in-trade* and was acquired for and by the remaining partner. (les mots en italique sont de moi.)

Comme bien on pense, pareille interprétation de la transaction n'est pas demeurée inaperçue. L'intimé, aux articles

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10 et 15 de la partie B de sa réponse (pages 2 et 3) prend acte de cette admission, qui ferait de la vente une cession de fonds de commerce, de valeurs portées à l'inventaire social et, de ce chef, soumise à l'impôt sur le revenu selon les articles 3, 4 et 139(1)(e) de la loi.

Au dictionnaire de terminologie légale de Black<sup>1</sup> apparaissent les définitions que voici des expressions mercantiles «Stock-in-trade» (fonds de commerce) et «Inventory» (inventaire) :

Stock-in-trade: . . . Merchandise or goods kept for sale or traffic.

Inventory: . . . an itemized list of the various articles constituting a collection, estate, stock-in-trade, etc., with their estimated or actual values.

Après ces explications préliminaires, la position du problème est simple. La transaction, avec profit, par laquelle Pierre Raby cédait, en 1957, à la firme Alain Construction Inc., alias Roger Pilon, sa part dans une entreprise de construction constituait-elle un gain de capital, comme le voudrait l'appelant, ou une affaire de nature commerciale, selon la prétention de l'intimé?

Rappelons les éléments constitutifs de cette part: la propriété, pour moitié, de 92 lots et, en outre, une égale proportion des profits pouvant résulter des travaux en cours d'exécution.

Antérieurement au statut 54 de 1955, art. 27, qui intercalait, entre autres, dans la *Loi de l'impôt*, l'art. 85E (1) la version de l'appelant se fut imposée sans conteste, vu le jugement de la Cour Suprême dans l'instance *Frankel Corporation Ltd. and The Minister of National Revenue*<sup>2</sup> auquel je réfère les parties.

Mais cet ajouté statutaire de 1955, dont le texte suit, dispose du cas dans un sens tout autre, et je cite :

85E. (1) Quand, sur l'aliénation d'une entreprise ou de quelque partie d'une entreprise ou après l'avoir aliénée, ou lorsqu'il cesse d'exploiter une entreprise ou quelque partie d'une entreprise ou après avoir cessé de l'exploiter, un contribuable a vendu la totalité ou une partie des biens compris dans l'inventaire de l'entreprise, les biens ainsi vendus sont censés, aux fins de la présente Partie, avoir été vendus par lui

(a) au cours de la dernière année d'imposition où il a exploité l'entreprise ou la partie de l'entreprise, et

(b) au cours de l'exploitation de l'entreprise.

<sup>1</sup> Black's Law Dictionary, 4th ed.

<sup>2</sup> [1959] R.C.S. 713.

Intentionnellement ou pas, cet article met de côté l'autorité du précédent ci-haut mentionné. La transaction dont il s'agit, disposant d'une partie, celle de Raby, des biens compris dans l'inventaire d'une entreprise que le cédant cessait d'exploiter, s'intègre, par définition de la loi, dans la catégorie des activités nommément visées au sous-paragraphe (e) du paragraphe (1) de l'article 139. La pièce 1, la vente conclue le 4 octobre 1957, entre Global Construction, autrement dit Pierre Raby, et Alain Construction, démontre de façon concluante que la part du cédant se composait d'une moitié «des biens compris dans l'inventaire de l'entreprise» jadis exploitée conjointement avec Roger Pilon.

PAR CES MOTIFS, l'appel est rejeté mais sans frais, aucune mention de l'article 85E (1), raison essentielle du débouté, n'apparaissant dans la réponse de l'intimé à qui l'article 99 (1) de la Loi fiscale imposait la divulgation «des dispositions statutaires et raisons» sur lesquelles il avait l'intention de s'appuyer.

*Jugement conforme.*

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ENTRE:  
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ENTRE:

AMÉDÉE DEMERS ..... APPELANT;

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ENTRE:

FRANÇOIS NOLIN ..... APPELANT;

ET

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*Revenu—Impôt sur le Revenu—Loi de l'Impôt sur le Revenu, S.R.C., ch. 148, articles 3, 4, 139(1)(e) et 85E—La vente par quelqu'un de toute son entreprise d'affaires ou commerciale (autrement que par un moyen prévu à l'art. 85A de la loi) n'est pas une transaction imposable s'il ne s'agit pas d'un commerce acheté dans le but de le revendre avec profit.*

Dans cette cause, les appelants, hommes d'affaires expérimentés, étaient engagés seuls ou ensemble dans diverses entreprises, soit comme entrepreneurs en construction, détenteurs d'immeubles pour fins de perception de loyers, directeurs de compagnie de transport routier et d'une compagnie faisant le commerce de terrains.

L'entreprise qui fut l'objet des transactions qui donnèrent lieu aux profits dont il s'agit était un commerce d'achat et de vente de machineries lourdes et de pièces opéré par Machines Modernes Ltée.

Ce débat ne porte que sur les profits réalisés par les trois appelants et provenant de:

1° la vente d'un immeuble;

2° et de la vente d'actions de Machineries Provinciales Inc.

Après avoir exploité ce commerce pendant un certain temps, les appelants le revendirent pour un prix plus élevé que celui qu'ils avaient payé pour son acquisition, et le Ministre leur imposa une cotisation supplémentaire afférente à un profit réalisé par eux pendant l'année d'imposition 1960.

La Commission d'Appel de l'Impôt (33 Tax, A.B.C. p. 14) a *maintenu* la cotisation supplémentaire afférente à un profit réalisé par les appelants et imposé par le Ministre.

Chaque contribuable se pourvoit maintenant en appel devant cette Cour.

*Jugé*: Il appert que les profits qui forment l'objet du présent appel sont des profits qui *ne doivent pas* être *inclus* dans le revenu des appelants, *ni être imposés* en vertu de la *Loi de l'Impôt* et ils seraient, par conséquent, communément appelés: des *gains de capital*.

2. Le seul fait qu'une personne, achetant une propriété dans le but de l'utiliser à titre de capital, pourrait être induite à la revendre, si un prix suffisamment élevé lui était offert, *n'est pas suffisant* pour changer une acquisition de capital en une initiative d'une nature ou caractère commercial.
3. Pour donner à une transaction, qui comporte l'acquisition d'un capital, le double caractère d'être aussi en même temps une initiative d'une nature commerciale, l'acquéreur doit avoir au moment de l'acquisition, dans son esprit, la possibilité de revendre, comme motif, qui le pousse à faire cette acquisition. En d'autres termes, il doit avoir dans son esprit l'idée que si certaines circonstances surviennent, il a des espoirs de pouvoir la revendre à profit au lieu d'utiliser la chose acquise pour des fins de capital.
4. Une décision qu'une telle motivation existe devrait être basée sur des inférences découlant des circonstances qui entourent la transaction plutôt que d'une *preuve directe* de ce que l'acquéreur avait en tête.
5. Si un profit est un profit provenant d'un commerce ou d'une initiative d'une nature ou d'un caractère commercial, il est imposable.
6. La vente par quelqu'un de toute son entreprise d'affaires ou commerciale (autrement que par un moyen prévu à l'art. 85E de la Loi) et s'il n'est pas dans le commerce d'achat et de vente de commerces, n'est pas une transaction imposable.
7. Si en achetant ce commerce il n'avait pas comme une des raisons le motivant à faire cet achat, l'idée de le revendre à profit, le profit provenant de la vente subséquente n'est pas imposable.
8. La Cour ne voit aucun fondement dans les déclarations de l'intimé, qui puisse justifier d'assujettir les appelants au fardeau de la preuve sur quelque point que ce soit (cf. *Minister of National Revenue v. Pillsbury Holdings Ltd.* 1964, C.T.C 294 p. 302).

Appel d'une décision de la Commission d'Appel de l'Impôt sur le Revenu.

L'appel fut entendu par l'honorable Juge Noël à Québec.

*Roger Létourneau, c.r.* pour les appelants.

*Paul Boivin, c.r.* et *Roger Tassé* pour l'intimé.

Les faits et points de droit sont exposés dans les motifs de la décision que rend maintenant (16 mars 1965) l'honorable JUGE NOËL.

Il s'agit d'un pourvoi devant cette Cour de la décision rendue le 19 juin 1963 par la Commission d'appel de l'impôt<sup>1</sup> approuvant une cotisation supplémentaire afférente à

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un profit réalisé par les appelants pendant l'année d'imposition 1960. Le revenu déclaré des trois contribuables fut ajusté comme suit à la suite de la cotisation supplémentaire du Ministre:

AJUSTEMENTS DU REVENU DÉCLARÉ

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I. PAUL RACINE

Revenu net déclaré ..... \$ 13,431.40

*A ajouter:*

Profit sur vente d'un immeuble ( $\frac{1}{3}$ ) .....	\$ 1,666.66	
Profit sur vente d'actions de Machineries Provinciales Inc. ....	19,000.00	
Profit sur vente de créance du Restaurant Peppe .....	3,575.00	24,241.66
Revenu net corrigé: .....		37,673.06
Exemptions personnelles .....	4,000.00	
Dons de charité .....	1,200.00	5,200.00
Revenu imposable corrigé: .....		\$ 32,473.06
<i>Profit sur vente d'un immeuble par MM. A. Demers, F. Nolin et P. Racine.</i>		
Prix de vente ....	\$ 30,000.00	
Coût .....	25,000.00	
Profit réalisé à partager en 3 .....	\$ 5,000.00	
<i>Profit sur vente d'actions de Machineries Provinciales Inc.</i>		
Prix de vente .....	\$ 20,000.00	
Coût .....	1,000.00	
Profit réalisé .....	19,000.00	
<i>Profit sur vente de créance du Restaurant Peppe.</i>		
Prix de vente .....	\$ 14,575.00	
Coût .....	11,000.00	
Profit réalisé: .....	3,575.00	

II. AMÉDÉE DEMERS.

Revenu net déclaré ..... \$ 44,864.47

*A ajouter:*

Profit sur vente d'un immeuble ( $\frac{1}{3}$ ) .....	\$ 1,666.66	
Profit sur vente d'actions de Machineries Provinciales Inc. ....	19,000.00	\$ 20,666.66
Part des revenus dans les Habitations St. Louis Ltée corporation personnelle .....		3,579.48
Revenu net corrigé .....		\$ 69,110.61
Exemptions personnelles .....	\$ 1,500.00	
Dons de charité .....	2,000.00	3,500.00
Revenu imposable corrigé: .....		\$ 65,610.61

<i>Profit sur vente d'un immeuble par MM. A. Demers, F. Nolin et P. Racine.</i>	
Prix de vente .....	\$ 30,000.00
Coût .....	25,000.00
Profit réalisé à partager en 3 .....	5,000.00
<i>Profit sur vente d'actions de Machineries Provinciales Inc.</i>	
Prix de vente .....	\$ 20,000.00
Coût .....	1,000.00
Profit réalisé .....	19,000.00

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## III. FRANÇOIS NOLIN

Revenu net déclaré .....		\$ 43,205.90
<i>A ajouter:</i>		
Profit sur vente d'un immeuble (‡) .....	\$ 1,666.66	
Profit sur vente d'actions de Machineries Provinciales Inc. ....	19,000.00	20,666.66
Revenu net corrigé .....		63,872.56
Exemptions personnelles .....	2,500.00	
Dons de charité .....	1,000.00	3,500.00
Revenu imposable corrigé .....		60,372.56
<i>Profit sur vente d'un immeuble par MM. A. Demers, F. Nolin et P. Racine.</i>		
Prix de vente .....	\$ 30,000.00	
Coût .....	25,000.00	
Profit réalisé à partager en 3 .....	5,000.00	
<i>Profit sur vente d'actions de Machineries Provinciales Inc.</i>		
Prix de vente .....	\$ 20,000.00	
Coût .....	1,000.00	
Profit réalisé .....	19,000.00	
<i>Correction de l'impôt additionnel pour les années 1955 à 1959, relativement à la récupération de la dépréciation.</i>		
Impôt additionnel suivant le tableau annexé .....		\$ 8,648.75
Impôt additionnel établi lors de la déclaration .....		7,437.34
Augmentation .....		1,211.41

Je dois dire que dans l'appel de Paul Racine, son procureur durant l'appel déclara qu'il se désistait de l'appel logé à l'encontre de l'inclusion dans son revenu d'un profit réalisé sur vente de créance du Restaurant Peppe au montant de \$3,575 et il ne sera pas tenu compte de ce montant dans le présent appel.

Le débat par conséquent ne porte que sur les profits réalisés par les trois appelants et provenant de la vente d'un

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immeuble et de la vente d'actions de Machineries Provinciales, Inc.

Ces trois appels furent, de consentement, entendus en même temps par la Commission d'appel de l'impôt ainsi que par cette Cour et les parties par leurs procureurs convinrent que l'appel dans les trois cas serait entendu sur la preuve faite devant la Commission d'appel de l'impôt.

Chaque contribuable interjette appel de ladite cotisation pour l'année de taxation 1960 et soulève le même moyen d'appel lequel, dans les trois cas, doit être décidé par la solution qui sera donnée à une seule question, celle de savoir si certains profits provenant de transactions que les trois appelants ont entreprises ensemble sont des profits provenant d'une entreprise dans le sens donné à ce mot par la *Loi de l'impôt sur le revenu* S.R.C. 1952, c. 148, suivant les articles 3, 4 et 139 (1) (e) de ladite loi. Les articles 3 et 4 se lisent comme suit:

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente Partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant
  - a) d'entreprises,
  - b) de biens, et
  - c) de charges et d'emplois.
4. Sous réserve des autres dispositions de la présente Partie, le revenu provenant, pour une année d'imposition, d'une entreprise ou de biens est le bénéfice en découlant pour l'année.

L'article 139 (1) (e) se lit comme suit:

- e) «entreprise» comprend une profession, un métier, un commerce, une fabrication ou une activité de quelque genre que ce soit et comprend une initiative ou affaire d'un caractère commercial, mais ne comprend pas une charge ou emploi;

S'ils sont des profits provenant d'une telle entreprise. l'intimé en a à bon droit inclus un tiers en établissant le revenu de chacun des trois appelants pour l'année d'imposition 1960. D'autre part, s'ils ne sont pas des profits provenant d'une telle entreprise, ils ne doivent pas être inclus dans le revenu des appelants ni être imposés en vertu de la *Loi de l'impôt* et ils seraient par conséquent ce que l'on appelle communément des gains de capital.

Les profits qui forment l'objet du présent appel sont, sans entrer pour le moment dans le détail, des profits provenant de:

- a) l'acquisition d'un commerce en opération (as a going concern) du fiduciaire des détenteurs d'obligations d'une compagnie qui, avant la dite acquisition, poursuivait ce commerce et qui, ce faisant, était devenue insolvable, et
- b) après avoir opéré ce commerce pendant un certain temps, ils l'auraient revendu pour un prix plus élevé que celui qu'ils avaient payé pour son acquisition.

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Comme nous le verrons plus loin, le moyen adopté fut de créer une compagnie (dont les appelants acquièrent un nombre égal des actions émises) qui se porta acquéreur de l'achalandage et de tous les actifs de ce commerce sauf un bâtiment et le terrain qui furent acquis au nom des appelants et ces derniers vendirent subséquemment les actions de la compagnie ainsi que le terrain.

Je suis d'avis que, pour les fins d'imposition, cette façon de procéder ne peut affecter le caractère de la transaction. En effet, cette transaction au point de vue impôt serait exactement la même si les appelants avaient tout simplement acheté le tout en leur nom personnel.

Il est certain qu'un profit ou une perte résultant de la vente d'un commerce en opération (as a going concern), à moins que la transaction ne tombe sous l'article 85E de la loi, n'affecte en rien la position du vendeur au point de vue de son revenu parce qu'un profit résultant de la vente d'un commerce n'est pas un profit d'un commerce. Il suffit de se référer à la décision de *Frankel Corporation Ltd. v. Minister of National Revenue*<sup>1</sup> pour s'en assurer. D'autre part, un commerce peut être acheté et vendu dans le cours d'un commerce d'achat et de vente de commerces ou dans le cours d'une initiative ou affaire d'un caractère commercial (tel que défini par 139 (1) (e) *supra*) et, dans l'occurrence, un profit réalisé à la suite de la revente d'un tel commerce serait un profit provenant de ce commerce ou de l'initiative ou affaire commerciale du vendeur. Dans *Gairdner Securities Ltd. v. Minister of National Revenue*<sup>2</sup> ces principes furent soutenus et cette décision fut confirmée par la Cour suprême<sup>3</sup>.

<sup>1</sup> [1959] R.C.S. 713.

<sup>2</sup> [1952] R.C. de l'É. 448.

<sup>3</sup> [1954] C.T.C. 24.

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Il apparaît clairement de la preuve que le commerce en question ne fut pas acquis dans le cours de l'exercice d'un commerce de vente et de revente de commerces. La question qu'il s'agit alors de déterminer dans ces appels se restreint à celle de savoir si l'acquisition du commerce en question fut le début d'une initiative ou affaire d'une nature commerciale comportant l'acquisition de ce commerce dans le but d'en disposer à profit. Il est donc nécessaire pour trancher cette question d'examiner les faits.

En premier lieu, il est important de connaître les activités des appelants au moment même où les opérations en cause ont commencé.

Pendant un certain nombre d'année qui précédèrent les transactions en cause, les appelants s'étaient engagés dans des opérations de commerce et de placement tant à titre individuel que conjointement. La preuve ne décrit pas leurs commerces respectifs et les valeurs qu'ils détenaient avec autant de précision qu'on pourrait peut-être le désirer, mais cette description est tout de même suffisante pour nous permettre d'apprécier leurs activités. En effet, en plus de détenir des propriétés immobilières pour y percevoir des loyers, soit en leur nom personnel ou au nom de compagnies dont ils détenaient toutes les actions, chacun des appelants exploitait aussi séparément des commerces différents par le moyen de compagnies qu'il contrôlait ou dont il détenait toutes les actions. Les appelants en plus se sont aussi lancés dans plusieurs entreprises par le truchement de compagnies dont ils détenaient, à part égale, toutes les actions.

Une de ces compagnies opérait un commerce de transactions de terrains. Toutes les autres acquirent des immeubles, les développèrent et les gardèrent pour en percevoir des loyers. Certaines de ces propriétés ainsi détenues comportent un placement substantiel.

Les appelants réussirent à financer ces diverses entreprises en souscrivant de très petits montants d'argent à titre de capital parce qu'ils avaient acquis dans la communauté une réputation d'hommes dont le crédit et l'intégrité étaient tels que la Banque de Montréal était prête à financer chacune de leurs nouvelles acquisitions. Il arrivait assez souvent dans le cours d'une année que plusieurs de ces acquisitions se faisaient par des emprunts faits à la banque de la presque totalité du capital requis pour le financement préliminaire

de la compagnie érigée dans le but de mettre à exécution un projet particulier, et ce sur le seul endossement personnel des trois appelants.

Chacun des appelants recevait un salaire de l'une ou de l'autre des compagnies dont il s'occupait et recevait des loyers des propriétés qu'il pouvait soit détenir personnellement ou qui étaient détenues par des compagnies dont il ou ils détenaient toutes les actions ou qu'il ou ils contrôlaient. Il semble cependant que, règle générale, les revenus provenant de ces compagnies étaient employés à rembourser la banque pour les prêts accordés et, ainsi, augmentaient d'autant la valeur des intérêts des actionnaires dans ces compagnies plutôt que d'être utilisés au paiement de dividendes aux actionnaires.

On peut donc décrire les trois appelants comme étant d'excellents hommes d'affaire, heureux dans leurs transactions, chacun ayant plusieurs fers au feu, comportant des opérations variées telles que la détention d'immeubles pour fins de perception de loyers, l'opération d'une compagnie de transport routier, celle d'une compagnie de construction, ainsi que d'une compagnie faisant le commerce de terrains.

L'entreprise qui fut l'objet des transactions qui donnèrent lieu aux profits dont il s'agit dans ces appels était un commerce d'achat et de vente de machineries lourdes et de pièces opéré par Machineries Modernes Ltée. Cette compagnie avait été gérée par un monsieur J. M. Dagenais qui en détenait les actions et qui mourut laissant sa compagnie à sa veuve et à ses deux fils. Cette compagnie devint subséquentement insolvable, à tel point que Raymond Normandeau, C.A., fiduciaire des détenteurs d'obligations de la compagnie, dut s'emparer de l'entreprise, y compris les propriétés réelles et personnelles qu'elle comprenait. Le fiduciaire prit possession desdits biens au mois de novembre 1959 et demanda des soumissions pour l'achat de ce commerce. Lorsque, le 5 février 1960, les offres furent reçues et examinées, aucune d'elles ne fut approuvée par les inspecteurs de la faillite. On approcha alors les appelants et ils furent invités à acquérir cette entreprise. Les appelants firent une offre le 15 mars 1960 et, le ou vers le 22 mars de la même année, M. Normandeau convint de vendre l'entreprise et tous les biens de ladite compagnie aux appelants pour la somme de \$176,000. Ils prirent possession de ce commerce le

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25 mars 1960, bien que les formalités des transferts nécessaires ne furent exécutées que quelques semaines plus tard, ce fait n'affectant d'ailleurs en rien le caractère de la transaction pour les fins d'impôt.

Durant la période qui précéda leur décision d'acheter ce commerce, les appelants mirent à point une entente conditionnelle avec la famille Dagenais en vertu de laquelle ils convinrent que si le fiduciaire leur vendait l'entreprise à leur prix, les fils Dagenais pourraient continuer à participer à ce commerce et la famille Dagenais aurait l'opportunité d'y acquérir un intérêt de 45%, sauf en ce qui a trait à la propriété réelle. Cette entente était basée sur le fait que l'inventaire de ce commerce était suffisant (il avait à ce moment une valeur aux livres d'au delà de \$500,000) pour que son prix d'acquisition soit payé par le produit de la vente d'une partie de cet inventaire qui pouvait, semble-t-il, être vendu sans trop affecter le commerce en question. Il appert aussi que les appelants crurent que bien que les fils Dagenais n'avaient pu opérer ce commerce avec succès après la mort de leur père, ils pourraient cependant le faire si un système de comptabilité moderne était instauré pour contrôler leurs opérations et s'ils recevaient, d'autre part, des directives et un certain contrôle de la part des appelants. Les appelants pourraient ainsi, sans nuire à leurs activités antérieures et sans qu'il soit nécessaire d'y consacrer trop de leur temps, y ajouter un nouveau commerce.

Cette entente projetée avec la famille Dagenais fut exécutée comme suit :

- a) les appelants incorporèrent une compagnie sous le nom de *Machineries Provinciales Inc.*, et souscrivirent chacun \$1,000 de ses actions; cette compagnie ensuite acquit tout le commerce de *Machineries Modernes Ltée*, autre que la propriété réelle, pour la somme de \$151,000 comptant et les appelants achetèrent la propriété réelle utilisée dans le commerce de la compagnie pour un montant de \$25,000 comptant avec entente que les appelants loueraient l'immeuble à la compagnie de sorte qu'il continuerait à être utilisé dans le commerce;
- b) tout l'argent pour l'acquisition fut emprunté de la banque sur le crédit personnel des appelants, et

- c) une entente sous seing privé contenant les clauses principales des engagements des parties fut exécutée par les appelants et la famille Dagenais.

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Le 25 mars 1960, après l'acceptation par le fiduciaire de l'offre des appelants d'acheter l'entreprise et les biens de la Compagnie Machineries Modernes Ltée et bien que tous les transferts n'avaient pas été, à ce moment-là, exécutés, les appelants prirent possession desdits biens et du commerce et se mirent, dès lors, à lui insuffler une vie nouvelle par des mesures telles que celles d'y introduire un nouveau système amélioré de comptabilité, le réengagement d'employés qui avaient été mis à pied à la suite de l'insolvabilité et l'établissement d'agences nouvelles et autres relations d'affaires. Ils commencèrent également à disposer d'une partie de l'inventaire de ce commerce dans le but de rembourser les argents empruntés à la banque. C'est pendant cette période que les appelants commencèrent à craindre que les fils Dagenais ne donneraient pas ce qu'ils attendaient d'eux et seraient incapables d'assumer la responsabilité d'opérer ce commerce sans un contrôle et une direction accrues que les appelants ne pourraient, à cause du peu de temps dont ils disposaient, leur donner. Ce commerce fut opéré pendant environ quatre à six semaines par les nouveaux propriétaires quand un dénommé Jean-Marie Baronet, gendre de l'appelant Demers, apprit que les appelants avaient pris charge du commerce Dagenais et, après quelques discussions, convint avec eux d'acquérir leurs intérêts dans ce commerce en achetant toutes les actions émises de Machineries Provinciales Inc., ainsi que l'immeuble et le terrain qu'elle utilisait pour la somme de \$90,000.

Par cette transaction Baronet assumait les obligations des appelants en vertu de leur entente avec la famille Dagenais ainsi que le remboursement de l'emprunt qu'ils avaient fait à la banque, que les appelants cependant durent continuer à garantir envers la banque par leur endossement personnel du billet de Baronet.

Le prix payé par Baronet valut aux appelants un profit de \$5,000 sur la propriété immobilière, soit \$1,666.66 chacun, et de \$57,000 sur les actions, soit \$19,000 chacun.

Baronet était en mesure de s'occuper à plein temps de la gérance de cette compagnie et sous sa direction Machineries Provinciales Inc. remboursa rapidement l'emprunt bancaire

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et Baronet se déclara fort heureux des opérations de la compagnie.

L'on pourrait envisager le problème que comportent ces appels du point de vue des transactions légales suivantes :

- a) l'achat et la revente d'une propriété immobilière, et
- b) l'acquisition et la vente de toutes les actions d'une compagnie.

Cependant, dans le but de déterminer si les profits en question sont des profits découlant d'une initiative ou affaire d'une nature commerciale, il me semble plus objectif de considérer ces transactions comme l'envisagerait un homme d'affaires, c'est-à-dire, tel que ci-haut mentionné, l'acquisition par les appelants d'une entreprise d'affaires et la revente subséquente de cette entreprise à profit.

Il me semble que la question que l'on doit se poser est celle de savoir si le seul objectif des appelants lorsqu'ils ont fait leur acquisition était d'ajouter ce commerce en cours à toutes leurs autres entreprises ou s'ils ont acquis ce commerce dans le but de l'opérer et dans le but de le revendre à profit suivant les circonstances qui pourraient surgir et les offres qui pourraient leur être faites.

En examinant cette question de savoir si les appelants avaient, au moment de l'acquisition, ce que l'on a parfois appelé une «intention secondaire» de revendre cette entreprise commerciale si les circonstances s'y prêtaient, il est important de considérer ce que cette notion doit comporter. Il n'est pas, en effet, suffisant de trouver seulement que si un acquéreur s'était au moment de l'acquisition arrêté pour y penser, il serait obligé d'admettre que si à la suite de son acquisition une offre attrayante lui était faite il revendrait car toute personne achetant une maison pour sa famille, une peinture pour sa maison, de la machinerie pour son commerce ou un bâtiment pour sa manufacture serait obligée d'admettre, si cette personne était honnête et que la transaction n'était pas exclusivement basée sur une question de sentiment, que si on lui offrait un prix suffisamment élevé à un moment quelconque après l'acquisition, elle revendrait. Il appert donc que le seul fait qu'une personne achetant une propriété dans le but de l'utiliser à titre de capital pourrait être induite à la revendre si un prix suffisamment élevé lui

était offert n'est pas suffisant pour changer une acquisition de capital en une initiative d'une nature ou caractère commercial. Ce n'est pas en effet ce que l'on doit entendre par une «intention secondaire» si l'on veut utiliser cette phraséologie.

Pour donner à une transaction qui comporte l'acquisition d'un capital le double caractère d'être aussi en même temps une initiative d'une nature commerciale, l'acquéreur doit avoir, au moment de l'acquisition, dans son esprit, la possibilité de revendre comme motif qui le pousse à faire cette acquisition; c'est-à-dire qu'il doit avoir dans son esprit l'idée que si certaines circonstances surviennent il a des espoirs de pouvoir la revendre à profit au lieu d'utiliser la chose acquise pour des fins de capital. D'une façon générale, une décision qu'une telle motivation existe devrait être basée sur des inférences découlant des circonstances qui entourent la transaction plutôt que d'une preuve directe de ce que l'acquéreur avait en tête.

Lorsqu'un homme achète une grande surface de terrain dans le but avoué d'y construire, par exemple, un centre d'achats et d'y louer des magasins pour en obtenir un revenu de loyers, mais qu'au moment de l'acquisition il ne fait aucun arrangement pour obtenir le financement permanent d'un montant considérable d'argent qu'il devra y placer ou qui sera requis pour les fins de son projet, ou aucun arrangement pour obtenir des locataires et qu'il n'a obtenu aucune information relativement à la question de savoir si le site en question possède les caractéristiques nécessaires et adéquates pour un tel projet, ou lorsque ce terrain est situé dans un secteur qui est adjacent à un autre secteur qui pousse et qui est en pleine expansion sur la périphérie et où la valeur des terrains a déjà commencé à monter et où l'acquéreur possède une expérience dans le domaine immobilier qui lui permet d'anticiper les changements qui peuvent se produire dans la valeur immobilière, il s'en suit presque une inférence irrésistible que cet homme avait dans son esprit lorsqu'il a acquis le terrain l'idée que s'il ne réussissait pas à faire les arrangements nécessaires pour y établir un centre d'achats, il pourrait indubitablement revendre ce terrain à profit.

Le problème de l'intimé dans la présente cause a ceci en commun avec l'exemple hypothétique du centre d'achats dont je viens de parler en ce qu'il n'y a aucune preuve

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directe que la possibilité de revendre le commerce en question ait été considérée dans l'esprit des appelants lorsqu'ils ont décidé de faire leur acquisition; en fait la preuve est à l'effet contraire. Toute la preuve présentée par les appelants est à l'effet qu'il n'existait pas une telle intention dans leur esprit et l'intimé n'a offert aucune preuve qui ait pu contredire cette preuve et je dois même ajouter que cette preuve des appelants n'a même pas été mise en question par une transquestion. Il n'a pas été suggéré à aucun des appelants dans la transquestion et aucune question ne leur a été posée à ce sujet, que la probabilité ou la possibilité d'une revente de ce commerce à profit aurait été un des motifs qui ont fait partie de leur décision lors de l'acquisition. Je n'ai d'autre part aucune raison de douter de l'intégrité des appelants et d'ailleurs la preuve au dossier ne me justifierait aucunement de le faire et il me répugnerait dans les circonstances de décider qu'ils ont faussement représenté la nature de cette transaction. D'autant plus, tel qu'on vient de le voir, on ne leur a pas donné par une transquestion l'opportunité d'accepter ou de rencontrer une version qui viendrait en conflit avec les raisons qu'ils ont données pour justifier ou expliquer leur transaction et sur ce point il est intéressant de noter les déclarations de Lord Herschell L.C. et Lord Halsbury dans *Browne v. Dunn*<sup>1</sup> aux pp. 70, 76 et 77:

Lord Herschell:

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

Lord Halsbury:

My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine

<sup>1</sup> (1894) 6 The Reports, 67.

witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

Il se pourrait cependant quand même, étant donné le témoignage intéressé des appelants, que les circonstances soient telles qu'elles pourraient rendre irrésistible une inférence qui contredirait leur intention exprimée dans leur témoignage.

L'intimé s'appuie pour établir cette inférence sur les opérations passées des appelants, leurs méthodes de financement, et le très court délai qui s'est écoulé entre l'acquisition et la revente.

Quant à ce qui concerne les opérations passées des appelants, je n'y trouve rien qui indique qu'ils devaient avoir dans leur esprit l'idée de revendre cette entreprise commerciale comme facteur les motivant au moment de l'acquisition. En effet la preuve ne démontre pas qu'ils aient jamais acheté et revendu une entreprise commerciale antérieurement. Ils se sont sans doute engagés dans beaucoup d'opérations commerciales mais, dans presque tous les cas, ils semblent les avoir retenues pour les revenus futurs que ces commerces pouvaient leur rapporter. Ils ont, il est vrai, une compagnie qui fait le commerce de terrains mais il s'agit là d'un commerce entièrement différent de celui d'acheter et de revendre une entreprise commerciale ou un commerce.

Quant au financement, il apparaît clairement que l'absence de moyens financiers peut parfois indiquer irrésistiblement qu'on devait avoir l'intention de revendre si le financement nécessaire n'a pas été prévu ou arrangé. Dans le présent cas cependant, les appelants avaient un plan en vertu duquel ils avaient prévu le financement de cette acquisition. Ils avaient en effet organisé le financement intérimaire par le moyen de la banque et ils avaient considéré que la banque pouvait être remboursée en disposant d'une partie des actifs de l'entreprise commerciale qu'ils acquéraient. Les événements subséquents d'ailleurs ont démontré que cette façon de financement envisagée par les appelants était parfaitement praticable puisque, effectivement, c'est de cette façon qu'il s'est opéré. De plus, leur plan de financement pour cette acquisition était entièrement

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compatible avec leur intention d'opérer le commerce qu'ils acquéraient indéfiniment et ne peut non plus, par conséquent, créer l'inférence qu'ils avaient l'intention de revendre rapidement.

L'inférence d'une intention de faire un profit par une revente rapide peut aussi découler du fait que l'acheteur en fait a revendu presque immédiatement à profit, mais seulement s'il n'existe pas d'explication satisfaisante de cette revente rapide. Les appelants ici donnent une explication pour la revente rapide que je trouve croyable et que j'accepte. Ils avaient beaucoup de fers au feu. Ils ont considéré que le projet d'acquérir cette entreprise commerciale dont il est question dans le présent appel et de l'opérer était entièrement praticable, basé sur les prémisses que les fils Dagenais, qui connaissaient ce commerce et en avaient l'expérience, entreraient avec eux en fait comme des partenaires juniors et ils présumèrent que les fils Dagenais agiraient de sorte qu'il leur serait permis de s'occuper de leurs autres intérêts. Ils réalisèrent cependant assez rapidement qu'ils avaient présumé un peu trop de ce que les fils Dagenais pouvaient leur fournir d'aide et à ce sujet leur projet ou plan ne se matérialisa pas. En face d'une telle situation, Baronet, qui pouvait fournir cette gérance constante requise dans l'intérêt de ce commerce, surgit et par son offre d'acquisition réglait non seulement le problème Dagenais mais donnait en même temps aux appelants un motif financier qui les induisait à abandonner leur projet. J'irai même jusqu'à dire qu'il se pourrait également qu'ils aient été heureux de fournir au gendre de l'appelant Demers une opportunité commerciale.

Je ne puis cependant rien trouver dans la preuve qui puisse me justifier de rejeter le témoignage assermenté des appelants quant aux explications qu'ils ont données pour justifier la revente de ce commerce si tôt après l'avoir acquis et ici également leur témoignage à ce sujet ne fut pas mis en question dans la transquestion.

Si cette explication est acceptée, et je l'accepte entièrement, la revente rapide après l'acquisition ne donne lieu à aucune inférence que cette revente avec profit a été une des raisons motivant les appelants lorsqu'ils ont acquis ce commerce.

L'intimé s'appuie également sur une déclaration des appelants dans l'entente écrite avec la famille Dagenais qu'ils avaient l'intention «si tout allait bien de continuer à opérer ce commerce de machineries et de pièces» comme indiquant une «intention secondaire» à l'effet que si tout n'allait pas bien ils utiliseraient ce commerce autrement. Cette déclaration qui apparaît dans un document qui semble avoir été rédigé par des hommes d'affaires doit être lu, il me semble, dans le contexte où il apparaît.

En effet, les appelants à ce moment s'organisaient pour donner à la famille Dagenais un intérêt de 45% dans ce commerce et pour employer les deux fils Dagenais. Dans ces circonstances, il ne me semble pas que ce soit une précaution anormale que d'indiquer qu'ils avaient l'intention de continuer d'opérer ce commerce seulement aussi longtemps que tout marchait bien. Ceci non plus, à mon sens, n'indique pas une intention de revendre l'entreprise commerciale comme étant une possibilité motivante dans l'esprit des appelants à ce moment.

Je me dois aussi de relever la proposition avancée à l'encontre des appelants par la Commission d'appel de l'impôt à l'effet que s'il doit y avoir un accroissement de capital, cet accroissement doit être un accroissement naturel, c'est-à-dire que cela doit être le résultat de circonstances qui ne dépendent pas des activités des individus. Il y est dit en effet qu'il doit être établi que «le profit représentait bien une plus-value du terrain et des actions qui était dû à des circonstances ou à des événements ne se rattachant pas à l'activité et à la volonté des appelants». Il ne me semble pas que cette déclaration reflète la position légale qu'on doit prendre en vertu de la *Loi de l'impôt sur le revenu*. En effet, si un profit est un profit provenant d'un commerce ou d'une initiative d'une nature ou d'un caractère commercial, il est imposable. Si le profit est fait par la vente d'une propriété qui n'a pas été faite dans le cours d'un commerce ou d'une telle initiative, il n'est pas imposable. Il est également clair que la vente par quelqu'un de toute son entreprise d'affaires ou commerciale (autrement que par un moyen prévu à l'art. 85E de la loi) n'est pas une transaction imposable. Il se pourrait en effet que, par ses efforts durant une période couvrant toute sa vie, un homme ait réussi à donner à un commerce qui n'avait aucune valeur une valeur de plusieurs millions de dollars. Cependant, lorsqu'il vend ses intérêts

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dans ce commerce ou se retire, il n'est pas imposable sur le gain capital provenant de la vente. Dans le présent cas, nous sommes en face d'une entreprise pour laquelle personne n'était prêt à payer un montant supérieur à \$176,000. Il s'en suit donc que cette entreprise n'avait que cette valeur marchande sur le marché parce que dans l'état d'insolvabilité où elle se trouvait, ceux qui auraient pu être intéressés à soumettre un montant pour son acquisition ne pouvaient y voir une valeur plus grande que ce montant.

Les appelants, qui sont des hommes de vision et énergiques, sur une période d'opérations assez courte il est vrai, réussirent quand même à insuffler à ce commerce une vie nouvelle et, en établissant son potentiel, réussirent à lui donner une valeur marchande accrue.

Si en accomplissant ces choses les appelants avaient comme un des mobiles les dirigeant l'idée de revendre le commerce à profit, ce profit serait imposable. Si, d'autre part, tel que je le décide, ils accomplirent ces choses dans le cours de l'exécution de leur intention avouée d'opérer ce commerce indéfiniment, le profit provenant de la vente qu'ils firent dans ces circonstances n'est pas imposable.

Je dois également référer à des déclarations répétées et variées des procureurs de l'intimé à l'effet que les appelants dans le présent appel avaient le fardeau de la preuve. Il ne m'apparaît pas que ce fardeau joue un rôle quelconque dans la décision de cet appel car il existe une preuve suffisante sur tous les faits pertinents au présent appel et d'ailleurs je ne vois aucun fondement dans les déclarations de l'intimé qui puisse me justifier d'assujettir les appelants au fardeau de la preuve sur quelque point que ce soit. cf. *Minister of National Revenue v. Pillsbury Holdings Ltd.*<sup>1</sup>

PAR CES MOTIFS, l'appel des trois contribuables quant aux profits réalisés par ces derniers tant sur la revente de l'immeuble que sur la vente de leurs actions dans *Machine-ries Provinciales Inc.*, est maintenu avec allocation des dépens de Cour aux appelants taxés en la manière ordinaire, sauf qu'il n'y aura qu'un seul honoraire de Conseil à l'audition.

*Jugement conforme.*

<sup>1</sup> [1964] CTC 294, p. 302.

BETWEEN:

AMERICAN CYANAMID COMPANY . . . . PLAINTIFF;

AND

CHARLES E. FROSST & COMPANY . . . . . DEFENDANT.

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*Patents—Infringement—Validity—Disclosure of pending patent applications—Public interest in secrecy of pending patent applications—Infringement where product sold derived from substance made by patented process—Presumption in s. 41(2) of Patent Act—Sufficiency of patent—Meaning of “workman skilled in the art”—Utility of invention—Workability and operability of invention—Judicial approach to invention of great importance and enjoying considerable commercial success—Validity of patent the words of which embrace useless as well as useful substances—Importance of invention date re patent being void for insufficiency or inutilty—Sufficiency of description of invention in patent—Patent specification not incomplete if sufficient to permit working of invention—Anticipation—Prior art—Anticipation of patent by conflicting application—Composite French patent as admission of joint patentees that all inventions the same—Patent Act, R S C. 1952, c. 203, ss. 10, 36, 41(2) and 45(1).*

This is an action for infringement of two Canadian Letters Patent owned by the plaintiff by way of assignment from the inventors. The first patent, known as the Duggar patent, is No. 497,339, issued on November 3, 1953 for an antibiotic substance and preparation called Chlorotetracycline, and the second, known as the Minieri patent, is No 542,622, issued on June 25, 1957 for the production of an antibiotic called Tetracycline.

The Duggar patent is directed to and claims the process for producing Chlorotetracycline, a new substance, and the substance itself, which is therefore a process dependent product under s. 41 of the *Patent Act*, whereas the Minieri patent claims only a new process for producing Tetracycline, which was not a new substance at the date of the Minieri patent application.

The evidence disclosed that the antibiotics, Tetracycline and Chlorotetracycline are both produced by micro-organisms called streptomycetes aureofaciens Chlorotetracycline is produced by placing the micro-organisms in a fermentation broth in which there is present a chloride ion Tetracycline can be produced in two ways, indirectly by deschlorinating Chlorotetracycline, and directly by placing the micro-organisms in a nutrient broth in which the chlorine content is controlled. The Minieri patent claims the direct process of producing Tetracycline and is therefore a process patent relating to the production of a known-substance in a different manner by a different process

The claims in both the Duggar and Minieri patents which are in suit are process claims only The parties agreed that for the purposes of this suit the defendant will be deemed to have sold in Canada two types of Tetracycline imported from Italy, the first produced from the organism identified as streptomycetes lusitanus fermented to produce Chlorotetracycline which was subsequently deschlorinated to produce Tetracycline, and the second produced by fermentation of streptomycetes lusitanus by a method infringing the Minieri patent if streptomycetes lusitanus is an organism of the group consisting of the species

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streptomyces aureofaciens together with natural and artificially induced mutants thereof. The manufacture of both types of Tetracycline was carried out in Italy.

On the question of infringement the main point in contention was whether streptomyces lusitanus is a separate and distinct species from streptomyces aureofaciens or is only a member of this species.

The defendant attacked the validity of the plaintiff's patents, alleging that the specification in the Duggar patent is insufficient and the process is unworkable, that both patents are incomplete, misleading and lack utility and do not disclose when and how the required strains of aureofaciens may be obtained, that the Minieri patent was anticipated by the Duggar and other patents and that the alleged inventor of the Minieri patent was not the first and true inventor.

*Held:* That under s. 10 of the *Patent Act* the confidential nature of pending patent applications is preserved only if disclosure thereof is not necessary to allow the Court to properly discharge its duty to render judgment and s. 10 cannot prevent the Court from dealing with such matters although as little as possible of the confidential information should be divulged.

2. That particularly where the pending patent application is that of the plaintiff, s. 10 of the *Patent Act* does not prevent dealing with such matters in a judgment when necessary, because the practice of not allowing the public to inspect pending applications and documents connected therewith, while necessary for the proper functioning of the public service, is not a public interest which overrides the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions.
3. That there is infringement of the Duggar patent even if the product imported by the defendant was not Chlortetracycline, the new product invented by Duggar, but Tetracycline admittedly made by the process of making Chlortetracycline and then obtaining Tetracycline by the deschlorination method
4. That when dealing with a new product, i.e. Chlortetracycline from which Tetracycline is made, s. 41(2) of the *Patent Act* creates a presumption in favour of the patentee that the substance imported "in the absence of proof to the contrary" is deemed to have been produced by the patented process.
5. That there is infringement of the Minieri patent on the basis of the agreement made between the parties, and, with regard to the Duggar patent, lusitanus having been found to be an organism of the streptomyces aureofaciens group, it follows that the presumption in s. 41(2) of the *Patent Act* comes into play and establishes that the Chlortetracycline produced in Italy and later made into Tetracycline must be presumed to have been produced by the Duggar process and there is, therefore, also infringement of the Duggar patent.
6. That in the light of the evidence that all the experts who testified at the trial would have no difficulty in producing Chlortetracycline according to the Duggar patent by following its teachings, the patentee has met his obligations under the statute and has properly described his invention so as to make it workable and operable by a man skilled in the art, who, in this case, would be a highly skilled scientist who works in the examination of micro-organisms and the making of antibiotics

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7. That the Duggar patent, because of its importance as a break-through in the antibiotic world and the enormous commercial success of the product produced should be approached with a judicial anxiety to support a really useful invention and by a mind willing to understand, not by a mind desirous of misunderstanding, and if this is done there is no question of the sufficiency of the description or the workability of the invention.
8. That if at the date of the patent the words used, i.e. streptomyces aureofaciens, embraced useless as well as useful micro-organisms then the Duggar patent is bad.
9. That the important date with regard to a patent being void on the ground of insufficiency or inutility is the invention date and if at that date all known strains of aureofaciens would produce Chlortetracycline, then the Duggar patent cannot be attacked on these grounds, even if there were known to be at some date subsequent to the date of invention certain strains of aureofaciens that would produce Tetracycline to the exclusion of Chlortetracycline.
10. That the two patents would be void if at the date of issue thereof they embraced useless as well as useful micro-organisms, but such must have existed at the respective dates of the patents.
11. That s 36 of the *Patent Act* requires as one of the considerations for the monopoly grant given the patentee that he give in the patent to the public an adequate description of the invention with sufficiently complete and accurate details as will enable a workman skilled in the art to which the invention relates to construct or use that invention when the period of monopoly has expired.
12. That the person skilled in the art in this case is a highly trained scientist because of the subject matter of the specification and in order that the specification be sufficient it is not required to describe the invention and the manner in which it is to be performed so fully as to instruct persons wholly ignorant of the subject matter.
13. That there is no requirement under the Canadian *Patent Act* or under its rules, in cases of patents which deal with the product of micro-organisms, to deposit the type culture or a strain of such micro-organisms as is required in the United States.
14. That the specification of the Duggar patent is not incomplete because of the absence of a reference to a specific strain of aureofaciens since such absence has in no way prevented the addressee from putting the invention into practice, or deprived the public of all the advantages of working with the invention during the life of the patent and of using it commercially at the expiration of the patent.
15. That in view of the fact that the Duggar patent dealt only with the production of Chlortetracycline by using materials containing a sufficient quantity of chloride to give this product, and because of the uncontradicted evidence of the plaintiff that the production of Tetracycline by fermentation without chloride could not, at the date of the Minieri patent, have been predicted, it follows that the information contained in the Duggar patent can in no way be taken to have given Minieri what he required for his discovery which would have to be the case if the Duggar invention were to be considered to have anticipated the Minieri patent.
16. That in order to have anticipated the invention the prior art must show in clear and unmistakable terms how to put the invention into

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practice, and accordingly the Duggar invention cannot have anticipated the Minieri invention because the teaching of the Duggar patent is to obtain production of Chlortetracycline and if something else is produced, i.e. Tetracycline, the teachings of Duggar are not being followed

17. That although s 45(1) of the *Patent Act* provides that two applications should be placed in conflict when each of them contains one or more claims defining substantially the same invention, or when one or more claims of one application describe the invention disclosed in the other application, it is only if both applications fall within either one or the other of these provisions that one of the applications can be considered as a possible anticipation of the other.
18. That the existence in France of a joint or composite patent, as apparently permitted by the laws of that country, cannot be considered as an admission that the inventions of the joint patentees are all the same invention.

### ACTION for infringement of patents.

The action was tried by the Honourable Mr. Justice Noël at Ottawa.

*Harold G. Fox, Q.C. and Donald F. Sim, Q.C.* for plaintiff.

*André Forget, Q.C. and Miss Joan Clark* for defendant.

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

NOËL J. now (March 16, 1965) delivered the following judgment:

This is an action for infringement of Canadian Letters Patent No. 497,339 issued November 3, 1953, to its inventor Benjamin M. Duggar, for an antibiotic substance and preparation called Chlortetracycline (hereinafter called the Duggar Patent); and Canadian Letters Patent No. 542,622 issued June 25, 1957, to its inventors, Pasquale P. Minieri, Herman Sokol, Melvin C. Firman, for the production of an antibiotic called Tetracycline (hereinafter called the Minieri Patent), now both owned by way of assignment by the plaintiff.

In order to appreciate the problems involved herein, it may be useful to deal at this stage with a number of characteristics involved in the world of antibiotics. I might first point out that the trade name of Chlortetracycline is the well known drug called aureomycin and the trade name of Tetracycline is achromycin and that both of these, although directed towards the same use, differ in that

Tetracycline or achromycin has a broader application and is more effective than Chlortetracycline or aureomycin.

These antibiotics are produced by living micro-organisms whose essential morphological features are too small to be seen with the naked eye or a hand lens, but instead must be viewed under a microscope and those we are concerned with here are members of the plant kingdom of the division PROTOPHYTA, of the genus streptomyces and of a species called "aureofaciens".

Now, although the two above mentioned antibiotics produced by streptomyces aureofaciens come from or are produced by the same micro-organisms, they are produced in a different manner in that Tetracycline is obtained by placing the micro-organisms in a nutrient broth in which the chlorine content is controlled thereby encouraging the production of Tetracycline and discouraging that of Chlortetracycline whereas in order to obtain Chlortetracycline a chloride ion (a combination of the gas Chlorine with either potassium sodium or calcium) must be present in the fermentation broth or media. Tetracycline can also be produced by taking Chlortetracycline and suspending it in a solvent in the presence of a catalyst such as metal palladium which has the effect of removing the chlorine and substituting hydrogen therefor. However, the use of the fermentation method to obtain Tetracycline has economic advantages over the catalytic hydrogenation method in that around 15 per cent more product is obtained. I might also add that the plaintiff submits that prior to the Minieri patent it was unpredictable that streptomyces aureofaciens would produce Tetracycline if chloride was not present in the fermentation broth.

These micro-organisms are composed of filaments about 1/25 thousandths of an inch in diameter branching and rebranching in a densely textured web and their ends bear chains of reproductive bodies, called spores. These filaments may be of various forms and the chains of spores may be simply straight or wavy or coiled. They are found everywhere, the soil however being the natural habitat for the various types of streptomyces, and the streptomyces aureofaciens used in the two patents in suit was isolated by Dr. Duggar in 1945 as appears at p. 2, column 4, line 25, of the Duggar patent "from the soil of a timothy field in

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Missouri" in the United States of America after experimenting with 600 samples of soil.

It is only through a pure culture that the organism can be properly isolated from the other micro-organisms that exist in a particular soil and this pure culture must contain only one type of a species. The working of such cultures requires special equipment and laboratories.

The streptomycetes will grow on many natural foods, such as cooked potatoes, cooked maize, beef broth, starch and others and in order to observe these cultures, a nutrient broth is used to which is added a substance called Agar-agar, which is liquid when hot but solidifies into a semi-solid condition at a temperature below 37 degrees centigrade. The pure culture is, therefore, obtained in the following manner: a sterile nutrient agar solution is prepared, poured into a sterile flat covered glass dish and allowed to harden and a small drop of a suspension of soil, which is the natural habitat of streptomycetes, is streaked across the surface of this nutrient agar or is incorporated therein and some days later micro-organisms begin to grow in the agar material. I might add that it is possible to supply nutrient conditions for growth which may favour one particular type of micro-organism over another and then certain types may be inhibited and kept back or pushed out of the way. The specialists may, by close observation, recognize the streptomycetes they are looking for and can reach in and bring out a small bit of the organism which they transfer to another sterile dish of nutrient agar and they keep on doing this until they finally obtain a pure culture of the streptomycetes they are looking for.

When an organism has been isolated from its natural habitat where it exists in nature, it is called a natural isolate. When, however, a strain has undergone some sudden heritable change which is such that it cannot be accounted for by the ordinary reproductive mechanisms of the organism, be they sexual reproduction or recombination, then it is called a mutant. Induced production of mutations is a standard part of the development of any one of the antibiotic processes and it may be done by a number of means, one of which would be to take a population of spores from a given organism, by experimentation select a mutating agent, which might be physical in nature, such as the various

radiations, ultra-violet light or x-rays, or chemical such as nitrogen mustard or various ones of the alkaloids, caffeine, which would kill a certain proportion, i.e., 90 to 99 per cent of the spores so exposed. The surviving spores which have been able to survive the effects of the mutogenic agent are able to grow and germinate and they again will form individual colonies. Among the survivors a very high percentage will be unchanged in any way from the parent and a very small percentage will show some differences. The main purpose of creating mutants is to obtain strains of a given organism which will have greater capacity to produce a given metabolic product than the present organism started from. Indeed, by such a process it is possible to make mutant strains which will produce greater yields of the antibiotic than was possible with the organism as it existed when isolated from nature.

It appears from the evidence that once a pure culture is obtained of one of these micro-organisms, no matter how small the quantity, any desired quantity can then be grown in a suitable nutrient.

This pure culture of a given micro-organism is then used to produce an antibiotic by means of fermentation which requires a fermentation broth or what is called in french "le bouillon" which in turn must contain certain nutrient ingredients to support and encourage the growth and reproduction of the micro-organisms and certain constituents from which the micro-organism can make the desired antibiotic. Indeed, in the fermentation process the micro-organisms digest or assimilate the nutrients of the fermentation broth and then elaborate the antibiotic. It appears from the evidence that the usual fermentation broth, which applies here, contains water plus a source of carbon, hydrogen, oxygen in the form of starch or sugar, nitrogen or organic nitrogen such as present in meat, bean extracts or a material called corn steep liquor a by-product of the manufacture of starch as well as certain essential nutrient salts, calcium, potassium, sulphur, certain metals in traces, iron, manganese, copper and a source of chloride which can be a combination from calcium chloride or potassium chloride which is all placed in a container with a cotton plug to allow ingress and egress of air.

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Certain products however, require special constituents and Chlortetracycline in the Duggar patent requires chlortetracycline.

An antibiotic is, therefore, an organic substance produced by a micro-organism which has the capacity of inhibiting or killing other organisms in dilute solution which can be as low as a tenth of a microgram per millilitre which is a tenth of a part per million and to be therapeutically useful must meet certain requirements. It must not harm the human body; it must inhibit or kill the cause of the infection in the body; it must be retained in the human body for sufficient time to cause the infection to diminish; and it must not be inactivated by the body or it must retain its strength.

A number of antibiotics may be produced which kill germs and bacteria but they also kill the patient and therefore they are not a useful antibiotic. Others may not be retained in the body or they may be inactivated by the body and they also are not useful.

It appears from the evidence that it could take two to three years at the least from the time a soil sample is received to the time that a new antibiotic can be confirmed as being therapeutically useful and ready for the market.

The modern antibiotic therapy of infectious diseases began with the discovery of penicillin, by Fleming, Floy and Chain produced by a micro-organism called penicillium NOTATUM in the year 1928. It was not, however, until several years later that penicillin was purified to a stage where it could be used on a human patient. As the action of penicillin was limited, a continuing search was carried out for antibiotics with a wider range and in 1941 the first antibiotic produced from streptomyces was announced at which time it was known as actinomycetes or streptomyces antibioticus and the name actinomyces was then given to the product. This antibiotic, however, was not useful because, while it killed the infection, it would also kill the test animal on which it was used.

The next step occurred in 1944 when streptomycin was discovered, which was the first useful antibiotic made from a streptomyces called streptomyces griseus. However, streptomycin had certain drawbacks in that bacteria seemed to become tolerant to it very quickly and so the dosage had to

be increased and when this was done there frequently appeared to be damage to the eighth cranial nerve, resulting in deafness.

The third important and useful antibiotic was chloramphenicol which was announced in 1947 and was produced by *streptomyces venezuelae*. The fourth was Chlortetracycline aureomycin announced by Dr. Duggar in 1948 and produced as we have seen by *streptomyces aureofaciens*.

It may be useful here, in order to properly understand the literature produced as exhibits herein, to deal with the terminology used with regard to these various antibiotics and the changes which later took place. Chlortetracycline of course was known, as already mentioned, under the name of aureomycin; an antibiotic discovered after Chlortetracycline and produced by *streptomyces rimosus*, was known as oxytetracycline otherwise known by the trade name of terramycin. After the discovery of aureomycin and terramycin, it was recognized that there was a nucleus common to both and the name Tetracycline was proposed for that substance. Aureomycin then became known as Chlortetracycline and that is how the generic name for aureomycin became the plaintiff's trade mark for Chlortetracycline of its manufacture and its trade mark on its production of Tetracycline became achromycin, although the name "achromycin" had been originally applied by the plaintiff to a new antibiotic produced by fermentation of an organism known as *streptomyces ALBONIGER* which, however, was later changed to puromycin.

The Duggar patent is directed to and claims the process for producing Chlortetracycline, a new substance from *streptomyces aureofaciens* in a suitable fermentation broth and therefore is a process dependent product under s. 41, whereas the Minieri patent which deals with Tetracycline is not as it contains only process claims. It contains no product claims because, as already mentioned, Tetracycline at the date of the Minieri application February 13, 1954 was not a new substance, the patent being obtained on the basis that, although the substance Tetracycline was produced by the same micro-organisms as Duggar, and although it could be produced by the Duggar method by way of first obtaining Chlortetracycline and then subsequently deschlorinating it to get Tetracycline, it was, however, obtained by Minieri in

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a different manner by a different process, i.e., by direct fermentation of streptomyces aureofaciens in a fermentation medium in which the chlorine content of the medium was controlled so as to discourage the formation of Chlortetracycline and encourage the formation of Tetracycline. This, according to the plaintiff, was the first time that Tetracycline had been produced by a direct method, fermentation, and the contribution of Minieri and his co-workers is submitted to be a pioneer contribution to the art of antibiotic production.

It therefore appears that the continuing search for antibiotics involves a search for micro-organisms, their isolation and classification, and then their use in varying types of fermentation broths or media to produce fermentation products, the testing of these products to determine their antibiotic properties and effects by applying them to actual bacteria, germs and viruses of known diseases as well as the determination of their side effects on the human body to insure that they are useful. The many steps involved here, in the whole process, in so far as the Duggar patent is concerned, must, therefore, be considered in the light of (1) the discovery of a micro-organism that had never been known before; (2) the preparation of the most suitable fermentation broth or media useful in fermenting this particular micro-organism; and (3) the recovery and isolation of a new and useful antibiotic produced from the newly discovered micro-organism and, although step No. 2 hereinabove was a new variation of known fermentation processes, steps No. 1 and No. 3 were absolutely new.

The evidence discloses that both Chlortetracycline and Tetracycline have been therapeutically and commercially very successful. They could be taken not only by injection but also in capsule form and have been successful in treating a much wider range of germs, bacteria and viruses than anything prior thereto such as Rocky Mountain spotted fever, typhus, tachoma, the so-called atypical pneumonia virus, pneumonia mastitus also known as Bangs disease and undulant fever, shigella, a type of dysentery and their side effects are of a minor nature. Their production in the world market has been 513,682,999 daily patient doses for Chlortetracycline and 487,530,000 daily patient doses for Tetracycline from the date of production to August, 1963. A number

of licences and sublicences have been granted by the plaintiff under both the Duggar and Minieri patents.

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Before dealing with the defences advanced by the defendant herein, I should point out that, although the Duggar patent has eight claims, the first three, 1, 2 and 3 are product claims and were withdrawn from suit. The Minieri patent has fourteen claims of which, however, only 1, 2, 3, 4, 5 and 7 are in suit and it, therefore, appears that all the claims in suit in both the Duggar and the Minieri patents are process claims only.

An agreement for trial in the present instance was produced, which also shortens the issues herein. This agreement reads as follows:

- I. The Defendant agrees to the amendment of the Statement of Claim and Particulars of Breaches herein by the addition of Canadian Patent No. 542,622 thereto. (which latter is the Minieri patent).
- II. For the purposes of this suit as amended, the Defendant will be deemed to have sold in Canada two types of Tetracycline imported from Italy as follows:
  - (a) The first type of Tetracycline was produced from the organism identified as *Streptomyces Lusitanus* which organism was fermented to produce Chlortetracycline which was subsequently deschlorinated to produce Tetracycline. The manufacturing process was carried out by Ferment Farma of Milan, Italy.
  - (b) The second type of Tetracycline sold by the Defendant was also manufactured by Ferment Farma at Milan, Italy and was produced by fermentation of the organism identified as *Streptomyces Lusitanus* and by a method which infringes Claims 1 to 5 and Claim 7 of Canadian Patent No. 542,622 if *Streptomyces Lusitanus* is an organism of the group consisting of the species *Streptomyces Aureofaciens* together with natural and artificially induced mutants thereof, but which method does not infringe Canadian Patent No. 542,622 if *Streptomyces Lusitanus* is not an organism of the group consisting of the species *Streptomyces Aureofaciens* together with natural and artificially induced mutants thereof.
- III. That the strain delivered to Mr. Austin Phillips by Dr. Tosoni of the University of Toronto, in Toronto, on November 9th, 1962, is the strain of *Streptomyces Lusitanus* as referred to in paragraphs II (a) and (b) hereof.

The first point in contention here appears to be whether *streptomyces lusitanus*, from which the Tetracycline imported and sold by the defendant, was produced, is a separate and distinct species from *streptomyces aureofaciens* or is only a member of this species.

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The effect of the above agreement would appear to be two-fold and of different impact in respect to both Tetracyclines admittedly imported into Canada. Indeed, with regard to the first type of Tetracycline produced by the deschlorination of the chlortetracycline and, therefore, admittedly made from chlortetracycline, there should be infringement if the facts are such that they do under the law as it now stands, including the presumption provided under s. 41(2) of the *Patent Act*, constitute infringement and providing that *lusitanus* falls within the *aureofaciens* group referred to in the agreement as counsel for both parties at the hearing agreed that infringement of both types of Tetracyclines would be dependent upon a prior determination of whether *lusitanus* is or is not "an organism of the group consisting of *streptomyces aureofaciens* together with natural and artificially induced mutants thereof" as provided under the agreement. With regard to the Tetracycline produced by fermentation under the Minieri patent, of course, the agreement clearly sets out the fact that infringement here is dependent upon a determination of the speciation of both micro-organisms only.

A specific attack is then made on the validity of the Duggar patent on the basis that the specification is insufficient in that it nowhere discloses the necessity to have chlorine in the broth to obtain chlortetracycline, although as already mentioned, without it the product cannot be obtained.

At the beginning of the trial of the present case, counsel for the defendant stated that in the course of research for the preparation of the trial, several matters were disclosed which made it now necessary to add a number of defences. He then submitted that it had been found that within the family of *streptomyces aureofaciens* there were a number of strains which will not produce chlortetracycline at all and that, therefore, the patent did not meet the promise of the patentee. He also urged that the patent cannot be worked because it was discovered that the strains of *aureofaciens*, although deposited with certain scientific or governmental agencies, are under conditions which make it impossible for these agencies to deliver it to others and are, therefore, not available to the public at the present time for testing, nor will they be available at the expiry of the patent so that the

monopoly granted by the patent, instead of being limited, will be perpetual.

The above defences apply to both the Duggar and Minieri patents and it was submitted on behalf of the defendant that in this connection the particulars of objection be amended by adding the following:

- (1) Both patents are incomplete, misleading and lack utility in that they fail to distinguish between strains of streptomyces aureofaciens which may produce chlortetracycline and other strains of streptomyces aureofaciens which will not produce chlortetracycline for Duggar and strains of streptomyces aureofaciens which may produce Tetracycline and other strains of streptomyces aureofaciens which will not produce Tetracycline for Minieri.
- (2) Both patents do not disclose where and how strains of streptomyces aureofaciens, capable of producing chlortetracycline when fermented in the presence of chlorine for Duggar and Tetracycline for Minieri, may be obtained for the purpose of lawful experimentation during the life of the patent and of commercial practice of the invention after the expiry.

A specific attack is made on the Minieri patent in that the process claimed therein is the same as that claimed in the Duggar patent which does not make any mention of chlorine ion and Minieri et al invented nothing in view of the Duggar patent.

With regard to the Minieri patent, a further defence was proposed in that Minieri was not the first inventor as a co-pending application with Minieri was discovered which should have been placed in conflict, i.e., one application made by Martin-Bohonos produced as Ex. D-16 which, however, bears no date but which in respect thereto was dealt with by a statement made by Mr. Sim, one of the defendant's counsels at vol. 2, p. 411, of the transcript as follows:

We will state for the purpose of this action only that whatever that application shows, the Martin and Bohonos application shows, whatever is in it was invented by Martin and Bohonos before Minieri invented what is shown in the Minieri patent in suit and that my friend will not have to go into matters of proof

We will also, of course, agree, if the record indeed doesn't show it, that the Minieri application and the Martin-Bohonos application were co-pending before the Canadian Patent Office at the same time, and I think that is the extent of our agreement.

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It was here submitted by the defendant that the particulars of objection be amended by adding the following:

The alleged inventor of Canadian Letters Patent No 542622 was not the first and true inventor being antedated by Messrs. Martin, Bohonos, Duggar and Devoe as well as Messrs. Heinman and Hooper; patent applications by the said inventors are pending and were co-pending with the application which matured into Canadian Letters Patent No. 542622.

This request for leave to amend by the defendant was strongly opposed by counsel for the plaintiff, firstly on the basis that an amendment of such far reaching importance which would change the nature of the present action, should not be allowed at this stage and, secondly that defendant's attempt to bring in the Martin-Bohonos application, should not be permitted as under s. 10 of the *Patent Act* pending applications are to be kept secret.

I, nevertheless, granted defendant's amendments with costs against it on the basis that the amendments proposed, although tardy, in no way changed the nature of the action and that as far as the production of the Martin-Bohonos application was concerned, it could be handled in such a way that the matters it contained, or the evidence adduced in connection with it, could remain confidential as between counsel for the parties, and myself, as well as (as requested by counsel for both parties) a representative of each party who, through their counsel, gave an undertaking to keep such matters as confidential and the matter was so dealt with.

I might point out that it now appears to me, after closer examination of s. 10 of the *Patent Act*, that as far as the judge is concerned, the confidential nature of such matters can be maintained only if disclosure is not necessary to allow the proper discharge of his duty to render judgment.

If the confidential matters in the application must be disclosed in the judgment, s. 10 of the Act which states that

10 All specifications, drawings, models, disclaimers, judgments, returns and other papers, except *caveats* and except those filed in connection with applications for patents that are still pending or have been abandoned shall be open to the inspection of the public at the Patent Office, under such regulations as are adopted in that behalf.

does not and cannot, in my view, prevent the Court from dealing with such matters although it would seem to be a proper procedure in all cases to try to divulge as little of the confidential information as possible.

It indeed appears to me that particularly in a case such as we have here where the application objected to belongs to the plaintiff, s. 10 of the Act does not and should not prevent the dealing with such matters in a judgment when necessary, because the practice of not allowing the public to inspect pending applications and documents connected therewith necessary for the proper functioning of the public service, is not a public interest which should be recognized as overriding what Rand J. described in *Regina v. Snider*<sup>1</sup> at p. 482 as:

the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions.

I might add that counsel for the plaintiff after the Court's decision to allow the amendment whereby the Martin-Bohonos application was allowed to be pleaded as prior art in the present case, volunteered to supply and did supply a copy of it. I might also say that the steps taken herein to provide for the secrecy of the contents of the Martin-Bohonos application appeared later at the trial to be somewhat unnecessary when counsel for the defendant stated that these contents could be substantially found in a document produced by the plaintiff in France to obtain a priority date, as appears from a certified copy of same produced as Ex. D-77.

Having set down the position taken by both parties herein and the issues involved, I now turn, firstly, to the determination of the matter of infringement based, as we have seen, on whether the importation into Canada of Tetracycline and its sale in this country (which is admitted by the defendant) infringes the two Canadian patents in suit and if so, whether *Streptomyces lusitanus*, which produces this Tetracycline, should be considered from a taxonomic and speciation point of view as the same species or one different from the recognized *Streptomyces aureofaciens*.

*In Rhone-Poulenc S.A. v. Micro Chemicals Ltd. et al*<sup>2</sup> I had occasion, in referring to the statement of the Supreme Court of Canada in *Hoffman-Laroche v. Commissioner of Patents*<sup>3</sup> to state:

<sup>1</sup> [1954] S.C.R. 479.

<sup>2</sup> [1964] Ex. C.R. 819 at 831.

<sup>3</sup> [1955] S.C.R. 414.

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That there is infringement of a Canadian process patent by the sale in Canada of a product made abroad by that process would now appear to be accepted by our courts and defendants' submission that the act infringing a Canadian patent must necessarily be done in Canada, cannot therefore be accepted

I might even say that the Supreme Court of Canada in an *obiter dictum* in the *Hoffman-Laroche* case appears to have gone still further and it would seem that the sale of a product made in accordance with a patented process would infringe a process patent, even though the patent contained no claim to the product.

There are also a number of cases which have held that a process patent does not have to be used to produce the precise substance that is imported in order to constitute infringement but may have been used to produce an intermediate product. Now, although it appears to me that to find infringement in such a case could sometimes lead to a situation where every person would be held to infringe a process patent who uses or sells an article or product imported into Canada in the course of the production of which the product produced by the process patent has been employed whether such use has been of importance or merely incidental in which latter case we would be going beyond protecting what is ordinarily termed the substance of the invention, there would appear to be some justification to find infringement where the product used as an intermediary is of importance such as we have here. As a matter of fact, infringement was found in a situation very similar to the present case, in *Saccharin Corporation v. Anglo-Continental Chemical Works*<sup>1</sup> where Mr. Justice Buckley stated:

. . . Now the grant in Letters Patent is a grant to a Patentee to make, use, exercise, and vend the invention, to have and enjoy the whole profit and advantage by reason of the invention; and to the end that he may have and enjoy the sole use and exercise and the full benefit of the invention all others are precluded from, either directly and indirectly, making use of or putting in practice the said invention, or any part of the same, or in anywise imitating the same.

And further down he added:

. . . Does it make it any the less an infringement that the article produced and sold is manufactured by the use of the patented process which is subjected to certain other processes? In my opinion it does not. By the sale of saccharin, in the course of the production of which the patented

<sup>1</sup> (1900) 17 R.P.C. 307 at 319.

process is used, the Patentee is deprived of some part of the whole profit and advantage of the invention, and the importer is indirectly making use of the invention.

It therefore appears that there would be infringement of the Duggar patent even if the product imported was not chlortetracycline, the new product invented by Duggar, but Tetracycline admittedly made by the process of making chlortetracycline and then by the deschlorination method obtaining Tetracycline.

It also appears that in such a situation, dealing with a new product (chlortetracycline from which Tetracycline is made), s. 41(2) of the *Patent Act* which creates a presumption in favour of the patentee that the substance imported "in the absence of proof to the contrary" is deemed to have been produced by the patented process would apply, were it not for the agreement for trial whereby the parties agreed that infringement of both types of tetracycline produced would be dependent upon a prior determination of the speciation of *lusitanus* which, I believe, has the effect of suspending the presumption and, therefore, the burden of proving that *streptomyces lusitanus* is a species of *streptomyces aureofaciens* would rest, under the ordinary rules of evidence, on the plaintiff. Cf. *Terrel and Shelley on Patents*, current edition, p. 327:

The burden of proving infringement (where it is denied) is on the plaintiff, and if he is unable to prove it, there is no necessity for entering upon the question of validity, unless there is a counterclaim for revocation.

I might add however, that if it is found that *streptomyces lusitanus* is merely a strain of *streptomyces aureofaciens* then the presumption of s. 41 (2) will be revived and the chlortetracycline produced and later made into Tetracycline will be presumed to have been produced by the Duggar process.

With regard to the Tetracycline imported and sold in Canada by the defendant and produced by means of the fermentation process, and which the plaintiff claims is an infringement of the Minieri patent, there can, of course, be no presumption because Tetracycline at the date of the above patent was not a new product. The agreement for trial, however, provides that there will be infringement of claims 1 to 5 and claim 7 of the Minieri patent "if

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*Streptomyces Lusitanus* is an organism of the group consisting of the species *streptomyces aureofaciens* together with natural and artificially induced mutants thereof."

It therefore follows that the matter of infringement will be decided on a question of taxonomy and speciation in determining whether or not *streptomyces lusitanus* is of the same species as *streptomyces aureofaciens*.

Taxonomy, according to the Glossary of Terms (Ex. 5) is "the classification of living organisms (although Dr. Henssen would add also fossils) according to their natural relationships. The laws and principles of such relationships" and speciation is "the art of determining the nature of the species or determining to what species a newly collected organism should be associated or assigned."

Now although the question as to whether *streptomyces lusitanus* is of the same species as *streptomyces aureofaciens*, appears to be a simple one, such is not the case and this appears clearly from an extract of Ex. 24 which is a recent paper written and presented in Madrid in 1963 by E. Kuster, a well recognized micro-biologist of the University of Dublin, entitled "Morphological and Physiological Aspects of the Taxonomy of Streptomycetes" at p. 195:

Among these genera the genus *Streptomyces* is the most important one and comprises the greatest number of species. 256 species are considered in Waksman's monography (24) and since that time many new species have been described and named. Much confusion arises when a new species is not sufficiently tested and compared with type cultures. So, it can happen that the same species is named with different designations and many species may be synonyma.

It is often very difficult to fix the borderline between the species; the definition of this taxon is quite unclear in spite of all the regulations in the Code of Nomenclature. Which criteria should be considered important and necessary for a species determination? There are two groups of taxonomists, the "lumpers" and the "splitters". The lumpers using only a few characters collect into one species many types which are designated as different species by the splitters. A good help for taxonomic work is the introduction and use of infrageneric taxa such as "groups", "species-groups" or "series". At present we are not yet able to build up a natural system of classification of bacteria to include the Streptomycetes, based on our knowledge of their phylogeny and evolution. Each classification system and key is only a tool for describing, collecting, and grouping the various naturally occurring types of organisms.

The whole situation of bacteriological work and particularly taxonomy is complicated by the fact that our laboratory experiments do not completely reproduce the conditions and relationships in nature, the original environment of the microorganisms. Uncontrolled mutations or other changes of the genetic substance may also occur in nature, e.g. in soil,

which are induced by mutagenic agents, such as metabolic products of microorganisms or substances derived from the decomposition of organic matter. If two strains have been isolated from soil which differ in one or two characters, they will be classified as two different species. On the other hand, by a treatment with mutagenic agents mutants can be artificially produced which sometimes differ in more characters and nevertheless belong to the same parent species.

- (24) Waksman, S.A. 1961. The Actinomycetes. II. Classification, identification and descriptions of genera and species. Williams & Wilkins, Baltimore.

In Ex. D-16, the Martin-Bohonos application, and this also appears in Ex. D-77, the document presented in France, it is also stated that:

Among mycologists the classification of microorganisms can frequently be a difficult problem, and different mycologists may arrive at different classifications for the identical organism.

In Ex. D-23, at pp. 52 and 53 of a paper printed in 1958 in the review "Applied Microbiology", vol. 6, the problem and difficulties of speciation of streptomycetes are further underlined by T.G. Pridham and associates:

After more than a decade of intensive investigation of streptomycetes, microbiologists are still confronted with the difficult task of identifying strains of these microorganisms. Of particular concern is the problem of characterizing isolates so that they can be readily recognized later. Of further concern is the difficulty encountered in identifying unknown strains using the systems presently available. These difficulties have their origin in the development of keys based principally on physiological criteria. . .

Major reliance on physiological criteria for grouping and speciation in the genus has led to the creation of a large number of "new species" (more than 100 since the discovery of actinomycin in 1940). This trend will continue as long as new antibiotics or other interesting compounds are discovered as metabolic products of streptomycetes unless reliance is placed on more constant taxonomic characteristics. The continuing addition of new species is not surprising when one considers the marked physiological diversity demonstrated in this genus. In our opinion, many of the new species are no more than varieties or physiological forms of valid ones already described. Once studied and compared with valid species, some of the new species could undoubtedly be rejected or placed in synonymy.

It therefore appears that if there are differences of opinion in the scientific world on the proper speciation of streptomycetes as we have just seen, such differences of opinion were naturally greater at the trial where a number of bacteriologists, biologists, botanists, taxonomists and chemists confronted each other and where, I may say, they were far from unanimous not only on the matter of species determination of streptomycetes lusitanus, but also on the value of the various criteria used for such a determination.

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The question of speciation which I am now called upon to examine and determine occupied the major part of the evidence at the trial and as already mentioned is one on which I have heard divergent opinions. My task, which is not an easy one, will be to consider the evidence of these experts, evaluate them and from that determine which evidence is and should be accepted on the balance of probabilities as more probative than the other. It is with this in mind that I now turn to the evidence of the experts in this case which I intend to analyze and weigh with as much common sense and shrewdness as I may have and with such skill I may have acquired in the course of the trial and during the deliberation.

On the matter of speciation, a Dr. Edward Backus and a Dr. Robert Benedict were heard on behalf of the plaintiff. Dr. Backus is a research microbiologist actually employed by the plaintiff, where he has been heading its Department of Microbiology since September 1956. This gentleman obtained from the University of Wisconsin a Bachelor of Arts degree majoring in botany, in 1937, a Master of Arts degree majoring in botany and plant biology, in 1939, and a Ph.D. degree majoring in botany and mycology, in 1941. Prior to 1956, since 1942, his principal duties with the plaintiff company have been the isolation of micro-organisms from natural sources, their identification and the production of mutations. He is the author of a number of scientific papers in the field of microbiology and is a member of a number of well recognized American scientific societies. From 1955 to 1960 he participated with a group organized by the American Society for Microbiology, now called Society of American Bacteriologists, which endeavoured to study and determine the proper criteria to use in order to determine species of the genus streptomyces and in 1960 he became a member of a study committee which organizes and runs the tests necessary to determine species of the genus streptomyces. He also became a participant of a corresponding group organized on an international basis at the International Congress for Microbiology in Stockholm in 1958, when a cooperative project was set up involving the interested microbiologists particularly those who practised in the taxonomy of the genus streptomyces from all parts of the world and he has continued to be active in this group up to the

present time. Dr. Backus was an associate of Dr. Duggar and has been working with micro-organisms of the genus streptomyces on a more or less continuing basis for the last twenty years and his attention has been focused more or less on the micro-organisms of the species streptomyces aureofaciens because of its importance to his employer, for the last seventeen years. This witness explained how mutant strains were produced, that there were a number of cultures and depositories around the world where interested parties may deposit micro-organisms, so that other people may obtain them and these various cultured collections will receive such organisms, maintain and distribute them upon request. He stated that strain A-377, isolated by Dr. Duggar, was first deposited in the collection of the Northern Regional Research Laboratory in Peoria, Illinois, in the summer of 1949 and it was assigned the number N.R.R.L. 2209. The Northern Regional Research Laboratory is a unit of the United States Department of Agriculture where studies are conducted on the utilization of agricultural products in general. This N.R.R.L. 2209 deposited according to Dr. Backus, was released on September 13, 1949 and from that date anyone could obtain without charge a culture of this organism to study its characteristics and experiment with it. He also stated that a strain of streptomyces aureofaciens known as UV-8 was first produced by a group working under the direction of Minieri, who, at the time, was at the Heyden Chemical Corporation. This strain was first deposited at the American Type Culture Collection (A.T.C.C.) around December 15, 1955 and was released on February 7, 1956, with the only restriction being placed on its distribution being that the plaintiff be informed if an organism was sent outside of the United States. He also testified that streptomyces aureofaciens is generally accepted by scientists as a valid and distinctive species new at the time of Dr. Duggar's original description and isolation of the organism and this seems to be accepted by the other experts.

A strain of streptomyces lusitanus (F. 1617) was delivered to Dr. Backus' laboratory by a Mr. Austin Phillips and the former made a comparative study of streptomyces lusitanus and streptomyces aureofaciens by utilizing strain

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N.R.R.L. 2209, the original Duggar organism, and concluded that this strain of streptomyces lusitanus is none other than a strain of streptomyces aureofaciens. In his written report produced as Ex. 20 he states at p. 2 thereof that:

4. An analysis of the observations on cultural characteristics of the two organisms reveals no significant differences—the minor variations in response to specific media being typical of the variation encountered in different *strains of the same species*. Both organisms gave moderate to good growth on most agar media—exceptions being the thin, light growth which both made on the Czapek-type formulations and on nutrient agar. A majority of media also supported moderate to heavy sporulation by both organisms. All appreciable spore masses of both were observed to be brownish-gray shades (*Benzo Brown* and *Mouse Gray* as defined by Ridgway) which fit into the “gray” series of the Pridham et al (Appl. Microbiol, 6, 55, 1958) Guide to Streptomyces classification or the “cinereus” colour group of the key devised by Ettliger et al (Arch. f. Mikrobiol, 31, 332, 1958). On media which supported good to moderate growth, both organisms produced substrate thalli and reverse colors in shades ranging from pale yellows to deep ruddy browns. No significant differences between the two organisms were noted with reference to soluble pigment production, a characteristic of minor taxonomic significance at best.

5. Morphological characteristics of the two organisms were remarkably similar—both showing hooks, loops or rudimentary spirals intermixed with straight to flexuous sporophores and clearly belonging to the *Retraculum-Apertum* section of Pridham et al or to the “Spiral” forms as interpreted by Ettliger et al. This total agreement is highly significant since this characteristic is one of the key criteria in Streptomyces classification. No significant differences in spore shape or spore size were observed in the two organisms. Likewise both organisms were observed to have smooth, unornamented spore surfaces as viewed by electron microscopy. This again is highly significant since the nature of the spore surface ornamentation has been shown to be a highly stable characteristic of Streptomyces species (Tresner et al, Jour. Bact., 81, 70-80, 1961).

6. The miscellaneous physiological reactions of the two organisms were also remarkably uniform—the chief differences being slight deviations in the amount of growth achieved on various substrate. Neither organism was able to reduce nitrate to nitrites when grown on either synthetic or organic nitrate broth. Likewise neither organism was able to liquefy gelatin, while both showed positive starch hydrolysis. Both organisms were non-chromogenic, i.e., did not produce melanin-type pigment on protein-rich media. This latter trait again is a highly significant characteristic for determination of Streptomyces species identity, (Ettliger et al, 1958). *Streptomyces lusitanus* F 1617 grew slowly on purple milk (Difco) and caused neither coagulation nor peptonization at 14 days; however, there was moderate growth and weak peptonization evident after 21 days. *S. aureofaciens*, which grew somewhat better on this medium, caused slight coagulation and weak peptonization at 14 days. Neither organism caused any shift in pH during the growth cycle. Reaction of Streptomyces cultures on milk media is a highly unreliable criterion for species differentiation because of the variability which different strains of the same species have shown in this test. This is particularly true of *S. aureofaciens* (Backus et al, Ann. N.Y. Acad. Sci., 60, 90, 1954). The lack of significance of reaction on

milk media for *Streptomyces* species differentiation in general is also pointed out by Hesseltine et al (Ann N.Y. Acad. Sci., 60, 147, 1954).

7 A highly useful criterion for *Streptomyces* species differentiation is the pattern of utilization of diverse carbon sources as determined by the technique of Pridham and Gottlieb (Jour Bact., 56, 107-114, 1958). Because of difficulties in interpreting the amount of growth achieved, minor differences in behaviour on specific C-sources are of little significance. Rather, it is the overall pattern of similarity or dissimilarity which is meaningful in the comparison of two individual cultures. The data displayed in Table IV shows the remarkably similar C-source utilization patterns of *S. lusitanus* F 1617 and *S. aureofaciens* NRRL 2209. The reactions to individual carbon compounds are either identical or differ only in a minor quantitative degree. Growth of *S. lusitanus* in several instances was less vigorous than that of *S. aureofaciens* which reflects its limited ability to utilize inorganic nitrogen compounds. Ammonium sulfate is the sole nitrogen source in this particular medium. This limitation, however, was not so severe as to interfere with the observation of the extreme similarity in the C-source utilization patterns of the two organisms.

8 It is reiterated for emphasis that my comparative study of the *S. lusitanus* culture received from Dr Tosoni and *S. aureofaciens* NRRL 2209 revealed almost completely identical characteristics for the two organisms as regards the five critical taxonomic criteria as follows:

- (a) *En masse* spore colour;
- (b) Sporophore (spore chain) morphology;
- (c) Spore shape and ornamentation as determined by electron microscopy;
- (d) Chromogenicity (melanin pigment production on protein rich media);
- (e) Carbon source utilization pattern.

This identity was further supported by identical or highly similar behavior with respect to the lesser criteria such as nitrate reduction, gelatin liquefaction, starch hydrolysis, soluble pigment formation, etc. This abundance of data is consistent with only one conclusion, namely, that *Streptomyces lusitanus* has no characteristics which establish it as a species separable from *Streptomyces aureofaciens*.

This witness described eleven characteristics or tests or criteria employed today for scientific determination of mesophylic species (i.e. organisms such as aureofaciens which grow or exist preferentially at intermediate temperatures (i.e. 25-35 degrees C.)) of the genus streptomyces, commented on their relative importance and the importance and the use made of them by various scientists, these criteria are as follows:

1. The nature of the spore-bearing portion of the aerial mycelium of the micro-organism, which contain chains of spores, their structure, form and shape;
2. The "en masse" spore colour; as the organism sporulates or grows and reaches maturity, the aeromycelium of the surface becomes coloured a distinctive shade and these

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colours (the total colour given to the surface of the well sporulated organism) can be used as diagnostic characteristics;

3. Nature of the individual spores as they may be observed under very high magnification such as provided by an electron microscope;
4. The production of a characteristic blue-black pigment known as melanin pigment, the ability of the micro-organism to produce it or not to produce it;
5. The pattern of utilization by the organism of selected sources of carbon, its ability to use up some types and not to use up others;
6. The range of colour displayed by the vegetative mycelium which grows on the surface of the agar, which is also called substrate thallus colour;
7. The ability of the organism or lack thereof to reduce nitrates to nitrites;
8. Its ability to liquefy gelatin;
9. Its ability to produce pigments other than the melanin which are soluble and may diffuse into the medium and give a distinctive colour called soluble pigment production;
10. Its ability to utilize starch;
11. Its behaviour on litmus milk.

With regard to criteria No. 1 the structure, form and shape of the aerial mycelium of the micro-organism, Dr. Backus produced Ex. 25, taken from the Pridham paper, (Ex. 23), which indicates the different types of sporophores or spore chain arrangements observed in streptomyces. These sporophores are straight, flexuous and fascicled. The first group is called *rectus-flexibilis*, meaning straight flexuous. The second group encompasses a mixture of sporophores of *rectus-flexibilis* together with a type described as open-loops, primitive spirals and hooks, which is recognized by the Latin name *retinaculum-apertum*, commonly referred to as R.A. The third category encompasses those organisms in which actual spirals are produced which may be open spirals or tightly wound spirals in almost the form of a little ball which the Pridham group grouped together as *spira*. Then there is the fourth category, where the spore chains come

out in little whorls along the axis of the hypha, called verticillate or whorls.

He produced Ex. 27, which are photographs of streptomycetes aureofaciens strain N.R.R.L. 2209 and streptomycetes lusitanus magnified 450 times and where it appears that both organisms produced the hooks and loops and coils of the *retinaculum-apertum* type with a certain amount of flexuous or rectus-flexibilis elements intermixed, and therefore they would both fall within the category of *retinaculum-apertum*.

Dr. Backus stated that all the above eleven criteria were not of equal value in the determination of species within the genus streptomycetes and that a number of them were far more stable than others. He admitted that different investigators take different views as to how many of these are more useful, but that, at one time or another, all have been used. He therefore has taken all of them and covered the whole range in the investigation of lusitanus and aureofaciens. He also stated that the Swiss investigators, Ettliger et al rely upon the first four criteria and consider them definitive for the determination of species, as it appears from a translation of the joint L. Ettliger, R. Corbiz and R. Hutter paper, produced as Ex. 22. Pridham and his associates, at the Northern Regional Research Laboratory in Peoria, on the other hand, accept the first five criteria as being most useful in the identification of species, as appears from a Pridham article in the review "Applied Microbiology", published in 1958 and produced as Ex. 23. Kuster, another well-recognized scientist, recommended the use of the first six criteria in 1963, as appears from Ex. 24.

In cross-examination on the first criterion (nature of spore-bearing portion of the aerial mycelium of the micro-organisms), he was shown p. 128 of a book entitled "The Actinomycetes" (Waksman) where there are three photographs showing on the left side, streptomycetes aureofaciens with straight, flexuous and continuous sporophores; in the centre, a photograph of a natural variant of streptomycetes aureofaciens with loops and some straight sporophores and, on the right-hand side, an induced mutant streptomycetes aureofaciens almost completely looped.

He was asked to explain how aureofaciens could produce these different types of sporophores, which he did by stating

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that strain A-377 used in the first photograph, under the conditions of growth existent at the time, produced straight to flexuous sporophores; that the second one was a strain isolated from nature and the third was an induced mutant strain prepared from A-377.

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Here, however, Dr. Backus stated that the difference in sporulation was not necessarily the result of mutations in the strain because the middle one which hooked and looped is not a mutant but an isolate from nature, as well as the first one which on the other hand is straight and flexuous. He is of the opinion that aureofaciens can produce either straight or flexuous or hooked and looped forms and still be aureofaciens, as the latter is usually a mixture of both and that it falls, therefore, within the definition of what the *retinaculum-apertum* group is.

He agreed that the medium used would influence the appearance of the sporophores and that, in certain media, poor sporulation would be obtained and that in order to get proper sporulation and characteristics, the organism must be in a situation where it is growing optimally.

He also admitted that with certain media the sporophores would be of the first type, i.e., straight, and on other media the percentage would tend to shift in the other direction so that we may find here a certain variation. He, however, pointed out that even with variation with regard to the percentage of straight flexuous forms and the loops and coils, it does not vary here out of what Pridham would define as *retinaculum-apertum*. As it was possible that the choice of the medium could affect the proportion of straight mycelium to the proportion of looped mycelium, Dr. Backus stated that he had selected a particular medium for his comparative study and that he had selected this medium because it was one upon which optimal abundant sporulation was developed and that, therefore, in his experience, that was the type of medium which would give the most characteristic appearance of the species and he used the same medium for both *streptomyces aureofaciens* and *streptomyces lusitanus* in his investigation.

He also admitted that, at column 4, line 32 and following, in the Duggar patent, a description of the branch hyphae of the aureofaciens mentions the "flexuous and continuous" and does not mention the presence of hooks and loops at all

and that, consequently, the strain used which shows, generally, hooks and loops might have been a mutation.

With regard to the second characteristic, the "en masse" spore colour of the sporulation aerial mycelium, Dr. Backus stated that in order to determine the spore colour, abundant and well-sporulated growth must be obtained; he found here that both organisms, lusitanus and aureofaciens, belong to the grey spore colour group.

He admitted that there were some variations in the scientific world as to the recognized spore colour groups. For instance, Pridham and his associates, as well as Ettlinger, recognize six, although the latter modified them somewhat by combining and splitting. Dr. Backus and his associates recognize seven, the same six recognized by Ettlinger, plus a violet shade group. He also stated that all of these systems contain a group which is regarded as grey but described as ranging from grey to brown, and he affirmed that both lusitanus and aureofaciens would fall into the grey-brown group.

With regard to the third stable characteristic, i.e., nature of the individual spores, as viewed by electron microscopy, the witness produced a number of photographs magnified in the neighbourhood of 40,000 diameters:

- Ex. 28: (S. Olivaceous)
- Ex. 29: (S. Diastatochromogenes)
- Ex. 30: (S. Purpurascens)
- Ex. 31: (S. Calvus)
- Ex. 32: (S. Albogriseolus)
- Ex. 33: (S. Diastaticus)
- Ex. 34: (S. Phaeochromogenes)
- Ex. 35: (S. Aureofaciens)
- Ex. 36: (S. Lusitanus)

From these exhibits, it appears that the spores of a number of streptomyces, viewed under sufficient magnification, have some interesting surface ornamentation useful in classifying these micro-organisms. He states that these characteristics are very constant and are highly reliable criteria. Some of the spores reproduced on the above photographs have little warts on the surface, others have stout thorns, spines or hairs; some have considerably longer hairs

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tangled and twisted around the spores; some have smooth spored forms and others are elongated types.

From the above exhibits it appears that aureofaciens and lusitanus are both smooth spored and have no thorns, spines, hairs or warts on the surface. The cells in both cases tend to be somewhat elongated and are further marked by curious thickenings at the ends of the cell with an electron-dense area running through the centre which gives this chain of spores a phalangeal appearance like the bones in the finger.

With regard to the fourth stable characteristic, i.e., the production of melanin pigment, which is a test for the presence in the organism of an enzyme, tyrosinase, which has the capacity to stimulate the chemical change of the aminoacid tyrosine to melanoid type of pigments, the witness produced Ex. 37 which illustrates that the two types of streptomyces, bikinienses and lavendulae, give a positive melanin production and reaction, whereas both lusitanus and aureofaciens do not.

The fifth criterion, i.e., the ability or lack thereof of the organism to utilize certain carbon sources in a defined medium can, according to Dr. Backus, supply something of a fingerprint as to its identity as certain patterns of utilization can be determined in particular species and are useful in identifying particular organisms. Certain species appear to be variable with reference to certain carbon sources, whereas concerning other carbon sources there is a very firm pattern of utilization or a constant lack of utilization. He stated that this technique was described by Pridham and Gottlieb and further expanded by Dr. Benedict in later years. Having applied this test to both lusitanus and aureofaciens, and having used a series of carbon sources indicated in his report (Ex. 20) in a defined medium, he stated that the results indicate that there is here a similar pattern of utilization. A key carbon source, in the opinion of this witness, is sucrose and both lusitanus and aureofaciens utilize sucrose as well as fructose and dextrose, although essentially all organisms utilize dextrose.

He added that, on the other hand, they both are essentially unable to utilize mannitol, raffinose, rhamnose and salicin.

He affirmed that, although generally the results of the test used by him in his investigation would depend somewhat on the strains and medium used, the carbons he used are very constant and therefore, in his opinion, his test was most useful. As far as the strain used in his test is concerned, it was a type culture derived from the original A-377.

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He also added that even if the strain he had used for his comparative study was a mutant, it would have exhibited no differences from its natural isolate predecessor in respect of the first five stable characteristics hereinbefore mentioned as well as in respect of the other six characteristics, so long as the strain used corresponds to the characteristics shown by the original.

According to this witness, the first five characteristics we have just seen are the most suitable for determination of the species and he has used them in studying approximately 600 nature isolates of various streptomyces and has found no strains of streptomyces to have identity with streptomyces aureofaciens on all five of the above-stated characteristics which were, in his opinion, a distinct species from streptomyces aureofaciens.

He also stated that he went through the six other criteria because they have been used by other investigators and he wished to confirm that his conclusions, based on the first five, which he believed most useful, would also be confirmed by these other criteria, adding that these other tests also confirmed his opinion that the two organisms belong to the same species.

With regard to the substrate thallus colour, both organisms produced a colour ranging from a creamy yellow to a deep ruddy brown (i.e., in a yellow brown area) depending on the nature of the substance upon which it is growing.

Neither of them were able to reduce nitrate to nitrites, nor did they liquefy gelatin to any degree.

As to the soluble pigment produced other than melanin, although somewhat erratic, the test produced in both cases the same soluble pigment in a yellow-brown shade.

Both organisms were able to hydrolyse starch.

With regard to the litmus milk test, which is one where an indicator of acidity, alkalinity, has been added to skimmed milk, growth in both cases was very slow, neither organism

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liking this medium particularly, *lusitanus* however growing somewhat more slowly than *aureofaciens*. During the period of incubation, there was no difference, neither being able to produce any change in the pH (acidity) of the medium in which there had been any mixture of the acidity of the alkalinity.

With regard to the use of mannitol, they, according to his test, would not support growth in *aureofaciens* and that part of the Duggar patent, column 5, line 32, which states that it will support growth, he explained by saying that in the patent it is being utilized in an entirely different sort of medium in which there are other types of compounds present supplying nitrogen, perhaps supplying even other carbon sources, and that a good deal depends on the medium although if the test is carefully prepared, according to the formula employed, it can be very meaningful.

In other words, with regard to the mannitol utilization, different media would give different results.

He also added that the difference in the result obtained in his test and that described in the Duggar patent revolves around the use of a specific Pridham-Gottlieb medium which is a chemically defined medium with precise determination of the ingredients contained therein. In contrast, the medium to which Professor Duggar was referring to in the patent contained natural materials which may well bring along with them miscellaneous carbohydrates other than the one he also added as a major component and, therefore, it would be unsuitable for use in determining whether or not a specific carbon source would or would not be utilized because of the nature of the other ingredients put into it.

In the case of both *lusitanus* and *aureofaciens*, he used the exact same media and identical mannitol, which incidentally is a sugar alcohol, and therefore he was comparing like with like.

In cross-examination he was referred to a paper prepared by Professor Waksman entitled "The Actinomycetes" and where the latter referred to Dr. Duggar, Dr. Campbell and Dr. Backus (the witness) in respect to the question of speciation. At p. 100 of vol. 1 of the above writing it is stated by Professor Waksman:

They (Dr. Duggar, Dr. Campbell and Dr. Backus) are willing to use as a basis of species differentiation minor or single variations of morphological or developmental features, of responses to environmental changes, of differential election of nutrients or of metabolic differences.

Dr. Backus admitted that he was part of a study that Professor Waksman was conducting at that time adding, however, that Professor Waksman has put a few interpretations of his own into that writing which are contrary to what Dr. Backus claims his and his colleagues' writings were and that Professor Waksman's statement did not interpret accurately what he, Dr. Campbell and Dr. Duggar had employed or written in that paper and that actually some of the quotations are couched in such a manner in Waksman's interpretation that they present an almost exactly opposite idea to what Backus states "we were trying to put forward". At p. 481 of the transcript he stated:

Rather than accepting that as a basis of the species, we pointed out that to do this would result in the creation of thousands of species where tens exist, and in so doing, of course, that would be exactly the thing which we in the line previously had agreed was unsound practice, so I am sure that it has never been my concept to accept this idea of using small differences to create species, and it is my general recollection that Professor Duggar was of the same view.

Having stated that in his opinion streptomyces viridifaciens and streptomyces aureofaciens were one and the same thing, he was asked whether he would change his mind after looking at Ex. 23 "A Guide for the Classification of Streptomyces According to Selected Groups" by Pridham, Heselstine and Benedict, p. 65, under the heading "Epithet", where both aureofaciens and viridifaciens are listed individually. He said he would not, stating at p. 387 of the transcript:

... The mere fact that they are both listed here does not necessarily mean that these authors accepted all of these organisms so listed as valid and separate species.

They indeed indicate earlier in this treatise, at p. 53, that it is their opinion that many of these may be reduced to synonymy. He then stated that he had had occasion to examine *S. viridifaciens* and conduct studies in respect of it in the same manner he had done for *S. lusitanus* and in his opinion *viridifaciens* is also only a strain of *aureofaciens*.

Dr. Backus was then referred to Canadian patent 658,503, granted to American Cyanamid Co. on February 26, 1953, p. 6, line 5, where in connection with the mention of *S. viridifaciens*, it is stated at p. 407 of the transcript:

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. . . The published morphological data on these microorganisms is insufficient conclusively to determine whether or not they are new species or merely strains of *S. aureofaciens*.

He was then asked whether the above would be a correct statement of the art of taxonomy of streptomyces at the date of this patent, i.e., 1963, to which he replied, at p. 407 of the transcript:

- A. Certainly the organisms you have mentioned there are inadequately described and one could not, simply by reading these descriptions, arrive at a determination since certain of these descriptions do not supply the majority of the key characteristics we were discussing this morning.

And later, when asked whether he would agree with the statement or not, he stated he would not disagree with certain portions of the statement, adding, however, at p. 408 of the transcript:

- A. Well, I certainly agree with these references to alleged distinct species, because I do not think these are distinct species. I would agree with this passage where he says that these are alleged to be distinct species. In other words, he is not committing himself to this point. But they are alleged in the literature to be different species. And the published morphological data on some of these is insufficient; in other words, we are not told what the structure is, whether it is flexuous or whether it is coiled, or whatever it is, and with reference to the other characteristics we are not told.

He then concluded by saying that he had conducted studies similar to the comparative study contained in his report, Ex. 20, on all of the following streptomyces: *viridifaciens*, *sayamaensis*, *feofaciens*, and that they are in his opinion merely strains of *aureofaciens*.

Dr. Robert Benedict, a fermentation expert and microbiologist, was also heard on behalf of the plaintiff.

This gentleman received his Bachelor of Science degree from Michigan State College in 1936; A Master of Science degree in biology from Virginia Polytechnical Institute in 1938; and a Ph.D. degree in agricultural bacteriology from the University of Wisconsin in 1942. He is the author and co-author of a number of technical articles and papers in the field of fermentation and microbiology. From July 1942 until September 1960 he was employed by the Northern Regional Research Laboratory in Peoria, Illinois, which, as we have seen, is a division of the United States Department of Agriculture. During the years 1942 to 1946, he maintained bacterial cultures of the N.R.R.L. and also did research work on penicillin and other antibiotics. From 1946

to 1953 he was with the Survey and Development Section of the N.R.R.L. where research on antibiotics produced by moulds, bacteria and actinomycetes was carried on, during which period he received the Superior Service Award from the United States Department of Agriculture in 1950; from 1953 to 1956 he was engaged in a special project for the United States Army Chemical Corps; from 1956 to 1958 he headed the Microbiological Technology of Polymer Unit where research work was carried out in dextrine and polymers from yeast and bacteria; in 1958 he was engaged for six months in a special project concerning the microbiological synthesis of rubber, and from 1958 to 1960 he was the head of the new product's exploration and reactions investigation group where work was being carried out in the production and isolation of fermentation product from fleshy fungi. From October 1960 to date, he has been associated with the College of Pharmacy, the drug plant laboratory of the University of Washington in Seattle, studying the chemical constituents of a variety of fleshy fungi and he is now an associate professor nominate in that University; he is a co-author, with Pridham, of "The Guide for the Classification of Streptomyces According to Selected Groups" (Ex. 23); he is a member of the American Society of Microbiology and is listed in the American Men of Science.

Dr. Benedict dealt with the N.R.R.L., its culture collection and the reputation it enjoys in the scientific world. It is composed of several divisions, one of which is the fermentation division where a culture collection of yeasts, moulds and bacteria is maintained. He affirmed that the above culture collection is known throughout the world and that any qualified microbiologist interested in taxonomy would know if he saw the initials N.R.R.L. that they stood for Northern Regional Research Laboratory.

Dr. Benedict has isolated three different strains of aureofaciens from samples of three Japanese soils and in addition to that, in the course of several years, has personally investigated about 4,000 samples. He has isolated actinomycetes from these samples, studied them culturally and has done fermentations in attempts to produce antibiotic substances of medicinal value.

He stated that Ex. 23, which is "The Guide for the Classification of Streptomyces According to Selected

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Groups", prepared by Pridham, Hesseltine and himself, should serve as a guide to both experts and novices interested in the taxonomy evaluation of strains of streptomyces.

He affirmed that where a spore has both R.F. and R.A. characteristics, the proper classification of such a micro-organism is to place it in the slightly more complex category and, in the present instance, with regard to lusitanus and aureofaciens, they should be referred to as R.A. types instead of R.F. types.

From the strain of *S. lusitanus* (F-1617) obtained from Dr. Backus, Dr. Benedict made a study of this micro-organism and compared it with *S. aureofaciens*, using two strains of the latter, number N.R.R.L. 2209 and the other from the Lederle Laboratories. He stated that as far as the two last mentioned strains are concerned, there was no difference between their morphological or other characteristics.

His conclusion also was that *S. lusitanus* is none other than a strain of *S. aureofaciens*, as appears from a report prepared by him and produced as Ex. 40, which is based on the following considerations taken therefrom at pp. 2, 3 and 4:

10. Although *S. lusitanus* grew somewhat more slowly and sporulated less vigorously than *S. aureofaciens* NRRL 2209 the habits of growth of the two were similar. Despite minor differences in shading due to differences in the total quantity of accumulated spores, there is no doubt that the spores of both strains should be grouped into color series 6 of Pridham *et al* (Appl. Microbiol., 6, pps. 52-79, 1958). This is the gray series (light gray to mouse gray to brown-gray to gray-brown). Likewise, there is no doubt that both organisms would belong to the "cinereus" colour grouping of Etilinger *et al* (Arch. f. Mikrobiol., 31, page 332, 1958).

11. *Sporophores* (Spore-chain Morphology): This is one of the most significant criteria for *Streptomyces* species differentiation. Media which afford optimal sporulation conditions provide material which reveal the characteristic sporophore structure of the organisms. The various sporophore types have been defined and illustrated in the Pridham *et al* Guide previously cited (Appl. Microbiol., 6, pps. 52-79, 1958). Well sporulated cultures of *S. lusitanus* revealed the presence of substantial numbers of sporophores which were hooked, looped and coiled into primitive spirals. Therefore, the morphological section in the Pridham *et al* Guide into which *S. lusitanus* falls is *Retinaculum Apertum* (RA) wherein the species *Streptomyces aureofaciens* also belongs.

12. *Soluble Pigments*: No significant differences were observed in the soluble pigment formation by *S. aureofaciens* and *S. lusitanus*, both producing light yellow or no pigments on the agar media used. No particular significance is attached to the production of soluble pigments as a criterion for species differentiation.

13. *Physiological Tests: Carbon utilization tests.* Within the past ten years, numerous investigators have employed carbon-utilization tests as an aid in species differentiation of *Streptomyces*. The majority of these workers have found the tests to be of value when combined with other characteristics which have been found to be most stable and uniform in behavior. For example, Benedict *et al* (Appl. Microbiol., 3, pps. 1-6, 1955) found that four strains of *S. aureofaciens* (natural variants) gave a fairly uniform carbon utilization pattern. Actually, if one eliminates from contention those C-sources commonly used by practically all *Streptomyces* species, he finds that relatively few C-sources are metabolized by strains of *S. aureofaciens*. One of the normally "difficult to utilize" C-source (Table 2, page 3, Benedict *et al*, Appl. Microbiol., 3, pps. 1-6, 1955) is sucrose, in contrast to the readily metabolized sugar alcohol, manitol. Both *S. aureofaciens* NRRL 2209 and *S. lusitanus* F-1617 gave identical reactions.

14. *Miscellaneous Tests:* Although chromogenicity (melanin pigment production) still ranks high as a link in species differentiation, far less importance can be attached to the results of such tests as nitrate reduction, gelatin liquefaction, etc. It should be noted, however, that both *S. aureofaciens* NRRL 2209 and *S. lusitanus* F-1617 gave identical reactions.

He accepted Dr. Backus' statement that the first five criteria or characteristics mentioned by the latter were stable and added that they were accepted by a number of scientific people as determinative of the species streptomycetes.

He compared the sporophore morphology of *lusitanus* and *aureofaciens* and both exhibited a combination of R.F. and R.A. types, which according to his classification should place both of them in the more complex group of *retinaculum apertum* (R.A.).

With regard to the second stable characteristic, the "en masse" spore colour of the micro-organism, although there are six colour groups in which streptomycetes may fall, he observed that both *lusitanus* and *aureofaciens* fell into what is called the grey group, or the grey colour.

With regard to the melanin pigment production, he stated it was a valuable diagnostic too and he found that both *aureofaciens* and *lusitanus* were negative.

The carbon source utilization test (Pridham-Gottlieb) is, in his opinion, valuable as a diagnostic tool for these micro-organisms and, having compared *lusitanus* and *aureofaciens* on a number of different carbon sources, he observed that the pattern of utilization between the two is similar.

Dr. Benedict stated that none of the streptomycetes strains he studied which showed identity with streptomycetes

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aureofaciens in respect of the five criteria were separate and distinct species.

He also conducted additional physiological tests with both *lusitanus* and *aureofaciens*, including the ability to hydrolyse starch, where both cultures were positive; the ability to break down gelatin, where both cultures were negative; and the ability to reduce nitrate to nitrite, where both cultures were also negative.

He also had occasion to conduct studies of streptomyces *aureofaciens* and streptomyces *viridifaciens* and concluded that the latter is none other than a strain of streptomyces *aureofaciens*.

Dr. Benedict admitted that various strains of *aureofaciens* would not respond similarly in the same medium, and, in his opinion, that explains Ex. D-1 which was discussed with Dr. Backus and which on the left side shows a photograph of filaments of a straight and flexuous type whereas the variant and the mutant *aureofaciens* shown opposite are full of loops.

Asked by the Court as to whether he used the best medium to obtain the best morphological development of the spores, he answered "yes", adding at p. 531 of the transcript:

A. I might explain that Doctors Pridham, Hesseltine and myself have done a considerable amount of this work in the last ten years. We have made a study of a variety of different media. In one of our publications we have about 30 different types of media listed. We have found in studying and analysing the various types of media that there are certain ones which are better than certain others. Therefore, the ones which I used in the present study, I believe, are ones generally accepted to be of value in producing the stable, morphological, sporophore types that we have been talking about. Also in producing spore colours en masse, that are reproduceable from one time to the next.

Asked how many species there are today of streptomyces he answered that it would be very difficult to say exactly but that Ettliger *et al*, the Swiss investigators, recognized about thirty-four different species.

Dr. Benedict was referred to Ex. 23, a paper of which he is a co-author, and particularly to certain colour series contained therein indicating that there are white, olive buff, yellow, blue, red and grey series. He also stated that he was familiar with a paper prepared by doctors Tresner and Backus, entitled "System of Colour Wheels for Streptomyces

Taxonomy" (Ex. D-15) in which the colours of streptomycetes are divided into a number of actual colours and sub-divided into what are called hues or codes. He also agreed that these colour divisions of the spores are an important factor and a diagnostic aid when involved in an analysis such as conducted in Ex. 23.

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In his report (Ex. 40), he produced four sheets, two of which are entitled "Section IA" for *lusitanus* and the two others, "Section IB" for *aureofaciens*. It is possible, by looking at these tables, to compare the amount of growth, the aerial mycelium and/or spores, the soluble pigment and the reverse colour, of both *streptomycetes lusitanus* and *streptomycetes aureofaciens* when grown in a number of media.

With regard to some growths, or colours, or pigments, there appears to be some differences which Dr. Benedict was called upon to explain in cross-examination. For instance, on a medium of tomato paste oatmeal, *lusitanus* has fair growth whereas *aureofaciens* has good growth and Dr. Benedict agreed that *aureofaciens* grows better in that medium than *lusitanus*. With regard to the aerial mycelium it appears that it is whitish becoming light olive grey with *lusitanus* and whitish becoming mouse grey with *aureofaciens* which Dr. Benedict explains in that in his colour guide when reference is made to the grey series, they are not speaking of a single colour but that there is meant colours ranging from light grey to mouse grey to grey-brown and to brownish-grey. In other words, there is a range of colours in the grey series which he compared to the Ridgway colour guide which has been used by scientists for a number of years in matching colours.

With regard to the words "sporulation areas becoming benzo-brown" in his report of *lusitanus* grown on tomato paste oatmeal, he pointed out that brown is just a preliminary stage in the development of the final colour. He admitted that he had not mentioned the colour of the *aureofaciens* spores "en masse" and could not say why but that he is sure the colours would be close to mouse grey. He agreed that there was a difference between *lusitanus* and *aureofaciens* in the reverse colour with regard to the medium tomato paste oatmeal, in that for *lusitanus* it was walnut brown and for *aureofaciens* it was deep olive, adding,

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however, that he did not attach special significance to the so-called reverse colour, nor does he attach a great deal of significance to the soluble pigment.

With regard to the second medium used in these tables, oatmeal agar, the amount of the growth of *lusitanus* is fair and that of *aureofaciens* is good. The characteristics of the aerial mycelium are, for *lusitanus*, "aerial: white to deep greyish olive in central colony zones to mouse grey at margins. Sporulation moderate", whereas for *aureofaciens*, on the same medium, he has "aerial mycelium: whitish becoming benzo-brown in sporulation areas. Sporulation moderate." He stated that he does not attach any significance to the above small differences as the significant colours here are those that have to do with the colour of the spores at maturity and those in the grey series range from light grey to mouse grey or a brownish-grey, and grey is the predominant colour in the series.

The same applies to the differences which appear with regard to both organisms in a medium called Hickey and Tresner agar, the important thing being the colour of the spores at maturity.

With regard to the medium yeast extract agar, which for the aerial mycelium reads: "From white to deep olive, grey to mouse grey in sporulation areas at margins. Sporulation moderate" for *lusitanus*, and "Aerial mycelium white becoming mouse grey, sporulation heavy" for *aureofaciens*, he explained what happened inside the body of the spores in *lusitanus* where the sporulation at margins is mentioned by saying that there is a tendency in some of these media for the colours on the outer edges to develop more sporophores than some of the colours inside. At p. 544 of the transcript he added:

A. . . . Why this is so I don't know. Often you will see it in the colonies out at the edge of the plate, on the periphery, and later it will develop towards the centre.

Asked why he did not make the same observation in connection with *aureofaciens*, he stated, at the same page:

A. We do not claim that *lusitanus* and *aureofaciens* are exactly the same thing; no two strains of any microorganism are the same. We simply referred to these as within the limits you would expect.

This table, with regard to *lusitanus* on a medium called inorganic salt starch agar, indicates that from a colour point of view, after ten days of growth the aerial mycelium is

"none to white". The table indicates that he did not analyse aureofaciens after ten days and he explained this by saying that he had found that lusitanus grew somewhat more slowly than aureofaciens and, therefore, the lusitanus plates had to be looked at sometime after the N.R.R.L. plates had fully developed insofar as sporulation is concerned. According to Dr. Benedict this was simply a matter of lusitanus in this particular case being unable to utilize inorganic nitrogen sources as rapidly as aureofaciens. He attached, he said, no importance or significance to the slow growth of lusitanus in this medium, nor does he attach significance to the fact that lusitanus went through capucine buff to light olive grey before getting to mouse grey, whereas aureofaciens become greyish olive and then deep greyish olive and then mouse grey, as those colour changes were intermediate changes, he also stated that he attached no importance to the fact that in Czapek's sucrose the growth of lusitanus is scant whereas the growth of aureofaciens is fair and that aureofaciens has "aerial mycelium scant, whitish becoming grayish white, sporulation none," and lusitanus has "aerial mycelium scant, white, sporulation none" because here again lusitanus cannot utilize inorganic nitrite quite as rapidly as aureofaciens N.R.R.L. 2209 and consequently the growth is somewhat slower and perhaps a little lighter.

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With regard to the growth of the organisms in asparagine dextrose, where lusitanus grows fairly and aureofaciens likewise, but where the aerial mycelium in aureofaciens is whitish changing to benzo-brown, and it is whitish becoming dark olive buff in lusitanus, no significance should be attached to these differences according to Dr. Benedict because, as he stated at p. 558 of the transcript:

- A. Here again strain variation, of course, does occur, it is a phenomenon which qualified scientists accept, or in this particular case I believe it is simply slight differences in colours, and to me they are not significant.
- Q. So that a difference in strain you think accounts for these differences in colour?
- A. I believe that is right.

In the medium potato dextrose agar, the colour for the aerial mycelium in lusitanus is "aerial mycelium whitish becoming dark olive buff in centre but mouse grey to benzo-brown in sporulation areas" and for aureofaciens it is

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“whitish, later becoming benzo-brown (first mouse grey to benzo-brown) in sporulation areas”.

The difference here again with regard to the deep olive buff and the benzo-brown is not, in Dr. Benedict's opinion, of any significance. He was asked whether the olive buff mentioned with regard to lusitanus was not the olive buff mentioned as No. 2 series of colours as contained in Ex. 23, a guide of classification of which he is a co-author, to which he replied that such was not the case and that in the development of the aerial mycelium of these actinomycetes it often happens that the initial colour is white. It may then go through a series of colour changes on its way to the final colour of these spores “en masse”. He indicated that he was simply pointing out in his report that one of the colour phases gone through, for example, would be olive grey, but the colour of the spores at maturity would be mouse grey or benzo-brown or some shade in between and olive grey would not be the colour of the spores at maturity.

He agreed that there was a difference in the lusitanus grown on yeast extract agar between his test and that of Dr. Backus where in the case of lusitanus the growth was moderate whereas in the case of Dr. Benedict it was fair and where the aerial mycelium in the case of Dr. Backus was “yellowish white becoming benzo-brown in isolation zones” and where in Dr. Benedict's it was white to deep olive grey to mouse grey. Although here the spores are at maturity, Dr. Benedict does not find this difference significant because, as he states at p. 570 of the transcript:

THE WITNESS: Here again, as we pointed out before, our gray series has a range of colours, and brown, grayish-brown can be included in that series the way we have defined it in our paper, and the mere fact that I observe, for example, a mouse-gray colour of the spores in contrast to perhaps Dr. Backus' benzo brown is not of particular significance to me. That is, there is not the difference—I would not attach a great deal of significance to that minor difference.

Dr. A. M. Henssen then testified on behalf of the defendant. She studied natural sciences in the summer of 1944 at Freiburg, Germany, which she interrupted for war service but resumed in the winter of 1945 at the University of Marburg, when she studied botany and chemistry. In 1949, she started her doctorate thesis in plant physiology at the University of Marburg, which thesis was accepted in June 1953, when she obtained her Ph.D. She first did research

work as an assistant at the Institute of Fruit Culture at the University of Bonn from September 1953 to April 1954 and then worked for two years in the Berlin-Dahleim Institute of Bacteriology from April 1954 to April 1956, where she became interested in the taxonomic study of thermophilic actinomycetes. From 1945 on she was interested especially in small plants such as mosses, lichens and fungi and worked seven months in Berlin in the Botanical Museum in the department of lichens.

In 1955, she was invited to take part in a Finnish expedition to Lapland where she studied for two months lichen flora, mosses and liverworts. In 1956 she went to Helsinki, Finland, to arrange the collections she had made in 1953 where she had the function of determining lichens. In 1957, she returned to Marburg where she obtained in May of that year a two-year fellowship for the taxonomic study of the lichens she had collected in Lapland. This was interrupted for one year when her professor asked her to take a year of assistantship at the University of Marburg, which lasted from 1958 to 1959, after which she continued the fellowship and went to Upsala, in Sweden, where she stayed two years until 1961. She then obtained a second fellowship and left Germany in 1961 for America, where she first went to the University of Colorado, and then six months later, to Harvard University, where she stayed until May 20, 1961, during which time she continued collecting lichens in different parts of the United States. In 1962 she went to Toronto as a research assistant at the Botany Department of the University of Toronto, where she worked with Dr. Roy Cain and where she became involved in the studies for the present trial. In July 1963 she was appointed curator of cryptogamic plants at the University of Marburg, which position she presently holds. She is a member of the International Association for Plant Taxonomy to the Deutsche-Botanische-Gesellschaft to the Svenska-Botaniska-Forennigen, to the British Mycological Society and the Mycological Society of America. She stated that she belongs to the group of specialists referred to by Dr. Backus as working on actinomycetes on account of the paper she wrote earlier and is considered as an expert in this group. She is an expert in lichens and has been invited to take part in 1965 in an antarctic expedition organized by Dr. Lamb, of Harvard

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University. She has established three new genera of streptomycetes: *termonospora*, *thermopolyspora* and *pseudonocardia* and has established two thermophilic species of the genus *streptomycetes*: *thermociolaceus* and *rectus*. She also wrote a paper which is a contribution to the morphology and taxonomy of thermophilic actinomycetes.

Miss Henssen, after pointing out that there is even divergence on the definition of taxonomy in that some authors call it a science whereas others call it an art, added that the proper classification of micro-organisms requires a diagnosis to characterize and identify the particular object which is a science where description is absolute and objective, and then this taxonomic classification which, however, is an art, and is subjective.

She then referred to Ex. D-20, which is p. 437 of an article taken from "The Microbial Species" which points to the subjectivity of taxonomy in stating that "just as no two observers see the same rainbow, so no two biologists conceive exactly the same species". She also indicated that "a microbial species" is a population and not a particular specimen and that like any other population, it is made up of many different individuals, each of which may show certain features. It therefore appears that for Dr. Henssen there are two problems in taxonomy, (1) identification of the organism and then (2) its classification, and that in order to identify an organism, she would study it very carefully and when she knew its characteristics, she would try to find a name for it. She stated that there are many books written on the subject of identification of micro-organisms containing keys for such identification but she added that they are difficult to use. She indicated that when dealing with bacteria we are not dealing with a single specimen but a culture in which there are many spores containing a population and therefore, the taxonomy of actinomycetes because of this culture, can change. She declared that it is much more difficult to identify an actinomycetes than any other plant.

In order to properly classify an organism, all of its characters must, according to this witness, be studied and a decision has to be taken as to what species it is and of what genus. This, in her opinion, is not a mathematical science, but is really the creative part of taxonomy.

Asked how many species there are in her opinion, she replied, at p. 673 of the transcript:

A. I don't know. To see how many species a genus has, I have to study this very carefully and make a monographic treatment and because it is so extremely difficult nobody has done it for streptomycetes before. You have to regard every species which is described in the literature, and in order to find all this literature it is a difficult task and then you try to study, you have to rely in many cases upon descriptions. You see you don't have all the type cultures of the species that have been described earlier.

According to Dr. Henssen, one has to study ten years to make a monograph of the streptomycetes and she added "we did not have that long to prepare this evidence."

Dr. Henssen made a comparative study of streptomycetes *lusitanus*, streptomycetes *aureofaciens*, streptomycetes *foefaciens* and produced her report as Ex. D-29, parts of which are hereafter set out:

Sporophores are defined as the hyphae which produce spores, at least normally. In *Str. foefaciens* the spore production is depressed, and the sporophores mainly develop fragments. Sometimes spore formation is observed along with the production of fragments (fig. 23). In the other species, the sporophores produce fragments occasionally (fig. 39).

The sporophores in all species are at first straight and alternately branched (fig. 2, 17). A verticillate branching is common later in *Str. aureofaciens* and *Str. viridifaciens* (fig. 9, 14, 16, 39), more rarely seen in *Str. foefaciens* and *Str. species* (fig. 12, 23), and not yet observed with certainty in *Str. lusitanus*.

Under optimal growth conditions, the sporophores are circinate or finally coiled in *Str. lusitanus*, (fig. 5, 44, 45), *Str. viridifaciens* (fig. 14, 16, 18, 39, 48, 49) and *Str. foefaciens* (fig. 22, 23, 25, 26, 41, 52). Occasionally coiled sporophores are developed in one of the two strains of *Str. aureofaciens* (fig. 11b). Usually, the sporophores of this species are straight or flexuous (fig. 9, 11a, 40, 47) as in *Str. species* (fig. 30, 33-35, 43, 51).

Aerial hyphae bearing sporophores were observed in *Str. species*, *Str. foefaciens* and *Str. lusitanus*. They disintegrate completely, form partly spores, or break down into fragments (fig. 1, 22, 34, 35, 46, 51, 52, 53).

Large systems of aerial hyphae not producing spores or fragments are developed by *Str. species* on starch and dextrose-asparagin agar (fig. 32, 50) and by *Str. viridifaciens* on Czapek agar. Coils of unknown function are formed abundantly by the hyphae in *Str. spec.* (fig. 42). Such coils of single or several aerial hyphae are also observed, but rarely, in the other species.

The aerial hyphae can fuse with each other or with substrate hyphae. Furthermore, connections arise where the hyphae twist around each other. The fastened hyphae becomes straightened and stretched (fig. 46, 50, 51, 53).

Long aerial hyphae, when developed abundantly, give the aerial mycelium a tomentous appearance. The production of spores or fragments on the contrary produce a powdery one.

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The border of the colonies may be straight or fringed, depending on whether the substrate mycelium forms a closed circle or is divided into little branches (three of them seen in fig. 48, covered here by the aerial mycelium).

The colors, produced by the *Streptomyces*, are very characteristic for each species. Coloration can be observed in the substrate as well as in the aerial mycelium, furthermore, pigments can be secreted into the nutrient medium.

In the species studied, the substrate mycelium itself was colored yellow to orange, red or brown, best seen in culture tubes, when observed from the side. The color can be masked by a thick layer of aerial mycelium. Colonies, actually orange-brown, may appear to have a red tinge seen from below through a thin layer of agar.

In media where pigments are strongly developed, it is difficult to judge if the colony coloration arises from the soluble pigment or by the coloration of the substrate mycelium itself.

The aerial mycelium is white. When spores or fragments are produced, grayish or brownish colors were developed in the species studied. The coloration is either uniform or variable in circular patterns.

*Relationships between the species.* The five species studied can be united into two groups, the first contains *Str. aureofaciens* and *Str. viridifaciens*, which produce orange pigments on Czapek's agar. On starch agar they develop single sporophores which soon branch verticillately and completely break down into spores. The second group contain *Str. lusitanus* and *Str. feofaciens* and *Str. species*, which grow very faintly on Czapek agar without production of pigments. On starch agar they produce aerial hyphae which can form sporophores or fragments along with single sporophores.

*Str. aureofaciens* and *Str. viridifaciens* are very closely related and scarcely warrant being retained as separate species. *Str. aureofaciens* may have originated from *Str. viridifaciens*. The orange pigment is produced more slowly, and the coiling of the sporophores is retarded (strain 2209) or completely suppressed (strain 10762).

The three species of the second group are not so closely related. *Str. lusitanus* stands nearer to *Str. feofaciens* than to *Str. species*, in having coiled sporophores and in producing fragments by aerial hyphae. *Str. feofaciens* differs from all other species in the abundant production of fragments and almost complete loss of spore production. *Str. species* is distinct in having its sporophores formed either singly by substrate hyphae or more or less clustered on the aerial hyphae but never coiled.

For the purpose of this study, she used three types of characteristics, some that can be observed through the eyes such as the substrate or the vegetative mycelium and the pigmentation in the substrate and in the medium, and produced Exs. D-22, D-23, D-24, D-25 and D-26 to illustrate this where one can see the aerial mycelium which can be either continuous or broken and in contrast to which, however, there can be a ring formation.

In D-25 there is a continuous growth in the lower picture (aureofaciens on dextrose) and in the upper picture (lusitanus on dextrose) there is a ring formation.

In the upper picture of D-26 (Lusitanus on cornmeal agar) there is a very fine extending aerial mycelium and the growth is produced in little white spots. In the middle picture (aureofaciens on cornmeal agar) there is a feathery growth. In the lower picture (S. species on cornmeal dextrose agar) there is the formation of aerial mycelium and this is very characteristic for this species.

Then she pointed out that there are the colours. In D-22 there is the orange colour on the lower picture (S. aureofaciens) which shows the orange soluble pigment in the agar. Then the colours of the aerial mycelium in D-25, where there is a change to grey in the uppermost one (lusitanus on dextrose) and in the lower picture (aureofaciens on starch agar) and in D-24 there is this greyish brown colour. In the lower picture D-26 (S. species on dextrose agar) there is a white aerial mycelium. She pointed out here, however, that the colour of the aerial mycelium can be changed by the photographic reproduction.

The second category of characteristics used by Dr. Henssen are those that can be seen with a microscope. The aerial as well as the substrate mycelium can be studied by looking at them on an agar plate. A good way to study the substrate hyphae is by making hanging drop cultures and thereby study the different branching type of the substrate mycelium which is a good means of identification for the species. Ex. D-21 contains aerial mycelium where there are hyphae which do not produce spores. Those that do produce spores are called vegetative and generative mycelium and they can form very long systems of hyphae which cover the whole colony. These sporophores can range from long branches to short ones.

The third means employed by Dr. Henssen is to observe the characteristics of the spores with the aid of an electron microscope.

In Dr. Henssen's opinion the important characteristics for the identification and the description of the species are (a) the type of branching of the substrate hyphae (straight or curved) and then (b) the shape of the sporophores, (c) the shape of the spores and (d) the pigmentation of the colonies

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or more properly the pigmentation of the substrate and aerial mycelium.

She made a comparative study of aureofaciens and lusitanus using aureofaciens strain 2209 of N.R.R.L. and another strain obtained from Dr. Cain (10762) and she had a lusitanus strain, a culture obtained from Dr. Tosoni. She studied both sets of strains side by side (two of aureofaciens and one of lusitanus) upon the same media to see if they were the same or different and in the process used the following media for these cultures: starch agar, dextrose agar, czapek, iron agar (to study the melanin pigment) and dextrose asparagin agar. She also used at one stage potato dextrose agar, malt extract agar and oatmeal agar prepared by Difco.

She then produced a number of living plates of both lusitanus and aureofaciens on the above nutrients and compared them. These plates are produced as Ex. D-30 to D-50. The comparison of these organisms on the same nutrient disclosed a number of differences which in her estimation has brought her to conclude that lusitanus and aureofaciens are to be considered as different species. On starch agar, the colours are brown in the substrate mycelium in lusitanus and reddish in aureofaciens. In this same nutrient, lusitanus has a brown soluble pigment whereas aureofaciens has none. The colour of the aerial mycelium in lusitanus is grey whereas in aureofaciens it is brown or grey and sometimes a little bit olive. On dextrose asparagin agar lusitanus has brown pigmentation whereas the pigmentation in aureofaciens is reddish. The substrate mycelium in lusitanus is brown whereas in aureofaciens it is reddish purple. The aerial mycelium in lusitanus is grey and poorly developed whereas in aureofaciens it is nicely developed with an olive greenish or brownish green shade. On the same nutrient, but on the cultures in tubes, the substrate mycelium of lusitanus is of a brownish tinge whereas in aureofaciens it is of a reddish colour. The aerial mycelium in lusitanus is grey whereas the aureofaciens is olive and lusitanus grows much slower on this media than aureofaciens.

On czapek agar, lusitanus has poor growth of aerial mycelium whereas aureofaciens has splendid growth.

On oatmeal agar, *lusitanus* has a reddish brown culture which later becomes black whereas *aureofaciens* is greenish blackish from the beginning. *Lusitanus* has no aerial mycelium and the colour of the aerial mycelium in *aureofaciens* is mouse-grey-brown-grey. On oatmeal, *lusitanus* has a brown colour whereas it is black on *aureofaciens*. The aerial mycelium for *lusitanus* is scarce whereas it is white and well developed in *aureofaciens*. On czapek agar, *lusitanus* has very faint colour whereas *aureofaciens* has a thick layer of aerial mycelium. On potato dextrose there is not too much difference between the two micro-organisms; on malt extract agar, *lusitanus* develops no aerial mycelium whereas *aureofaciens* does.

She then studied with a microscope and with the aid of the hanging drop cultures the morphology of the substrate mycelium and the aerial mycelium and produced drawing Ex. D-51 which indicates the substrate and aerial mycelium of *S. lusitanus* and Ex. D-52, that of *aureofaciens*. From this it appears that the substrate mycelium in both cases is very similar, which, however, she claims cannot be of any help for the purpose of identification.

She then studied the type and the morphology of the aerial mycelium and she produced four separate sheets, Ex. D-53 (*lusitanus*), three magnified photos on starch agar; Ex. D-54 (*lusitanus*) three magnified photos on cornmeal dextrose; Ex. D-55 (*aureofaciens*), four magnified photos on cornmeal dextrose (1) on starch agar (2); Ex. D-56, (*aureofaciens*), three photos on malt extract agar (1) on cornmeal agar and czapek (1). She pointed out that Ex. D-56 shows *aureofaciens* with a system of the long hyphae without any sporophores and which, according to Dr. Henssen, is only produced in *aureofaciens*. She pointed out that on Ex. D-55, two pictures on the left side and Ex. D-56, the two uppermost pictures, she observed a special type of hyphae which applies only to *aureofaciens* where the sporophores look like stars with substrate hyphae. At. p. 723 of the transcript she stated:

A. . . . If you have young sporophores they always look straight and flexuous, and later you can have spirals if they are produced in the the species.

HIS LORDSHIP: You say that the young ones have a tendency to grow straight?

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THE WITNESS: Yes.

HIS LORDSHIP: If they are not in the best condition they develop loops.

She admitted that this was a very complicated morphology and in Ex. D-55, which is aureofaciens on different media in the lower picture on the right the starch agar, it has loops between the straight stars whereas in the upper picture of Ex. D-56, which is also aureofaciens, the stars are distributed uniformly.

An examination of Ex. D-53 (*lusitanus*), the lowest picture on cornmeal agar and Ex. D-54 (*lusitanus*), the middle picture on cornmeal dextrose agar, in Ex. D-53, the uppermost middle picture and Ex. D-54, the upper and the lowest picture, one can see that these sporophores are really complex. Dr. Henssen pointed out that in aureofaciens we get these stars with relatively few branches in contrast to *lusitanus* which has real thick coils. There is also this ring formation in *lusitanus* in contrast to the continuous growth in aureofaciens. She stated that in *lusitanus* a substrate hyphae always produces rings of aerial mycelium.

On Ex. D-52, (*aureofaciens*), the stars at 11a are usually straight or flexuous and this is strain 10762 whereas at 11d, which is strain 2209, there are some loops.

Dr. Henssen did not personally study the shape of the spores seen in an electron optical microscope as this was done by a Dr. Shnep, although she was present during the taking of most of the photographs. This was the first time that she had looked at the species through an electron optical microscope. She produced Ex. D-57, three photos of *lusitanus* on starch agar and Ex. D-58 three photos of aureofaciens 10762 on the same medium.

She stated that the spores in Ex. D-58, picture 164, are the same as can be seen in Ex. D-57, picture 132, although she claims that the size of the spores in *lusitanus* are a little larger than in aureofaciens. She admitted that the spores in both cases, *lusitanus* and aureofaciens, are smooth.

Dr. Henssen based her decision that *lusitanus* and aureofaciens are to be considered as different species on the fact that she found differences in the pigmentation of the substrate mycelium, although the latter is, in her opinion, not too convincing a characteristic, as well as differences in the growth; this is the continuous growth which she has

found in aureofaciens and the ring formation in lusitanus on the same medium. There is also the difference in the type of sporophores where she found clear stars in aureofaciens and thick balls in lusitanus. She also found a difference in the hyphae system in aureofaciens which was not observed in lusitanus; on the other hand, she found aerial hyphae with short sporophores in lusitanus which she did not observe in aureofaciens. She stated that in using certain media she had differences in lusitanus and that in using other media she found other differences and it is based on these differences, the number of differences on the culture and in the sporophores that she has concluded that they are different species. She added that the growth of the sporophores in lusitanus is slow and it is difficult to culture it whereas in aureofaciens it is fast and very easy to culture, although she admitted that she had difficulty when she started with strain 2209.

In addition to the two strains of streptomyces aureofaciens and the one strain of lusitanus, she also studied three other species, *S. psammoticus* which is *S. feofaciens* (strain 11654) received from A.T.C.C.; two strains of *S. Viridifaciens* one from Dr. Cain and the other strain, No. 11989, the original strain received from A.T.C.C.

She conducted tests on these strains similar to those conducted on *S. aureofaciens* and *S. lusitanus* on the following media: czapek agar, iron agar, starch and dextrose asparagin, potato dextrose and malt extract agar and oatmeal from which she concluded that *S. viridifaciens* is so very closely related to *S. aureofaciens* that she considers both as varieties and sub-species of the same species; she considers *S. psammoticus* and streptomyces species as distinct species and she is of the opinion that *lusitanus* is more related to *S. psammoticus* and streptomyces species than *S. viridifaciens*.

She produced Ex. D-59, a living plate of culture of *viridifaciens* 11989 and comparing it with plates D-36 (*S. aureofaciens*) and Ex. D-34 (*S. lusitanus*), she found the same colour colony in aureofaciens and viridifaciens whereas in *S. lusitanus* there is only a faint growth in the aerial mycelium. She finds the long hyphae system very similar to what is found in aureofaciens, the same colour in the aerial colony as well as the same colour in the product pigment.

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She produced Ex. D-60, a sheet marked "Streptomyces Viridifaciens" being four photographs of sporophores of *S. viridifaciens* and compared it with Ex. D-55 and Ex. D-56 which shows the sporophores of *aureofaciens* and Ex. D-53 and Ex. D-54 which show the sporophores of *lusitanus*.

It appears that *S. viridifaciens* is different from *S. aureofaciens* because of the shape of the sporophores and that *S. viridifaciens* and *S. lusitanus* are similar with regard to the coils. On the other hand, *S. viridifaciens* has the same continuous growth as *S. aureofaciens* and has the same star-like sporophores and, therefore, she does not consider that *S. viridifaciens* is a different species from *S. aureofaciens*, basing her conclusion on the fact that there is agreement on most characters. Her explanation as to how it happens sometimes that different scientists obtain different results after preparing tests on the same organisms, is that there is often contamination inside of the actinomycetes; there is also the possibility of getting a spore of another species into the culture or, as this is a population, i.e., a mixture of different spores within the organism itself, of getting a mutant during culturing, which is different. She explained this by sketching black and green spores in a particular culture. These spores would belong to the same species but as the strain is a population it could be that the black spores would produce coiled sporophores and the green ones little stars. She also pointed out that if a different medium was used it might happen that the black spores would develop much better than the green spores on a particular medium, which would result in having many coiled sporophores and very few flexuous ones. If another medium was taken, however, such as starch agar, then only the green spores in a star shape would develop as they grow much better than the black ones on this medium and, therefore, because of this, there is a possibility of selection.

With regard to pigmentation, she stated that it is never a good character because it is something to be looked at and that is subjective. With regard to the lack of pigmentation, she maintains that it does not indicate that it is a different species, and that two scientists starting with the same strain might later obtain a different pigmentation of the cultures.

It appears from her evidence that there is no valid type of culture for *S. lusitanus* and that she made no attempt to get

this type culture or to ascertain what the type culture was before conducting her taxonomic study because she was told that this was the type culture she was to study. She stated that the two strains of aureofaciens that she investigated behaved identically in that she first got a light color and then an orange one and then a dark reddish one, adding, however, that sometimes she got slow growth. Her report, Ex. D-29, however, records a number of differences of behaviour of these two strains which is peculiar as the two strains, 10762 A.T.C.C. and 2209 N.R.R.L. are one and the same. With regard to the evidence given by Dr. Backus and Dr. Benedict that the first five criteria were determinative of the species within the streptomyces, she agreed that the first four were important but that she did not check the carbon source utilization as she had never used this test. She added that these tests are not stable because all of these characteristics can vary and that in addition to the above tests she would add any other character which she thinks is important, reiterating that there is no such thing as a stable characteristic in taxonomy.

She admitted, however, that the first five criteria are useful tools for species determination of streptomyces with the exception of carbon utilization of which she knows nothing as she has never used it. It appears from her evidence that she made her studies and tests and then checked the literature.

She does not agree with Dr. Backus and Dr. Benedict that the sporophores of *S. lusitanus* and *S. aureofaciens* both exhibit a combination of straight flexuous and primitive loops, hooks and coils because, according to this witness, the sporophores of *S. lusitanus* are coiled and looped and the final shape of *S. aureofaciens*, so far as she has studied this micro-organism, is normally flat and flexuous and only occasionally looped. Although she admits that Pridham in the case of a micro-organism, displaying both the straight flexuous and primitive loops, hooks and coils places it in a more complex group, she does not agree with this opinion.

She also disagrees with Dr. Backus and Dr. Benedict that both *S. lusitanus* and *S. aureofaciens* fall into the same group with respect to spore colour. On the basis that if she uses Pridham (Ex. 23, p. 55, the colour groups at the bottom of the page) with regard to the colour of aerial mycelium,

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she would place her spores study of *S. lusitanus* in the sixth group of grey (light-grey to mouse-grey to brown-grey to grey-brown) and aureofaciens, according to Dr. Henssen, belongs to this grey group and sometimes to the second group which is olive buff (buff to tan to olive-buff), not taking into consideration, however, as pointed out by Dr. Backus and Dr. Benedict, that the Pridham colour chart referred to deals with the colour of sporulating aerial mycelium at maturity and not their colour at an intermediate stage as stated specifically at p. 55 of the above exhibit. Furthermore, at p. 4 of her report, Ex. D-29, when speaking of all the micro-organisms she observed, she states that: "When spores or fragments are produced, grayish or brownish colours were developed in the species studied," which confirms Dr. Backus and Dr. Benedict. She explained this, however, by saying that since her report of December 12, 1962, she had had an opportunity to study further and has revised her observations and conclusions in this regard.

The electromicroscopic examination and the photographs taken were made in the *last days of October, and the beginning of November, 1963* and, therefore, did not figure in her initial report, Ex. D-29. She admitted that the spore surface, when viewed by electromicroscope, displays a smooth surface in both cases. She agreed that melanin pigment production or the ability of the micro-organism to produce melanin pigment is an old criterion but only one of several physiological criteria used. She has had very little experience with this criterion and in her comparative study all the strains were negative. With regard to the carbon source utilization, she stated that it was a difficult test to run because it is necessary to have pure substances and technical assistance for the test and that she did not have this as she had to do everything herself. She considers this test of converting nitrates to nitrites as very insignificant, although admitting that it is mentioned in the literature. On czapek agar where aureofaciens grows and *lusitanus* has only a faint growth, she was asked if that did not indicate that there seemed utilization by *lusitanus* and she replied that it was only faint and indicated nothing except that "the organism draws on its own reserves which explains the faint growth but no utilization of the medium."

She is familiar with the literature in respect to the ability of the micro-organisms to liquify gelatin and considers this test insignificant, although she admits it is used extensively by taxonomists and bacteriologists. She did not, however, run this test. She did, however, run the "Hydrolysis of Starch" test as she used starch agar and she found that both *S. lusitanus* and *S. aureofaciens* grow well on starch and that the other strains cannot utilize it. She did not try the litmus milk test, although she admits it is mentioned in the literature, considering it also as insignificant.

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She admitted that it is important to compare the characteristics on a medium which permits maximum growth of the micro-organisms studied adding, however, that on czapek agar there was no growth on *S. lusitanus*, for instance, whereas, *aureofaciens* grew (although even here she did not obtain sporophores but only long hyphae systems) and according to Dr. Henssen this is as good a character for the determination of the species as whatever characters can be seen from both growing on a productive nutrient. She later admitted, also, that she had used a cornmeal recipe which is a well-known medium for fungi but which is not used for streptomyces and that no qualified investigator had ever before used it for the determination of the latter. She insisted upon the importance of the characteristic of *S. lusitanus* not really growing and *S. aureofaciens* and *S. viridifaciens* growing on czapek. This, in her opinion, is one of the keys that can be used for the determination of the species streptomyces. She added that the keys which have been made to date are very difficult to use and are not useful and that is why everybody is trying to make new keys. She added that she would make one or two and identify the test keys that she could find and in the present case she is relying on her own keys for the five species dealt with in her report. According to Dr. Henssen the classification of the species is a very difficult task and at p. 850 of the transcript, she explains the difficulties as follows:

- A. For these five species, you see, I have a key. Before I can make a really good key for streptomyces, I have to make a monograph and it should last at least ten years.

She attaches considerable importance to the differences in *S. aureofaciens* and *S. lusitanus* in respect of the soluble pigment production and she considers it a very helpful

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criterion, admitting, however, that in dealing with a mutant which does not produce the same pigment it no longer is helpful. She agreed that Ettlinger, in Exs. 21 and 22, states that he does not like to consider the soluble pigment production in the classification of the species, but pointed out that there were many other scientists, such as Baldacci, Bergley and Waksman, who show that this characteristic is a useful one in taxonomy within the genus streptomyces. She, however, was unable to produce any writings of these authors in support of her contention. She was also impressed by the physiological characteristics of the substrate mycelium which she maintains appears in the living cultures produced as Exs. D-22, D-23, D-24 and D-25. The colour of the substrate mycelium in *S. lusitanus* is different from the reddish tinge in that of *S. aureofaciens*. With regard to Exs. D-31 and D-32, she admitted that although these plates were prepared at substantially the same time, because *S. lusitanus* grows more poorly or more slowly than *S. aureofaciens*, the micro-organisms are not being compared at the same stage of development. With regard to the ring formation in *S. lusitanus* and the continuous growth of *S. aureofaciens*, she admits that no one in the literature recognizes this as useful or valid. At p. 862 of the transcript, she was questioned as follows in this connection:

Q. Is it not possible that what you are observing there is the difference between the RF and RA type of structure when you are observing the fringe, because you have loops, hooks and coils.

A. No, in *aureofaciens* the same continuous growth is observed as in *viridifaciens* for example, you have in *viridifaciens* these nice coils, and in *aureofaciens* you have these little stars.

...

Q. What do you think it is due to?

A. It is a good character for determination, I think.

Q. What do you think causes it?

A. This is difficult to say. I have to study yet that.

Dr. Roy Cain, a biologist, mycologist and botanist, was also heard on behalf of the defendant. He received from the University of Toronto a Bachelor's degree in biology in 1930, a Master's degree in mycology in 1931 and a Ph.D. in mycology in 1933, at which time he became the curator of the cryptogamic herbarium at the Department of Botany of the University of Toronto. He later, in 1946, became assistant professor and eventually, in 1955, Associate Professor

at the same Herborium. In 1959, he became acting chairman of the Department of Botany of the University of Toronto and in 1961 became full professor at the herborium. He is a member of the Mycology Society of America and at present (1964-1965) is a member of the council. He is a member of the American Biological Society of which he was vice-president in 1949-1950 and president in 1960-1961; he is also a member of the Ecological Society of America, the American Society of Plant Taxonomy, the American Institute of Biological Sciences, the International Institute of Plant Taxonomy, the British Mycological Society and the Swedish Botanical Society and he is included in the publication "American Men of Science". He is also the author of some 28 papers dealing with the taxonomy of fungi.

This witness also explained why different scientists may and have obtained different results when testing micro-organisms and particularly species of streptomyces. When a culture is obtained from the soil, there is always the possibility of getting hyphal fragments or even groups of spores that contribute to the single colonies insulated to make the one culture. He explained that it has been demonstrated for a considerable number of species of streptomyces that a single filament always contains numerous nuclei. The nuclei are the carriers of genes which are the heritable factors, i.e., the only characters pertinent, according to this witness, to the determination of the classification of organisms as the characteristics induced by the environment should not be considered. He stated that it has been shown in at least five different species of streptomyces that when filaments come together, there is the possibility of a fusion taking place and the movement of one or more of the nuclei going from one filament over to the other. If there are any gene differences in the nuclei that have moved from one filament over into the other, then the filament with the two groups of nuclei will have nuclei of a different gene composition. He also pointed out that in culturing, in order to be exact, it is necessary to purify the culture before it can be related to anything because if there is a mixture of heritable characters in the culture, the results obtained will be mixed depending upon the mixture one starts with. If the filament contained only one nucleus in each spore, it would be a

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simple matter of sorting out the characters. However, in the genus streptomyces, several of the species have not only one nucleus in the spore but some of them have two nuclei so one cannot be absolutely sure in plating out these spores that one is getting one nucleus only. In order to insure that there is one nucleus in the spore, the spore is grown and a new colony is produced on a plate. After having so purified the filament, the culture will then remain consistent with no changes except those one might get due to environment. Now, if this culture, however, is bombarded by some type of rays, something may happen to it and we may obtain a mutation. Some mutations may take place with the organism growing in the laboratories but it can be speeded up immensely by irradiating, by ultra-violet light and various mechanical means where it is possible to produce a mutation which might take possibly hundreds of years under natural conditions. He also pointed out that another factor may enter here. It is when growing the original filament which had two types of nuclei in it, the balance between the two could be shifted by merely growing it in a different medium and one nucleus could be favoured over the other. The name for such a process is, according to Dr. Cain, selection which is a method for shifting the genetics composition. He then stated that a process called fusion might also take place and this, according to him, has been demonstrated in five species of streptomyces. In a selection method the two nuclei in the filament have remained intact, one only taking over the other in the selection, but with a fusion we obtain a new and different culture from anything we had before. It will be the essential parts of the same characters but in a different combination. This is also called mutation by reduction. He pointed out that it will be difficult to distinguish between the results of the mutation obtained by means of the reduction division and by means of the reduction by bombardment in the nucleus concluding, however, that a new combination would be a new culture.

He also pointed out that there is vegetative reproduction and sexual reproduction although, actually, there are no structures in streptomyces that can be identified as sexual; they have, however, so far as the heritable characters are concerned, a sexuality. In his opinion, this is the way species originated through the sexual mutations and evolution until

one gets a product which can be used, sufficiently different from the original to be regarded as a different species adding "But in that evolution as it occurs in nature there is no pearly gate which the species go through and come out a new species. It is a gradual development."

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Dr. Cain referred to the literature which indicates there has been at least five species reported in which recombinations have been demonstrated. He produced Ex. D-67, a photocopy of pp. 854 to 861 inclusive, of the Annals of the New York Academy of Scientists, vol. 81, which shows that re-combinations of streptomyces coelicolor was dealt with by Sermonti and Spada-Sermonti. He also referred to Ex. D-68, pp. 914 to 949 of a paper entitled "Genetics of Organisms Producing Tetracyclines" by a Russian called Alikhanin et al. However, here, although the possible recombinations of aureofaciens is discussed, it was not demonstrated in this paper. Dr. Cain stated that in all probability, most of the species would eventually be found to exhibit the sexuality he mentioned before, the only open question remaining in his opinion is whether it is the reduction division or the parasexual cycle which is involved. His explanation as to why different scientists when studying the same cultures of the species streptomyces get differences, can be found at p. 904 of the transcript:

- A. This demonstrates that given a mixed population to begin with in any culture you have the various mechanisms by which you can get out of it different combinations of these characters so that you get a series of combinations which will not match exactly the original; and even when you have a single set of genetic factors, any subsequent mutations might still give you some differences in the culture, so that the two cultures that have had the same origin, if kept separately, as they would be in different laboratories, with no subsequent remixing, could ultimately come to exhibit different characteristics by either these two mechanisms with either having started with an original mixture or the mixture having its origin in the culture itself by a mutation giving a different factor to work on, and once you have the two factors, out of it you can get quite a number of different-appearing cultures, and this explains why, when you make the original isolation from the soil, you may get out, as, indeed, they have reported in streptomyces aureofaciens cultures which vary slightly from others and, depending on the proportions of the various genetic types, you will get a somewhat different-appearing culture with considerable—if you have several mutations within a species such as aureofaciens, then with all the permutations and combinations it would be unique if from the soil you would get exactly the combination in one field that you have got from a few feet away in another field, because the chance of getting the same grouping would be very slight.

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And at pp. 905-906 when asked what classification he would make in a case such as here where he would have some differences and some similarities between aureofaciens and lusitanus, he answered:

- A. In a population such as streptomyces aureofaciens you will get recombinations of the same sets of factors, so you will always have some common characteristics, but you will get a few that are different in each of the different isolates. But this will give you a random assortment and completely unbiased mixing of the various genetic types that are included in the species aureofaciens. But in the case of lusitanus you get a different combination of factors which are not common to all that are present in aureofaciens, and of these cultures that you isolate from the soil you don't get the exact copy of the lusitanus, because we consider this a separate entity, and being a separate entity in our opinion it would not mix with this population even if it did occur in the same area, so there is no mixing. If it were a mixing completely between aureofaciens and lusitanus, then you would have a complete integration right through of all characters, including those of lusitanus, which we have not seen; lusitanus doesn't fit into this picture.

Dr. Cain maintained that the thing to do in differentiating the organisms is to deal with characters known as heritable and to rule out all of those that are simply, from appearance, due to the environment. He added that while the actual appearance of a character might be inherited, the expression of the characteristics may be an influence of the environment and he used as an example aureofaciens and lusitanus growing on czapek, where aureofaciens grows well and where there is practically no growth of lusitanus. This, he says, is inherited but one would not see it unless it was placed in this particular environment. He admitted streptomyces would appear different at different stages of development and that on some of the medium it can be grown to an optimum growth whereas on others it would stop far short of that and, therefore, one does not obtain by this method all the morphological features which are inherited in the heritable characteristics. He also pointed out with regard to spore chains and the discrepancies found in the observations of the tests made in this case that this might be due to the humidity or the amount of moisture in the medium or to the fact that the observations were made in the air which might influence the tightness of the spiral or whether it is pulled out, loose or compact and, therefore, a different investigator working in different areas might

conceivably obtain different results due to atmospheric conditions.

Dr. Cain referred to a published article by Dr. Kuster entitled "Results of a Comparative Study of Criteria Used in the Classification of Actinomycetes" which deals with a conference of scientists which decided to distribute a certain number of cultures to 34 different specialists and they were asked to record their observations with respect to these different cultures. The people who made these tests were Baldacci, Kuster, Backus, Nomi (Japan), Hutter, Pridham and Krassil'Nikov. These cultures were taken home by these scientists where they were tested and a chart was subsequently published in the International Bulletin of Bacteriology Nomenclature and Taxonomy, pp. 133 to 160, produced as Ex. D-73 in this case, where it appears that the various investigators, although showing similarity, showed also different spore colour groups for the same culture. The observations in the above tests had to do with two features, the morphology of colony changes and the spore colour and it therefore appears that the results obtained are far from uniform.

Dr. Cain's definition of the rectus flexibilis is "where the sporophores are straight and wavy, the number of hooks forming complete turns is small, the occurrence of real spiral is very rare, though possible with other strains", adding that the observance of one or two spiral sporophores cannot be decisive in typifying. He however admitted that there is no clear cut operation so far as the species are concerned with respect to the form and shape of the sporophores and that out of the same species one may obtain considerable variations from the flexuous through to some spirals and hooks to some spirals.

Dr. Cain's method of classifying any group of organisms, similar in this respect to that of Dr. Henssen, is to not rely on an arbitrary system but to first make observations on the specimens themselves, record every conceivable difference, all the characters, going into as many minute details as is practical and as he put it at p. 945 of the transcript:

It is a question of being able to see all of the features that are exemplified by a particular organism quite irrespective of what some other author has said should be the criteria that you are going to set up by which you are going to identify these unknown organisms.

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He stated that Dr. Henssen and himself had three sources of *lusitanus*, the original transfers made by Dr. Tosoni, one of the original tubes and one of the transfers that Dr. Henssen used in making her own set of experiments.

Dr. Cain conducted tests on *streptomyces aureofaciens* and *streptomyces lusitanus* with five different media, dextrose, asparagin, beef extract czapek and alphacel beef extract plus starch. His conclusions from his first set of experiments are that the characters he obtained were sufficient to recognize *lusitanus* as a species distinct from *aureofaciens* adding that *viridifaciens* showed very small differences from *aureofaciens*. He explained his conclusions by saying at p. 950 of the transcript:

There was a considerable number of different characters by which I could distinguish between *lusitanus* and *aureofaciens*, and from experience in working with other groups I know that the degree of relationship between any two species is not determined by the extent—that is the quality of any particular difference—but actually the number of differences is more significant, even though the differences themselves may be very slight.

Dr. Cain agreed that there is no question as to the status of *aureofaciens* as a separate species. He also admitted that as far as he knows, there is no legal publication of *lusitanus* so that the type referred to and the culture used in making the description is not yet described and there is no type culture for *streptomyces lusitanus* at the present time. He agrees that the question of speciation, of placing an unknown organism in one species, involves the evaluation of the differences observed in the physiological and morphological characteristics of the two micro-organisms adding that all the information available should be taken inclusive of that obtained from a cytological examination as species in the black flies, for instance are now being examined by the arrangement of the genes on the chromosomes. He admitted also that although they are rare, there were some loops, hooks and coils in respect of the *aureofaciens* he tested. He also admitted that one can obtain *S. aureofaciens* strains which produce an abundance of loops, hooks and coils. He would not agree to the suggestion based on the literature that if a colony has even one loop, hook or coil, it should be classed in the more complex group consisting of loops, hooks and coils. Asked by the Court what he would do when he had a combination of both, he replied at p. 979 of the transcript:

It is a question of what is inherited. I have to find out what are the differences in the observations which are due to environment, and considering only the heritable characters, I see whether there is actually any difference between the one and the other that I am comparing. I don't care what somebody else has said how you are going to classify them.

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He admitted that some authors in the literature classify them in the more complex group whereas others, he stated, do not. He was not, however, able to produce one reference in the literature which states that it is not valid to place it in the higher or more complex group, as suggested by Pridham.

He also admitted that in the "en masse" spore colour of both these micro-organisms on medium which promoted optimum growth they both fell in the grey grouping. He did not study these micro-organisms under the electron microscope. He admitted observing that neither of the two organisms produced melanin pigment but with regard to the utility of the melanin pigment test he stated:

. . . a difference would indicate the different species, but similarity wouldn't give you any clue.

He however admitted that there is a recognized grouping based on the ability or not to produce this melanin pigment. He then agreed with an article by Kuster, Ex. D-72, which says at p. 91:

Likewise the melanin reaction is an unequivocal characteristic and can be applied in a classification.

He admitted running no tests with respect to carbon source utilization as he did not have the facilities to do that adequately and that he was familiar with the fact that the literature indicated that this was a useful criterion.

He did not study the ability of these organisms to produce gelatin liquefaction nor did he run the litmus test.

He produced no written report of his study and then gave the factors in which he found differences in both aureofaciens and lusitanus as follows: there was a difference in the colour that diffuses into the agar medium by the production of soluble pigments; there was a difference in the colour of the mycelium observed in reverse; there are slight shades of difference in colour of the aerial hyphae spores which he qualified as minor differences; there were differences in the structure of the substrate mycelium and in the manner the aerial hyphae branched and the way the chain of spores came off; there were differences in the size of the hyphae.

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He stated that so far as he recalls, the two strains of aureofaciens the N.R.R.L. and the A.T.C.C. performed identically throughout his taxonomic study and that, therefore, there were no recombinations here. He also agreed that there is no literature reference that says that recombination has occurred in streptomyces aureofaciens, and that to his knowledge the genetic aspect of aureofaciens has not been investigated and so, therefore, his theory on recombination is based not on his own observations because he had two cultures that behaved identically and not on direct work conducted on aureofaciens but on conclusions that he draws from the work and report of others in respect of streptomyces. He admitted that when faced with differences between two different organisms then it becomes a personal matter of evaluation as to what category it is to be placed under, adding at p. 1001 of the transcript:

. . . There are none of the species that we have all of the information as to similarities and differences, so we just have to work with the information that we have, depending on how much information we have we can make a more refined or a very loose classification.

It appears from this detailed and exhaustive review of the expert evidence adduced in this case that the taxonomic classification of the genus streptomyces is a very complex problem, one which admittedly requires, on the part of the investigator, considerable experience and an intelligent personal evaluation of the morphological and physiological characteristics of the micro-organisms investigated. It is also clear that these same characters may vary from strain to strain and from culture to culture due either to the environment in which the micro-organism is cultured, or the medium on which it is developed and even because of a natural or induced mutation.

There is also, as pointed out by both Dr. Henssen and Dr. Cain, the possibility of allowing the nuclei of a different species into the culture due to the difficulty of isolating a pure culture of this species. Dr. Cain has even gone farther than that in asserting that in a particular strain, a pure culture, the spores may have two different nuclei, one for instance giving flexuous sporophores and the other looped or coiled ones.

It follows, therefore, that the person most competent to arrive at the best possible classification of the species would be not only one who has had considerable experience in

studying the species, but also and especially one who has had considerable experience in studying various strains of *Streptomyces aureofaciens* as it is only by so doing that a reasonable evaluation of its variations can be made and a reasonable classification of a micro-organism can be determined in relation thereto; as a matter of fact the only real difference between the experts on both sides is the importance or effect of the differences they found between the micro-organisms in the studies they conducted.

In this respect there can be no question of the qualifications of both Dr. Backus and Dr. Benedict over both Dr. Henssen and Dr. Cain on this particular point. Indeed Dr. Backus has spent the last twenty years investigating organisms of the streptomyces type and the last seventeen years investigating and working on many micro-organisms of the *Streptomyces aureofaciens* species. He has produced isolates from the soil, he has produced and investigated mutants and has investigated 600 isolates of *Streptomyces* with reference to the first five criteria mentioned in his evidence affirming that he has not found one that could not be correctly classified on the basis of these five criteria. Dr. Benedict, whose professional career has been mostly spent with a U.S. Government agency in charge of deposited cultures of micro-organisms, is the co-author with Pridham of a guide for the classification of *Streptomyces* according to selected groups (Exhibit 23) and is now a Professor at the University of Washington; he has been working on *Streptomyces* for over eighteen years and has investigated 4,000 samples, including various strains and cultures of aureofaciens.

On the other hand, although both Dr. Henssen and Dr. Cain are no doubt competent scientists, their personal experience with regard to the genus streptomyces herein, has not been of the same magnitude. Dr. Henssen admitted that she knew nothing about antibiotics, had never studied them and had never run fermentation studies. She has never isolated any aureofaciens and never tried to, nor has she ever done any mutations or mutation studies of this micro-organism. She received her Ph.D. degree in relation to duck weeds which is a member of the spermatophyta division, whereas *Streptomyces* is a member of the Protophyta division, and her habilitation in respect of lichens related to the Thallophyta division of the plant kingdom and not to the

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Protophyta with which we are concerned here. Her studies in *Streptomyces* prior to April, 1954 and her investigations at that time, were restricted to the thermophilic forms (found in compost and manure piles) whereas *Aureofaciens* and *Lusitans* are of the mesophilic form. She only started to study *Streptomyces* of the mesophilic form in 1962 for the present trial for the purpose of giving evidence and preparing her report, Ex. D-29.

Now, although the taxonomic study of lichens (fungi and algae) and of thermophilic streptomyces has some similarities, she admitted that generally speaking it was quite different from that of the mesophilic streptomyces.

Dr. Cain's background is mainly in connection with the taxonomy of fungi which are not streptomyces. He has never conducted any mutation studies of *Streptomyces aureofaciens*, nor has he ever attempted to produce chlor-tetracycline by *Streptomyces aureofaciens*. There have been fermentations run in his laboratory of these micro-organisms to produce antibiotics, but he does not recall that he actually did all the work. I must also add that his evidence was not supported by a written report and the examination of the criteria he examined and his discoveries in respect of each media used could, therefore, not be verified.

At page 985 of the transcript, when asked for the factors or criteria in which he found differences in the behaviour of both *aureofaciens* and *lusitanus* he stated:

A. Well, I don't have my notes here. I couldn't give you a scientific answer. I wouldn't try to commit from memory a scientific document.

He did, however, later describe a number of factors very similar to those described by Dr. Henssen.

It also appears that both Dr. Henssen and Dr. Cain tested only the *aureofaciens* A.T.C.C. and N.R.R.L. strains which turned out to be the same strain which, of course, would give no information as to what the permissible variations might be within this given species.

There, therefore, is no question in my mind that the background of both Dr. Backus and Dr. Benedict, as contrasted with that of Dr. Henssen and Dr. Cain, is the one most conducive to evaluating similarities and differences and permissible variations and most likely, in the present state of the art, to assist in arriving at a proper conclusion as

to the significance of these similarities, differences and variations and a proper determination of the speciation or classification of the species involved, having regard to the reference set down in the agreement for trial, i.e. "as to whether lusitanus is an organism of the groups consisting of the species streptomyces aureofaciens, together with natural and artificially induced mutants thereof".

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There is an additional reason for accepting the evidence of the plaintiff's experts in that their studies were founded on a scheme of classification supported by the literature, were enclosed in a written report which listed the method and media used and the results obtained inclusive of some which indicated differences but which both Dr. Backus and Dr. Benedict stated and, in my view, established as being permissible variations allowed for the species.

On the other hand, Dr. Henssen, instead of going to keys already published by well recognized investigators stated that she did not find these published keys to be useful and decided upon her first investigation into the determination of the species involved herein to find keys of her own, using in one instance at least a medium (cornmeal) that had been used on fungi, but that never before had been used on streptomyces. Now, although it would appear to me to be a good thing for investigators of streptomyces to go to new media for the purpose of determining the species and making new keys which would add to its scientific determination, it would seem more practical and more helpful and possibly also more scientific when dealing with a problem such as the present one, to use mainly the methods used by prior and well recognized investigators in this field. Moreover, Dr. Henssen, in my view, admitted the weakness of the personal keys she used in her study of streptomyces when she stated at page 850 of the transcript:

- A. For these five species you see I have a key. Before I can make a really good key for streptomyces, I have to make a monograph and it should last at least ten years, I say.

Under these circumstances, one wonders what credence should be attached to the differences she found by the unproven methods she adopted and which she considered important in the determination of the species.

Furthermore, in several cases she was unable to support the differences she found as indicating to her a difference in

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species between the species she studied, (including aureofaciens and lusitanus) as having been found useful or determinative by any prior qualified investigator. This occurred, for instance, in relation to the differences observed in the soluble pigment production which Dr. Henssen considered very important and which Ettlinger (Exhibit 21 and Exhibit 22) does not think much of, and although she referred to a number of investigators in support of her view, she produced no documents to substantiate it. The same applies to her contention as well as that of Dr. Cain's that the micro-organisms which display a combination of flexuous and loops, hooks and coils, should be placed in the group where the majority lay (which is nowhere supported by the literature) and not in the more complex group as Dr. Backus and Dr. Benedict have done, which latter position, however, is supported by the literature in Pridham Exhibit 23 and Exhibit D-73 produced by the defendant, the article entitled "1961 International Bulletin of Bacteriology Nomenclature and Taxonomy, Krassil'Nikov where at page 139 he states:

We believe that if any strain has even a single spiral sporophore on any medium, it should be classed as a spiral culture.

Dr. Henssen, at one point in her evidence, stated that in order to make a proper taxonomic study of an actinomycetes she would require and need a type culture. However, later at page 784 of the transcript she admitted that there is no such thing for lusitanus when she stated:

.. A. There is no description, no valid description of Lusitanus and therefore we don't have a type culture.

It also appears that she made no attempt to get the type culture of lusitanus or to ascertain what the type culture was before conducting her taxonomic study because she was told this was the type culture she was to study. With regard to the Melanin pigment production which all the experts agreed, (including Dr. Henssen,) was a well recognized criterion and where both organisms showed identity she found unimportant. She admitted that she did not use the carbon source utilization test as she had never studied nor used it, although she had heard of it and knew that some investigators found it useful. She stated that it was a difficult test to run because one must "have pure substances and technical assistance for the preparation to make the

work for you, but I had to make everything with my own hands”.

With regard to the aerial mycelium of both *lusitanus* and *aureofaciens* which she described in her report, D-29 at p. 4 as developing “greyish or brownish colours” in the species she studied, which went counter to her verbal evidence at the trial that *lusitanus* should be placed in the sixth Pridham group, “grey, light grey, mouse grey, a brown-grey and grey-brown” and *aureofaciens* in the second Pridham group, “olive-buff” (buff to tan to olive-buff), she explained by stating that this is her report (D-29) of December 12, 1962 and that in the meantime she had had an opportunity to study further and had revised her original observations and conclusions.

The ring formation on *lusitanus* and the continuous growth on *aureofaciens* which Dr. Henssen felt was an important difference in both species and determinative of species she agreed was not recognized in the literature and she could not explain how these characteristics are caused as appears from her evidence at page 862 of the transcript:

Q. Is it not possible that what you are observing there is the difference between the RF and RA type of structure when you are observing the fringe, because you have loops, hooks and coils?

A. No, in *aureofaciens* the same continuous growth is observed as in *viridifaciens*, for example, you have in *viridifaciens* these nice coils, and in *aureofaciens* you have these little stars.

...

Q. What do you think it is due to?

A. It is a good character for determination, I think.

Q. What do you think causes it?

A. This is difficult to say. I have to study yet that.

Dr. Henssen had the species she was studying examined as already mentioned by a Dr. Snep under Electron magnification and the spores of some of the species examined showed spikes, others showed long hairs and warts, whereas both *aureofaciens* and *lusitanus* showed characteristic smooth phalangeal configurations. She produced a number of magnified photographs which from an examination of same indicate to me that there is practically identity between the shape of the spores of *aureofaciens* and *lusitanus*, both indeed showing the same smooth phalangeal effect and whatever differences Dr. Henssen pointed out as indicative of these being of a different species, such as the size and the foldings and thickenings, I must say I could not perceive.

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With regard to Dr. Cain, although as already mentioned, he conducted a taxonomic study investigation of species including aureofaciens and lusitanus, he did not prepare a written report. He states that he observed the sporophore morphology of the two micro-organisms. (cf. page 977 of the transcript):

A Not in any great detail I just observed some differences.

With regard to the matter of placing a micro-organism in a more complex group, i.e. RA in the event it shows even a minor amount of loops, hooks and coils, he stated that the authors in literature disagree, some say they should be so placed and others that they should not. However, when asked to indicate one reference in the literature which is in Court which says it is not valid to place it in the higher or more complex group as suggested by Pridham, he answered:

A No I am afraid I can't. I would have to search the material

With regard to the conversion from nitrate to nitrite test when asked whether growing the micro-organism on Czapek Agar proves an ability to utilize nitrates or nitrites, he said:

A I don't know.

He then stated later at page 986 of the transcript:

Well, the ones that impress me most was the fact that it (Lusitanus) wouldn't use the nitrate, in the Czapek.

It however appears as pointed out by Counsel for the plaintiff, Mr. Sim, if reference is made to the Minieri Patent column 1, bottom of column 7, line 17 that the patentee refers there to the characteristics of two isolates of aureofaciens derived from the type culture used in the production of Tetracycline which is exactly what both Dr. Cain and Dr. Henssen observed in respect of lusitanus and which is described in the following words:

Czapek Agar, poor growth, flat colourless mycelum no aerial hyphae.

and this is one instance which indicates that Dr. Cain and Dr. Henssen, because of their restricted experience with aureofaciens, did not and could not appreciate the variations permissible within this species. When asked for the criteria in which he found differences in the behaviour of the two micro-organisms, Dr. Cain first answered at page 985 of the transcript:

A Well, I don't have my notes here I couldn't give you a scientific answer I wouldn't try to commit from memory a scientific document

He then attempted to give some of the factors reiterating as far as I can see the same differences previously listed by Dr. Henssen.

Now contrasting the methods used by the plaintiff's experts using accepted tests and keys, and those used by the defendant's experts who had never done a study in this field before and using as they did personal unrecognized keys, here again there can be no hesitancy in preferring the former to the latter.

It, therefore, follows that if the proper classification of the species in the present case is to be conducted on a proper assessment of the significance of the differences observed and a proper determination as to whether they are sufficient to warrant the creation of a new species or that they are so small that they should be considered as within the same species, the explanations given by both Dr. Backus and Dr. Benedict of these differences based on their experience in working not only on all the species examined but also on various strains or cultures or mutants of aureofaciens, would place them in a better position to determine the permissible variations within the latter species than both Dr. Henssen and Dr. Cain who dealt only with one strain of aureofaciens and who first became interested and studied streptomyces of the mesophylic form in 1962 for the preparation of their evidence in the present case.

I must, therefore, of necessity accept the evidence of both Dr. Backus and Dr. Benedict on this matter of speciation and find that there is here a preponderance of evidence which drives me to the conclusion that the lusitanus dealt with here is not a separate and distinct species from streptomyces aureofaciens and is, therefore, "an organism of the group consisting of the species streptomyces aureofaciens together with natural and artificially induced mutants thereof," as set out in the agreement for trial.

It therefore follows that there is infringement of the Minieri Patent on the basis of the agreement of the parties already referred to and with regard to the Duggar Patent having found that lusitanus is an organism of the streptomyces aureofaciens group, it follows that the presumption of section 41(2) now comes into play and establishes that the Chlortetracycline produced in Italy and later made into Tetracycline must be presumed to have been produced by

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the Duggar process and there is, therefore, also infringement of the latter patent.

I now turn to the question of validity and to the first attack made on the Duggar Patent that the specification is insufficient in that it nowhere discloses the necessity to have chlorine in the broth to obtain Chlortetracycline and without it the product cannot be obtained and, therefore, the process is unworkable and inoperable. It may be of some use to point out here that Chlorine is the element and as such is a poisonous gas and chloride is chlorine after it has entered into combination with, for example, a metal like sodium.

It indeed appears that although chloride is not essential to the growth of the micro-organism which produces Chlortetracycline, it must however be present in the fermentation broth if Chlortetracycline is to be achieved and this necessity for a content of chloride ion is not specifically referred to in the Duggar Patent and the question here is whether the absence of such a specific reference could be such as to defeat the Patent. It is urged by the defendant that in the formula at column 1 of the Duggar Patent, although there is a Cl. atom indicated as being present in the molecule, this does not necessarily show that chlorine must have been present in the fermentation broth to obtain the product Chlortetracycline; furthermore, again, according to the defendant, the absence of a specific chlorine requirement in the Patent for the broth might lead one to use instead a chlorate or chlorite (where in both cases chlorine is united to a metal together with oxygen) and in which event, as stated by Dr. Petty, this might kill the organism and the process would, therefore, be useless. Now although this chlorine can be found in nature as submitted by Dr. Petty, other essential constituents of the fermentation broth here can also be found in nature such as carbon and nitrogen and yet they are specifically set out in the patent, whereas chlorine is not and I must say that the absence of such a reference in the Duggar Patent is somewhat surprising. What the defendant, of course, is saying here is that the patentee has not, with respect to the Duggar Patent, complied with his obligations under s.36 of the Act to

(1) . . . correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process, . . . in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains,

or with which it is most closely connected, to make, construct, compound or use it; . . . in the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions; he shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

This section then requires that:

(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege.

Dr. A. L. Tosoni, a chemist, was heard on behalf of the defendant. This gentleman became a bachelor in chemistry in 1942, a Master in organic chemistry in 1944 and obtained a Ph.D. in chemistry in 1947 from the University of Toronto. He has done some work in connection with antibiotics and has written a thesis on the purification and preparation of Penicillin and its derivatives. He is a Research Member at the Connaught Laboratories owned by the University of Toronto which deals with vaccines, toxoids and materials used in preventive medicine, polio vaccine products, diphtheria and tetanus.

At page 578 of the transcript Dr. Tosoni asked by Counsel for the defendant, Mr. Forget, if, after having analysed the Duggar Patent in connection with this chlorine problem, he could say whether he could use a medium which would be chlorine-free among the various media indicated in the patent, stated:

- A. No, I think if I were trying to repeat the Duggar Patent I would use the things he prefers, corn steep liquor, and that contains considerable quantities of chloride ion.
- Q. Have you analyzed the possibility that by selecting from his list of ingredients you may get a chloride-free medium?
- A. I think you could get a medium which was extremely low in chloride content almost to the point that you could say it was chloride free.
- Q. What would be the effect of such medium on the production of chlortetracycline?
- A. There would be chlortetracycline produced to the extent of the chloride content. If it was very low the production of chlortetracycline would be very low, and to the extent that the organism produced a tetracycline, the remainder would be tetracycline.

He then later, at page 640 of the transcript, reiterated that if he wanted to carry out the teachings of Duggar and produce Chlortetracycline in accordance with same, he would not use a chlorine-free medium.

- A. I would use the ones recommended by Duggar as being the ones he prefers.

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Q. Which are not chlorine-free?

A. That is right.

Q. And which are not even extremely low in chlorine content?

A. That is correct.

Dr. Milton Petty a biologist who testified on behalf of the plaintiff and who is the author and co-author of a number of technical papers in the field of microbiology and fermentation research, confirmed the chlorine content of the Duggar broth when in cross-examination he stated at page 422 of the transcript in answer to the following question:

Q. If you used the Duggar Patent but happened to take a broth that was chlorine free, I think you would agree that you could not produce chlortetracycline?

A. No. One. The Duggar Patent does not teach a chloride-free medium and therefore I would not be following Duggar if I took a chloride-free medium.

Q. But does it teach that the medium must be chloride?

A. The patent teaches this, that we want to make Chlortetracycline which contains chlorine. The patent teaches what the organism requires for its growth and for the production of the desired substance, may be used with natural materials and a source of essential salts, and if I use natural materials I will have chloride present in the medium.

Q. Show me where the patent says you use natural materials

A. P 3 column 6 first paragraph:

"Suitable sources of nitrogen for the fermentation process include a wide variety of substances such as amino acids" (which may or may not contain chlorine, some do, others don't) "casein" (could go up as high as 5% sodium chloride) "both hydrolyzed and unhydrolyzed, fish meal, soy bean meal, meat extracts, liver cake, and various other substances of vegetable or animal origin."

Dr. Petty affirmed that the above ingredients all contain chlorine and that he has not run into any nitrogenous substances of vegetable or animal origin for instance, which have not contained chlorine varying in quantity from very small to large amounts.

Now although Counsel for the defendant in cross-examination attempted to get Dr. Petty to agree that if one used the ingredients mentioned by Duggar in his patent in their pure form, one would not have any chlorine, the witness would not agree that such a result could ever be obtained in Duggar because the ingredients mentioned in the patent were specifically described as not being in their pure form but were natural materials containing in most instances sufficient quantities of chlorine to obtain the result contemplated by Duggar.

It indeed appears from the evidence that only ten parts per million of chlorine are required in the fermentation medium to permit the reaction to proceed in the manner indicated by Duggar and all the witnesses agree (including Dr. Tosoni) that there is more than sufficient chlorine in the preferred materials listed by Duggar in his patent, such as corn steep liquor, caseine, artificially chlorinated water and even natural water which may even be chlorinated, to produce Chlortetracycline, I might add that the very name of the product achieved, Chlortetracycline, and its formula in the Patent, indicate that it has chlorine in the molecule and the extent of the skilled knowledge I have acquired as a result of the evidence adduced in the present case, of which the defendant has the burden on this matter of validity of the Patent, would indicate to me that if the end product is Chlortetracycline and there is chlorine in the formula of this product, it must have come from somewhere and this would be from the fermentation broth.

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In the light of the above circumstances and the statements of all the experts including Dr. Petty, and even Dr. Tosoni, that they would have no difficulty in producing Chlortetracycline according to the Duggar Patent, by following the latter's teachings as therein contained, it would appear to me impossible to hold that the patentee has not met his obligations under the statute and has failed to properly describe his invention so as to make it unworkable and inoperable as if the man skilled in the art which here appears to be a highly skilled scientist, one who works in the examination of micro-organisms and the making of antibiotics finds no difficulty in producing the product, then that should and will determine sufficiency and operability.

In *British Ore v. Minerals Separation*<sup>1</sup> Lord Justice Fletcher Moulton clearly set down the correctness of such a solution when he said at p. 138:

In the first place, the patentee is entitled to say that his Specification is addressed to those who are skilled in the art, and that if its directions are adequate to guide them he has sufficiently "described the manner in which his invention is to be performed", even though they might seem utterly inadequate to one unacquainted with the subject matter.

I also feel that there is no substance to the allegation that the Duggar process would be useless in that some one might use a chlorate or a chlorite instead of a chloride and thereby

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not be able to produce Chlortetracycline in view of the fact that such elements could kill the organism; it indeed appears to me that if such a result would occur and even this is not entirely certain in view of Dr. Petty's uncertain answer to Counsel for the defendant in this regard, no person skilled in the art to whom this invention is addressed would use such a radical. I cannot, indeed, see how a competent workman in the art would use in a patent such as here, whose object is to grow organisms on a nutrient in order to obtain an antibiotic, would use an element which would kill the very organism which produces the desired result.

In my view, this Duggar Patent, because of its importance as a break-through in the antibiotic world and of the enormous commercial success of the product produced and sold on the market, should be approached as stated by Sir George Jessell in *Hinks & Son v. Safety Lighting Co.*<sup>1</sup> at p. 612, "with a judicial anxiety to support a really useful invention and by a mind willing to understand not by a mind desirous of misunderstanding" and if this is done there can be no question, in my view, of the sufficiency of the description nor the workability of the invention which here leads the competent workman to success.

It therefore follows that the attack made by the defendant on the sufficiency of the Duggar patent must and does fail.

I now come to a two-fold attack made on both the Duggar and the Minieri patents and they may, therefore, be dealt with together here.

This attack is to the effect that the patents,

- (1) are incomplete, misleading and lack utility in that Duggar fails to distinguish between strains of Aureofaciens which may produce Chlortetracycline and other strains of Aureofaciens which will not produce Chlortetracycline and Minieri fails to distinguish between strains of Aureofaciens which may produce Tetracycline and other strains of Aureofaciens which will not produce Tetracycline, and
- (2) do not disclose where and how strains of Aureofaciens capable of producing Chlortetracycline when

<sup>1</sup> (1876) 4 Ch. D. 607.

fermented in the presence of chlorine ions may be obtained, nor where and what strains of Aureofaciens capable of producing Tetracycline may be obtained for the purpose of lawful experimentation during the life of the patent and of commercial practice of the invention after its expiry.

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The position taken by the defendant with regard to (1) above, is that aureofaciens being a broad term embraces, as we have seen, a great many strains some of which it submits refuse to produce chlortetracycline and, therefore, the patentee in his patent, to use an expression current in patent cases, has spread his net too wide and has thereby embraced strains which will not and do not achieve the result of producing chlortetracycline with any strain of streptomyces aureofaciens and he has, therefore, claimed too widely.

The defendant produced Ex. D-11, a Canadian patent No. 678,153, issued January 14, 1964, entitled Tetracycline Fermentation by John Andrew Growich Jr. and Nicholas Deduck and Ex. D-78, a U.S. patent issued August 29, 1961 entitled Production of Tetracycline, by Terry Robert Daniel McCormick, Newell Oscar Sjolander and Ursul Hirsh, both of which now belong by assignment to the plaintiff company which deals with strains of aureofaciens which it submits will not produce chlortetracycline under the Duggar patent, but which will only produce Tetracycline. Exhibit 11, at p. 1, reads as follows:

This invention relates to the production of tetracycline by fermentation and, more particularly, is concerned with certain novel mutant strains of *Streptomyces aureofaciens* which possess the property of producing tetracycline to the exclusion of chlortetracycline irrespective of the chloride ion content of the fermentation medium.

Now it is clear that if at the date of the patent the words used (and here we are dealing with streptomyces aureofaciens) embraced useless as well as useful micro-organisms then the Duggar patent is bad. There is considerable authority for this proposition, the main one being, of course, the *Minerals Separation Case* which came before this Court, was heard by the Supreme Court of Canada<sup>1</sup> and then by the Judicial Committee of the Privy Council<sup>2</sup>.

The facts of this case dealt with a froth flotation process for the concentration of ores where the claim in issue

<sup>1</sup> [1950] S.C.R. 36.

<sup>2</sup> 12 Fox P.C. 123.

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claimed xanthate, a chemical, as part of the process of froth flotation for the concentration of ores. It was established at the trial that there were some 90 known xanthates at the time of the patent of which 14 only were effective, the balance being ineffective. On the basis that many xanthates were known to the patentee which were not effective or of no value to the process, the patent was held invalid by the Supreme Court and later confirmed by the Judicial Committee of the Privy Council.

Now before dealing with the legal aspects of this matter, it would be in order to deal firstly with the defendant's assertion that Growich et al and McCormick et al cover patents dealing with aureofaciens which will not produce chlortetracycline.

Dr. Backus questioned in this respect and when presented with the Growich and Deduck patent (Ex. D-11) agreed that it appeared to be based upon the discovery that certain novel mutant strains of aureofaciens produce by fermentation Tetracycline to the exclusion of chlortetracycline and that they do this regardless of the concentration of chloride ion in the medium.

At p. 357 of the transcript, in view of the fact that certain strains of aureofaciens would not give chlortetracycline, he was asked the following question:

Q. Am I right in saying that when an inventor of your company says he makes chlortetracycline with streptomyces aureofaciens he is not giving enough information to allow a person wanting to make tetracycline or chlortetracycline with aureofaciens to proceed; he would have to indicate the strains?

A. On the basis of my personal knowledge, I have never dealt with a strain which did not produce—

At pp. 357 and 358 of the transcript he was then asked:

Q As an expert in this field, from your personal knowledge in this field would you not admit that unless we knew the strain involved we could not be sure of getting chlortetracycline with aureofaciens?

A. All of the strains of streptomyces aureofaciens which exist in nature to my knowledge produce chlortetracycline.

...

Q I didn't ask you to construe the document, doctor. Your learned counsel objected strenuously to that, and I agree with him. But would you not agree, on the basis of your own general knowledge of the subject and as an expert that there are strains of aureofaciens that will not, even in the presence of chloride ion, produce chlortetracycline.

A. As of this date, yes

...

HIS LORDSHIP: What was the answer?

THE WITNESS: I said that as of this date perhaps it was true, but I was not sufficiently familiar with whether or not the determinations had been run in such a manner that it was absolutely certain that there was no chlortetracycline. There might have been a very small amount, but I could not speak from my own experience with reference to it.

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As for Dr. Benedict, his evidence is to the effect that even today he knows personally of no strains of aureofaciens which will not produce chlortetracycline.

As far as I can see this is the extent of the evidence submitted by the defendant on this matter. There is indeed on the one hand the production of these patents (Exs. D-11 and D-78) which appear to say that some strains of aureofaciens have been discovered which produce tetracycline to the exclusion of chlortetracycline and a statement by Dr. Backus in cross-examination to the effect that there might still be a small amount of chlortetracycline produced even with the McCormick and Growich strains. Now, although the fact that these patents were assigned to the plaintiff corporation might give this evidence some stature on the basis that the plaintiff would not have acquired these patents had they been useless, it still, in my view, falls short of the cogent evidence required and which would have been met, for instance, if a scientist had stated that he had used these strains and had effectively produced tetracycline to the exclusion of chlortetracycline. This question, however, of whether such strains exist or not today appears to me to be of an academic interest only in the present case due to the fact that the important date with regard to a patent being void on the ground of insufficiency or inutility is the invention date and if at the date of the invention all known strains of aureofaciens would produce chlortetracycline, then it cannot be successfully attacked on the above grounds.

The law appears indeed to be that if at the date of the patent, 1953 for Duggar and 1957 for Minieri, both embraced useless as well as useful micro-organisms, then the patents are bad and void. However, these useless micro-organisms must have existed at the date of the patent to avoid it as the patentee is not required to have the gift of prophecy and this appears to have been always recognized by our courts as well as by the authors.

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Now, as evidence clearly discloses that as of the above dates there existed no strains of aureofaciens that were unworkable and if the law is such as is hereinabove indicated, then this should dispose of this attack made on both patents. I might point out that with regard to the attack on this basis made on the Minieri patent, no evidence at all was adduced of the existence of strains of aureofaciens which would not produce Tetracycline.

That the state of knowledge must be considered at the date of the patent appears clearly in a reference contained in *Frost on Patents*, 4th edition, at p. 204:

It must not, however, be forgotten that the meaning of words is liable to change with the progress of science and discovery, and a term which, for the purpose of the specification, is sufficiently accurate, may, in future years, include that which will not answer the purpose the patentee has in view. In such a case the specification will be read with reference to the state of knowledge at the time it was prepared, and if the term used include nothing then known that would not answer, it will not be held to be ambiguous, though the use of the same term subsequently might be. This is only equitable, for a patentee is not entitled to a monopoly of ingredients and materials which were unknown at the date of the specification, and which, viewed in the light of the knowledge at the date of the specification, would not be perceived to be the equivalents of materials mentioned, even though the language used be sufficiently wide to include them. It would be manifestly unfair to hold that language which, by the advance of knowledge, has come to include more than the patentee contemplated should vitiate the grant.

Thus, for instance, when the directions given in a specification for the preparation of the article, which is the subject-matter of the patent, necessitate the use of a practically chemically pure substance, and, at the date of the patent, the person to whom the specification is addressed would, by using the knowledge of the period, obtain the substance sufficiently pure and would succeed, it is no valid objection to the utility of the invention and the sufficiency of the specification that, at a subsequent date, the same person using the then commercial article (*which has only come into existence as a commercial product after the date of the patent*) would fail.

The above, in my opinion, applies to both the plea of insufficiency of the specification and lack of utility. Further authority in this regard can be found in the "*Z*" *Electric Lamp case*<sup>1</sup> a decision of the Court of Appeal, where Lord Fletcher Moulton stated:

. . . For the purpose of considering this point, I must go back to the state of knowledge at the date of the Letters Patent, for I think it perfectly good law to say that you have to judge of the validity of Letters Patent at the date of the grant, and that if they are then valid, no subsequent increase of knowledge can affect that validity in any way.

<sup>1</sup> (1910) 27 R.P.C. 745.

And *Terrell and Shelley on Patents* at p. 67 confirms this in stating that :

A specification is to be construed with reference to the state of knowledge at the time it is published.

This notion is also clearly indicated in the *Minerals Separation case (supra)* where as indicated by counsel for the plaintiff, Mr. Fox, the judges of the Supreme Court at pp. 50, 52, 59, 67 and 70 when inquiring as to the common knowledge known or contained in dictionaries refer always to the year 1923 which was the date of the patent in that case. Indeed, Mr. Justice Rand at p. 52 states:

On the plain language of this claim, it is bad: there *were known to Keller* many xanthates which were of no value to the process. (the emphasis is mine).

And at p. 59, Mr. Justice Kellock states:

In 1923 the only xanthate in commercial use according to the evidence was cellulose xanthate which was used in the rayon industry.

The same applies to the decision of the Judicial Committee of the Privy Council (*supra*), p. 133 where it is stated:

... It has already been said that in their Lordships' judgment the word "xanthate" as ordinarily used by chemists at the date of the patent included cellulose xanthates and indeed cellulose xanthates were the only xanthates at all widely known.

It therefore follows that the attack on the basis that all strains of aureofaciens will not produce chlortetracycline or tetracycline must and does necessarily fail.

I now turn to the next attack made on both patents in that they do not disclose where and how strains of *S. aureofaciens*, capable of producing chlortetracycline when fermented in the presence of chlorine ions (for the Duggar patent) and Tetracycline (for the Minieri patent) may be obtained for the purpose of lawful experimentation during the life of the patent and of commercial practice of the invention after the expiry.

It indeed appears that the Duggar American patent (Ex. D-3, September 13, 1949) in addition to a description of the growth of the micro-organisms clearly states that the strain of aureofaciens can be obtained from the Northern Regional Research Laboratory, at Peoria, Illinois, U.S.A. under the designation N.R.R.L. 2209 whereas the Canadian Duggar patent is silent in this regard, although for the purpose of designating the organism it contains a complete

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description of its growth at p. 2, column 4, line 23 of the patent as follows:

The organism which produces chlortetracycline was isolated from the soil of a timothy field in Missouri. Structurally and functionally this organism, *Streptomyces aureofaciens* as found naturally in the soil and as represented by spontaneous or induced mutants, belongs to the genus currently distinguished as *Streptomyces*. It is typically aerobic, with limited growth when submerged. A mycelium is formed, and when young, discrete colonies in asparagine-meat extract-agar (hereafter referred to as AMD agar) display branched hyphae, rapidly intermeshed, producing a dense, button-like colony with the free ends of the hyphae generally flexuous and continuous. Surface colonies are raised, often slightly depressed at the center. Agar slants sown with well distributed, numerous spores yield a confluent growth, that is, a continuous and "prostrate" mycelial stratum in the exposed or outer layer of the nutrient matrix, a growth type commonly called surface growth. Colonies in this state of growth on AMD agar are commonly hyaline for at least 48 hours, gradually changing to orange yellow (dull to bright), and in the several forms that may be selected out, pigmentation of the hyphal mass may be described as a hygrophanous Persian yellow, apricot yellow, maize yellow (Oberthur et Dauthenay, Répertoire de couleurs), yellow buff, or turbid variations of the clearer qualities.

The AMD agar is only slightly, if at all, pigmented with the growth of *Streptomyces aureofaciens* recently isolated from soil. On the AMD agar a continuous growing surface on a slant culture exhibits aerial hyphae with conidia white at first, becoming dark grey and abundant as sporing proceeds (7-10 days). The reverse view at this stage is tawny. Fragmented hyphal remains are also gray.

Young hyphae are gram-negative (older hyphae variable) and not acid fast; these younger hyphae measuring about 0.7-0.8  $\mu$  in diameter and up to twice as much when differentiating conidia. The conidia are spheroidal to ovoidal, measuring up to 1.5  $\mu$  in the longer diameter.

Growth on AMD agar is very good and conidial production abundant, with favorable temperature.

Growth on nutrient broth agar is good but production of aerial hyphae and conidia is inhibited. With added  $\text{NaNO}_3$  there is no improvement, and only a slight betterment with the addition of dextrose.

Growth on corn steep liquor agar is very good, conidial formation slow but ultimately (15 days) heavy.

Growth on synthetic (Ushinsky's asparagin) agar yields a heavy hydrophanous yellow-tan prostrate mycelium, no conidia, and the medium displays a cloudy amber pigmentation.

Growth on steamed potato slants in orange yellow (to brownish yellow in certain mutants), considerably raised, surface eventually nodulate.

Gelatin stabs display no liquefaction in 15 days at about 26°C

Nutrient broth affords a collar of almost hyaline growth at the glass surface; with added nitrate growth is similar, but with either dextrose or starch added the collar is yellowish-brown.

Litmus milk also supports a slight growth collar, yellow brown above, but in 15 days there is neither significant pH change nor apparent peptonization.

In fermentation tubes (with phenol red as indicator, pH 6.8-7) there is no gas accumulation with the addition to the nutrient broth of either xylose, glucose, galactose, sucrose, maltose, lactose, glycerol, or mannitol. Acidity is indicated over a period of about 5 days with only glucose or sucrose, this color change being gradually succeeded by a slow change toward alkalinity. In the presence of the other carbon sources either no change occurred (maltose, glycerol) or increasing alkalinity developed, this being strongest with mannitol.

Among other carbon-furnishing substances, dextrose, sucrose, maltose, lactose, dextrin, starch, glycerol, and mannitol support growth.

Dispersed in agar, soluble starch is hydrolyzed in a zone around the colony (pH = 5.8 to 6.0). Hydrolysis of starch is also induced when the dispersion is in nutrient broth.

The defendant here takes the position that the Canadian competent workman (and here we are talking about a microbiology and fermentation scientist, because the subject matter of the specification is such that no one but a person possessing a very considerable amount of scientific knowledge could at the date of the specification be considered a competent workman) has not in the present patent the information he needs to either work this patent experimentally or even after its expiry to produce the product, whereas his American counterpart has a reference to a strain, i.e., N.R.R.L. 2209 with information as to where it is deposited and, therefore, the patentee here has not made a full disclosure of his invention as required by s. 36 of the Act.

The American Duggar patent, at column 3, lines 70 to 75 inclusive and at column 4, line 2 inclusive, indeed refers to the organism as follows:

The organism which produces the new antibiotic substance of the present invention was isolated from the soil of a timothy field in Missouri. Cultures of the living organism have been deposited with the Fermentation Division of the Northern Regional Research Laboratory at Peoria, Illinois, and have been added to their permanent collection of microorganisms as N.R.R.L.-2209.

There is no question that s. 36 of the Act requires as one of the considerations for the monopoly grant given the patentee that the latter give in the patent to the public what Mr. Fox at vol. 1, p. 328 *Canadian Patent Law on Practice*, 3rd Ed. 1948, describes as:

. . . and adequate description of the invention with sufficiently complete and accurate details as will enable a workman, skilled in the art to which the invention relates, to construct or use that invention when the period of the monopoly has expired

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In *Minerals Separation North American Corporation v. Noranda Mines, Limited*<sup>1</sup>, Thorson P., as he then was, with respect to the obligation of the patentee, in this regard stated at p. 316:

Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor, and with respect to each the description must be correct and full. The purpose underlying this requirement is that when the period of monopoly has expired the public will be able, having only the specification, to make the same successful use of the invention as the inventor could at the time of his application.

And at p. 317 he added:

When it is said that a specification should be so written that after the period of monopoly has expired the public will be able, with only the specification, to put the invention to the same successful use as the inventor himself could do, it must be remembered that the public means persons skilled in the art to which the invention relates, for a patent specification is addressed to such persons.

It would be apposite to reiterate that the person skilled in the art here is a highly trained scientific person because of the subject matter of the specification and in order that the specification be sufficient it is not required to describe the invention and the manner in which it is to be performed so fully as to instruct persons wholly ignorant of the subject matter.

*Frost on Patents*, vol. 1, pp. 210 and 211 clearly explains this as follows:

The often repeated statement to the effect that the specification is insufficient unless it be comprehensible to the "ordinary workman" in the trade to which the invention relates is apt to lead to great confusion, if it be not clearly borne in mind that the "ordinary workman" is to be regarded as a person of very different knowledge and skill according to the nature of the field of invention with which the patentee in a particular case is dealing. Thus, if the invention is merely the construction of a mechanical combination of parts for a purpose readily understood—e.g., a bicycle—then the "ordinary workman" is, no doubt, a mechanic used to the construction of machines; but if the invention is the production of something by a process, or series of processes, to understand which the highest scientific knowledge and attainments are requisite, the "ordinary workman" then becomes a highly trained scientific person, who may be called upon to give the necessary instructions to his less highly instructed and skilful subordinates to enable the process to be carried out by them—e.g., if the invention relates to the production of a chemical product by a process, or series of processes to the understanding of which a knowledge of the most recent developments of chemical theories and ascertained facts is indispensable, then the "ordinary workman" becomes a highly trained

<sup>1</sup> [1947] Ex. C.R. 306.

chemist, who may be properly called upon to bring his special knowledge of the particular branch to which the invention relates into play, for the purpose of giving minute directions to his less skilful subordinates so as to enable them to perform the operations necessary to the carrying out of the process, which they, by their lack of knowledge, may not be able to fully appreciate.

Have the patentees (Duggar and Minieri) fulfilled the requirement of s. 36 of the Act of describing the invention and its operation or use and of setting forth clearly the various steps in their process in such full, clear, concise and exact terms as to enable *any person skilled in the art or science to which it appertains* to make, construct, compound or use it, when such as here, having deposited a culture of the micro-organism used in the patent under an identifiable number in a U.S. depository, they have not (at least in so far as the Duggar patent is concerned) indicated it in the Canadian patent, and by so doing have they deprived Canadians from all the advantages of working with this invention during the life of the patent and of using it commercially thereafter because it appears to me that it is only in the event that the absence of a reference to a culture has this result that s. 36 of the Act can be taken not to have been complied with. There indeed is no requirement under the *Canadian Patent Act*, nor under its rules, to deposit in the case of patents which deal with the product of micro-organisms the type culture or a strain of such micro-organism such as required in the United States as appears from an extract of a letter addressed by the plaintiff to the Northern Regional Research Laboratory, dated August 11, 1949, and produced as Ex. D-7 where it is stated:

We are placing these live cultures in your possession in view of a requirement by the U.S. Patent Office that the aureomycin producing mold *S. Aureofaciens* be made available to the public as a condition to the allowance of our patent application covering aureomycin and a method of producing this material by fermentation filed by Dr. B. M. Duggar.

Counsel for the plaintiff here takes the position that there was no obligation on the part of the patentee to indicate a deposit in his patent at all and that as Dr. Duggar, in his patent, describes how to obtain aureofaciens, lists the steps he took, where and how he obtained the micro-organism, describes its structure, together with the nutrients on which it is grown and sporulates, which is sufficient to enable a skilled man in the art to work his invention, the patentee has sufficiently complied with the requirements of the

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*Patent Act.* Dr. Tosoni, one of the defendant's witnesses stated at p. 578 of the transcript that as of June 1953 and reading the Duggar patent, the latter teaches one to try to obtain it by looking in the soil and he added that one may be fortunate and find it soon, or it may take a long time. Now, although this method might mean the examination of a great number of soil samples, there is no evidence in this case that by following the Duggar teachings one does not obtain streptomyces aureofaciens. The question here might therefore well be whether Duggar has disclosed everything that is necessary for the certain procurement of the commodity for which the patent was granted or reiterating what Thorson P. said in the *Minerals Separation* case (*supra*) at p. 317:

When it is said that a specification should be so written that after the period of monopoly has expired the public will be able, with only the specification, to put the invention to the same successful use as the inventor himself could do, it must be remembered that the public means persons skilled in the art to which the invention relates, for a patent specification is addressed to such persons.

The answer here would appear to be in the affirmative if the evidence of Dr. Benedict is considered as it appears at p. 502 of the transcript where he states that by following Dr. Duggar's teachings in his patent, he was able to isolate three strains of aureofaciens from the soil in Japan and produce chlortetracycline and as he was not cross-examined on this point, I may take it that he had no trouble in finding the organisms:

Mr SIM: What, if any, work have you done in the production of chlortetracycline?

A I have isolated strains of aureofaciens from samples of Japanese soil.

Q How many?

A. Three strains, three different strains from three separate soil samples. These were isolated, studied, and using the teachings of the Duggar patent I have been able to produce chlortetracycline with each of these strains.

Q. How did you know that the strains that you had isolated were streptomyces aureofaciens?

A. I compared very carefully using the teachings of the Duggar patent . . . I can't recall the exact column there, but I think it goes from No. 34 to 51. If I may have it. At column 4, starting at about line 24 and going over to column 5, about line 53.

Q You are referring now, of course, to the Canadian Patent?

A. Yes

Q. Now, at that time what would you have done?

A. At that time I would have referred to patent No. 2,482,055.

Q Is that the corresponding United States patent?

A. Yes.

Q If, Dr. Benedict, on November the 3rd 1953, you had been given a copy of the Canadian Duggar patent which you have just looked at, and using only the ordinary knowledge available to you as an expert in this field you had been asked to carry out the teaching of the patent, what difficulty, if any, would you have experienced in producing chlortetracycline?

A. None.

The evidence moreover discloses that the N.R.R.L. and A.T.C.C. depositories in the United States are scientific places well known to all the experts heard in this case and would, according to the latter, be well known and recognized also by all those competent workmen in the art who would, during the life of the patent, like to work on it or after its expiry use it. They could indeed write to these depositories and obtain the organisms.

Dr. Backus, at p. 132 of the transcript, dealt with the availability of these deposited organisms as follows:

Q. When was this N.R.R.L. 2209 released?

A. It was released on September 13th, 1949.

Q. And what is the effect of the deposits being released, what does that mean?

A. It means that anyone can obtain a culture of this organism, to study its characteristics, to carry out the teachings of Professor Duggar in the patent which he had written. It was released to those who requested it.

Q. What charge was made on a request for a strain?

A. There was no charge made.

Q. Would you tell the court what, if any, restriction was placed on the supply of N.R.R.L. 2209 after it was released?

A. None.

Q. Are you familiar with the strain of streptomyces aureofaciens known as UV8?

A. Yes, I am.

Q. By whom was UV8 first produced?

A. UV8 was produced by a group working under the direction of Minieri, who at the time was with the Heyden Chemical Corporation.

Q. Would you tell the court where UV8 was first deposited and released?

A. I would say the first deposit at the A.T.C.C, American Type Culture Collection, was about the 15th of December, 1955, and it was released on February 7th, 1956, I believe.

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Q. What is the A.T.C.C.?

A. The A.T.C.C. is the American Type Culture Collection, and this is one of the major culture collections of the world where an extensive collection of micro-organisms is maintained and available.

Q. What restrictions were placed on the supply of the A.T.C.C. deposit of the micro-organism UV8, if any?

A. The only restriction placed to my knowledge was that American Cyanamid, who had deposited the organism, were informed if an organism was ever sent outside of the United States.

This witness stated that to his knowledge the plaintiff company never refused permission for this strain to be sent outside the United States by the A.T.C.C. He also stated that from the records of the plaintiff company it appears that strains of N.R.R.L. 2209 were sent to Canada, one to a Dr. R. H. Haskins from the Prairie Regional Laboratory, in Saskatoon, in May 1951 and in April of 1952 a Dr. Stewart of the University of Alberta, in Edmonton, obtained a similar transfer.

Dr. Benedict stated at p. 501 of the transcript that if one wrote to the N.R.R.L. and merely asked for aureofaciens, although one could have obtained the exact number of a particular strain because the evidence shows that the literature was full of reference to the deposits, one would get aureofaciens and probably aureofaciens 2209. There was also a deposit at A.T.C.C. of A.T.C.C. 10762 and here, although it was necessary to get permission to send it out of the United States, there was evidence that permission to send it out of the United States was never refused. The evidence clearly shows that to the skilled scientist in the art, the micro-organisms were well known and easily available upon demand and could be used if one did not wish to have recourse to the soil, and, therefore, the invention could have been put to the same successful use as the inventor if such means had been adopted. This also, in my view, could be an answer to the alleged incompleteness of the specification of the patent in not specifying the strain or its location. Support for such a view can be found in *Blanco White on Patents*, at p. 160, line 5, where it is said:

Thus a general instruction to use "any suitable material" or "known methods" or to use chemical reagents of a general class (leaving it to the addressee to determine which members of the class will operate satisfactorily), will be sufficient if it enables the addressee to put the invention into practice.

It, therefore, follows that the absence of a reference to a specific strain in the patent has in no way prevented the addressee from putting the invention into practice, or deprived the public of all the advantages of working with this invention during the life of the patent and of using it commercially at its expiry and this attack made on the Duggar patent must, therefore, fail.

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The attack made on the Minieri patent on the basis that there is no mention therein as to where or how strains of aureofaciens, capable of producing Tetracycline, can be obtained, is urged by counsel for the defendant to be more serious than in the case of Duggar because here, although Minieri mentions strain UV-8 which, according to the evidence, is deposited with A.T.C.C. under number 12416, the evidence discloses that instructions were given by the plaintiff company to the culture depository not to send the strain to a foreign country without the plaintiff's consent and that, therefore, the Canadian scientist would thereby be at the mercy and will of the plaintiff corporation with regard to the procurement of the micro-organism.

Dr. Petty testified that the question of the strain UV-8 (which is 12416) being available or not was a matter of policy of the company and that although the plaintiff wanted to know what strains of UV-8 were sent out of the United States, permission to send it out was never refused. The evidence discloses that Dr. Cain tried to get strain No. 12416 but did not, although in this case, as appears from his letter to the American Type Culture Collection dated September 14, 1962, and produced as part of Ex. D-75, he had suggested an alternative (10762) which is also aureofaciens and had no trouble obtaining it.

Now it also appears from the Minieri patent that the latter is not limited to the UV-8 strain. It is, indeed, mentioned in the patent only as one organism which is found to be useful as the patentee made it clear that any *S. aureofaciens* can be used as appears at p. 4, column 8, line 59 of the patent:

The present invention is not limited to UV-8 or any particular organism but includes any *S. aureofaciens* organism or variant or mutant, either naturally occurring or artificially induced, which produced tetracycline in concentrations making possible the recovery of the therapeutic product.

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Under these circumstances I fail to see how it can be said that the Canadian scientist, who knows about the depositories, is at the mercy and will of the plaintiff when, as it appears from the evidence, Dr. Cain had no trouble at all after referring to the literature in obtaining an aureofaciens organism capable of producing Tetracycline under the Minieri patent even if it was not the UV-8 strain, and this attack fails also. As stated by *Frost on Patents*, vol. 1, at pp. 204 and 205:

It is always a question for the jury, or the Court acting as a jury, to say whether or not the specification describes with sufficient accuracy the ingredients or materials which the patentee directs to be used, but a patentee is not obliged, in referring to materials and ingredients, to enter into minute details as to them if they are known in commerce and can be readily procured under the names which he gives them.

I now turn to the attacks made on the Minieri patent on the basis that the latter is invalid because it was anticipated by the Duggar patent by the Martin, Bohonos, Duggar and Devoe application as well as by the Heineman and Hooper patent application.

As no evidence was presented nor argument expressed in relation to the Heineman and Hooper application, I need not deal with it.

With regard to the Duggar patent, the defendant submits that if Duggar is followed and if the ingredients indicated by Duggar are chosen without a chlorine content or very little, the Minieri result will be obtained and that, therefore, it is possible by following exactly the directions of Duggar to obtain Tetracycline instead of chlortetracycline.

This attack on the Minieri patent as set down by the defendant in his particulars of objection reads as follows:

B I. The process claimed therein is the same as that claimed in Canadian Letters Patent No. 497,339 also in suit which does not make any mention of chloride ions.

Now there is no question but that chlortetracycline or (aureomycin) is a valuable antibiotic as recognized by the experts, including Dr. Tosoni, who at p. 632 stated in answer to the following question:

Q Would you agree with me that chlortetracycline and tetracycline are very valuable products?

A. I certainly would.

The difference between chlortetracycline and Tetracycline is that the chloride ion that appears in chlortetracy-

cline was taken off and a hydrogen substituted and so chemically it is a different product. Now the evidence discloses that although Tetracycline has about the same effectiveness as chlortetracycline as an antibiotic, it has fewer side effects and, therefore, is more easily tolerated by the patient. It is, therefore, an improved product.

Dr. Duggar's contribution was therefore the discovery, isolation and identification of streptomyces aureofaciens and the production of chlortetracycline as a new product using aureofaciens in a fermentation medium which contains chloride. On the other hand, Minieri deals with the production of Tetracycline and his contribution was to discover that Tetracycline (not a mixture of chlortetracycline and Tetracycline) could be produced by the same micro-organisms aureofaciens, not by the method of deschlorinating chlortetracycline which, as already mentioned, had been discovered before, but by fermentation, if the chlorine content in the medium were controlled in one way or the other.

Dr. Petty's evidence at p. 98 of the transcript explains Minieri's method of producing Tetracycline as follows:

Q What is the relationship, if any, between the process of producing tetracycline by deschlorination and that of producing tetracycline by using the organism streptomyces aureofaciens in a medium or broth in which the chloride is controlled?

A. The deschlorination of chlortetracycline is a chemical process. It was unpredictable that the micro-organism streptomyces aureofaciens would produce this molecule in the absence of chloride.

HIS LORDSHIP: What was that again?

THE WITNESS: It was unpredictable that the microorganism streptomyces aureofaciens would produce tetracycline if chloride was not present in the fermentation broth.

This witness then explained that following Duggar's work in 1953, the production of Tetracycline by fermentation of aureofaciens in a medium from which the chloride has been removed or stripped or held back, has economic advantages over the chemical method of knocking it off with a catalytic agent, because using the fermentation method results in an increased production of 15 per cent of the product chemically speaking.

Dr. Petty was the only person skilled in the art of fermentation who spoke of the skilled person in the art at the relevant date, which here is September 28, 1953 (date of the Minieri invention) and it is at this date that this matter

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of anticipation by Duggar or Martin-Bohonos or even of the invention of Duggar over Minieri must be looked at.

This witness appears to have been the only one heard on the matter of anticipation and inventiveness in Duggar, Minieri and Martin-Bohonos and he was not cross-examined on these subjects. I had occasion in *Dominion Auto v. Defrees*<sup>1</sup> to point out the heavy onus one has who attacks the validity of a patent in instructing the judge and making him sufficiently skilled in the art to enable him to appreciate the problems involved in assessing the relevance of the prior art cited either as anticipation of, or of establishing the obviousness of a patent, when at p. 351 I said:

I do believe that whether the presumption of validity is a heavy or easy one to displace remains a question of fact in each case although I must say that in patent matters it would seem that as the alleged infringer has the burden of not only attacking the validity of the patent in issue, but of also placing the judge in the position of a man skilled in the prior art it is not too surprising that the President of this Court has stated on numerous occasions that the onus is not an easy one to discharge.

From an examination of both the Duggar and Minieri patents, and using whatever knowledge the evidence has supplied, it now appears to me with reference to claim 1 of the Minieri patent that the latter's contribution to the art consists in using any aureofaciens and placing it in a fermentation broth which is substantially free of chloride and thereby recovering tetracycline instead of chlortetracycline. This claim deals with a broth which is free of soluble chlorides. Claim 2 deals with a broth being substantially free of available chloride ion. In the case of claim 1, if the broth is free of soluble chlorides, it means there is not much chlorine there. If, however, it is free of available chlorides, it may mean that there is chlorine there, but it is not available for participation in the reaction. Minieri appears to cover also a medium in which chlorine, although present, is in some way restricted or tied up so that it cannot take part in the reaction.

It, therefore, follows that Minieri's contribution consists in discovering a process of producing Tetracycline by direct fermentation in a medium in which the chloride is controlled or restricted or inhibited, with a conventional culture of streptomyces aureofaciens and is quite different from the Duggar patent which, as already mentioned, uses as a

<sup>1</sup> [1964] Ex. C.R. 331.

requirement for the production of chlortetracycline a minimum quantity of chlorine which, as we have seen, can be found in large quantities in the nutrient materials listed by Duggar.

In view of the fact that Duggar dealt only with the production of chlortetracycline by using materials containing a sufficient quantity of chloride to give this product, and because of Dr. Petty's uncontradicted evidence that the production of Tetracycline by fermentation without chloride could not, at the date of the Minieri invention, have been predicted, it follows that the information contained in the Duggar patent can in no way be taken to have given Minieri what he required for his discovery which would be required if Duggar is to be considered as a valid anticipation of Minieri and, consequently, I fail to see how Duggar could have anticipated Minieri.

Counsel for the defence, however, submitted that notwithstanding the fact that Duggar's object was to produce chlortetracycline by following his teachings, a medium could be selected which would be substantially free of chlorine and Tetracycline would be obtained and not chlortetracycline and that if such is the case, Duggar would have anticipated Minieri because one could, by following the teaching of Duggar, get Tetracycline in what turns out to be the Minieri method.

The requirements for a valid anticipation of a patent were set out clearly by Thorson P., as he then was, in *The King v. Uhlemann Optical Company*:<sup>1</sup>

...The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own.

<sup>1</sup> [1950] Ex. C.R. 142 at 157.

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It is not even sufficient that a prior art reference in order to be an anticipation contains, as expressed by Thorson P., in the same decision:

. . . suggestions which taken with other suggestions might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea, which in the light of subsequent experience, could be looked on as being the beginning of a new development.

The prior art, indeed, must show in clear and unmistakable terms how to put the invention into practice. Now it appears that the teaching of Duggar is to obtain the production of chlortetracycline and if something else is produced, the teachings of Duggar are not being followed. Indeed, if pure materials are used and the chlorine is kept down and Tetracycline is obtained, the latter was not obtained by following the teachings of Duggar, but by going against those teachings and, therefore, Duggar cannot be considered as solving for Minieri the production of a material different from that produced by the Duggar patent and by a process discovered several years after his original production of chlortetracycline. It follows that the Duggar patent can in no way be considered as having anticipated the Minieri patent.

I now turn to the attack made on the Minieri Patent under B-3 of the Particulars of Objection which reads as follows:

The alleged inventor of Canadian Letters Patent No. 542,622 was not the first and true inventor, being antedated by Messrs Martin, Bohonos, Duggar and Devoe as well as Messrs. Heneman and Hooper; patent applications by the said inventors are pending and were co-pending with the application which matured into Canadian Letters Patent No. 542,622.

What the defendant is saying here is that both Minieri and Martin-Bohonos cover the same invention and that if such is the case conflicts should have been declared between the two as according to the admission made by Counsel for the plaintiff and referred to at the beginning of this judgment, the Minieri Patent as an application was, at one stage, co-pending with the Martin-Bohonos application. The above admission also recites that whatever was disclosed in Martin-Bohonos was disclosed prior to whatever was disclosed in Minieri and it, therefore, follows that if Martin-Bohonos is an anticipation of Minieri it will invalidate the latter. The defendant urges that the examples given in Martin-Bohonos show the same media as those shown in Minieri. This,

however, is not the case and Dr. Tosoni, one of defendant's expert witnesses, in cross-examination at p. 609 clarified this point when he stated that from the examples given in Martin-Bohonos, whatever he meant by "controlled conditions" he did not mean that the medium was to be free of available chloride (which, of course, is the teaching of Minieri) as there is in Martin-Bohonos substantial chloride in every example varying from 20 parts to a million in one example to 3 and 550 parts to a million in another. It, therefore, can hardly be said that both media are the same. Minieri's teaching is, therefore, to keep the available chloride low and Martin-Bohonos teaching is that even with 3 or 550 parts to a million and more of available chloride, Tetracycline can still be obtained or a portion thereof by using certain selected strains.

Now looking at the Martin-Bohonos application again with whatever skill I have acquired as a result of the evidence submitted at the trial, it appears to me that although, as mentioned by Counsel for the defendant, the Martin-Bohonos application contains very broad claims, some of which even dominate the Minieri invention, this is not sufficient to place two applications in conflict under section 45(1) of the Act because the above article covers only two situations where applications should be placed in conflict which are (1) "when each of them contains one or more claims defining substantially the same invention," (2) "when one or more claims of one application describe the invention disclosed in the other application." It is indeed only if both applications fall within either (1) or (2) above that consideration can be given to the Martin-Bohonos application as a possible anticipation of Minieri, although compliance with section 45(1) (a) and (b) is merely one obstacle to overcome in order to make the application available as an anticipation, the latter being determined on an examination of the fundamental principles which apply to all prior art citations and which was referred to above in re: *The King v. Uhlemann Optical Company (supra)*.

I do not think it necessary to go into an examination of the claims of both Minieri and Martin-Bohonos in order to determine whether they should be placed in conflict or not, because in my view even if they should have been placed in

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conflict (which, however, I refrain from determining although I might say that a cursory comparison of both claims in the light of the knowledge I have acquired from the evidence adduced herein, would indicate to me that they should not have been placed in conflict), Martin-Bohonos cannot be considered as a valid anticipation of Minieri.

Dr. Tosoni's evidence and the Martin-Bohonos Patent, D-16, indicate to me that the latter's discovery is that certain selected strains of streptomyces aureofaciens in a conventional fermentation broth will produce Tetracycline as well as Chlortetracycline, whereas Minieri, as already mentioned, discovered that any conventional strain of aureofaciens in a special medium will produce only Tetracycline and, of course, these are two different inventions.

Counsel for the defendant then introduced a copy of the United States Martin-Bohonos application deposited with the French Patent office in support of a request for priority under the International Convention as Exhibit D-77 as well as D-76 the French joint Minieri, Martin-Bohonos and Duggar and Devoe patent, which were allowed in under reserve of Counsel for the plaintiff's objection that these documents were not pleaded or listed in the affidavit on production and no notice was given which, in my view, should be sufficient to reject them entirely. However, even if they were admissible they do not, as urged by Counsel for the defendant show that Minieri and Martin-Bohonos are one and the same thing. They merely show that as apparently permitted in France a composite patent can be obtained involving work from different inventors and this can in no way be considered as an admission that Minieri, Martin, Bohonos and Duggar are all the same invention, nor does the evidence establish that such is the case.

There appear to be, in fact, three important differences between Minieri and Martin-Bohonos:

- (1) Minieri used any conventional strain of *Streptomyces aureofaciens*. Martin-Bohonos used certain selected strains only with peculiar characteristics. Martin-Bohonos deals apparently with new or selected micro-organisms discovered and bred strictly for their capacity to produce in a chloride containing medium a substantial amount of Tetracycline as well as amounts of Chlortetracycline.

- (2) Minieri used a special medium in which chlorine is controlled, restricted or inhibited; Martin-Bohonos used a conventional medium containing large quantities of chlorine.
- (3) Minieri teaches that with proper control of the chlorine Tetracycline can be produced to the exclusion of Chlortetracycline; Martin-Bohonos teaches that with his process a mixture of Tetracycline and Chlortetracycline can be produced with a slightly larger proportion being Tetracycline.

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It, therefore, follows that whether the Martin-Bohonos application qualifies as a reference within the meaning of section 45, subsection (1)(a)(b) or not, it certainly does not, in view of the above, meet with the requirements necessary to make it a valid anticipation of Minieri.

The essential ingredients and materials essential in Minieri for its utility cannot, in my view, be found in Martin-Bohonos and this is not too surprising as the processes invented are, as already mentioned, fundamentally different, Martin-Bohonos dealing with selected strains of aureofaciens in a conventional fermentation broth producing Tetracycline as well as Chlortetracycline, whereas Minieri deals with conventional strains of *S. aureofaciens* producing Tetracycline by direct fermentation in a medium in which the chloride is controlled, restricted or inhibited.

Under these circumstances, it is impossible to say paraphrasing the dictum in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.*<sup>1</sup> that Minieri in attacking the problem he solved would have found what he wanted in Martin-Bohonos and, therefore, it cannot be said that Martin-Bohonos anticipated Minieri.

I now come to the last attack made on the Minieri Patent in that the latter invented nothing in view of Canadian Letters Patent 497,339, which is the Duggar Patent. The defendant is saying here that in the light of Duggar, Minieri was obvious and does not therefore possess one of the necessary attributes of a valid patent, i.e., inventiveness. In order to find here that this attribute is missing in Minieri, I would have to come to the conclusion that the new process in Minieri, in view of Duggar at the date of the Minieri

<sup>1</sup> [1929] A.C. 269; 46 R.P.C. 23 at 54.

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invention of 1953, was so easy that very little reflection would have been required to find it. This I am not prepared to say because, having regard to what was generally known at the date of the patent in suit, it was not obvious without considerable experiment and research that the new process invented by Minieri could give Tetracycline by direct fermentation and consequently I must, and do, hold that the attack made on this basis must and does also fail.

During the presentation of argument, Counsel for defendant submitted also that Minieri was obvious in the light of the Martin-Bohonos application; it however appears that this application, although pleaded as an anticipation of Minieri, was not pleaded as establishing non-inventiveness and, therefore, strictly speaking, should not form part of the issues involved in the present case. Now, although this would be sufficient in my view to dispose of this attack, I might add that even if this issue had been properly pleaded, I would still find no substance to it as, in my opinion, there is no doubt that here again Minieri's process could not have been and was not obvious in view of what Martin-Bohonos disclosed, which I dealt with in some detail on the matter of anticipation and, consequently, this attack must also fail.

I find, therefore, that all the attacks on the validity of the claims in suit fail. It follows, of course, that I find that as between the parties the claims in suit are valid.

There will, therefore, be judgment in favour of the plaintiff as against the defendant that as between the parties the claims in suit of the two patents are valid and that they have been infringed by the defendant as contended and that the plaintiff is entitled to the relief sought, except as to damages. If the parties are unable to agree on the amount of the damages or the amount of profits, if the plaintiff elects an account of them, there will be a reference to the Registrar or a Deputy Registrar to determine the amount of such damages or profits and judgment for the amount found on such reference. The plaintiff is also entitled to costs to be taxed in the usual way. The defendant's counterclaim must also be dismissed with costs.

*Judgment accordingly.*

ENTRE :

MIDO G. SCHAEAREN AND CO. S.A. . . . DEMANDERESSE;

ET

DONAT TURCOTTE et VIDO ENRG. . . DÉFENDEURS.

1964

8 et 9 juin

1965

19 mars

*Marque de commerce—Enregistrement de marque de commerce—Loi sur les marques de commerce, S. du C. 1952-1953, ch. 49, articles 2(c), 4(d), 6(1) (2) (5) (a) (b) (c) (d) (e), 19, 20(a) (b) (i) (ii), 2, 31, 45, 65.—Pouvoirs d'amendements conférés à la Cour selon la Règle 119, Cour de l'Échiquier—Marque de commerce «créant de la confusion».*

Propriétaire d'une marque de commerce enregistrée sous le nom de: «Mido», la demanderesse vend, au Canada, des horloges, des montres et leurs accessoires.

Les défendeurs exploitent un commerce analogue à celui de la demanderesse sous la raison sociale au nom commercial de: «Vido Enrg.», vendant aussi des montres au Canada.

Prétendant être lésée dans les droits qu'elle détient dans sa marque de commerce enregistrée sous le nom de: «Mido», la demanderesse a réclamé une injonction en redressement de l'infraction de sa marque de commerce.

*Jugé:* Que l'emploi de la marque de commerce: «Vido» crée de la confusion avec la marque de commerce: «Mido», vu que ces marchandises étaient vendues dans la même région, au point de faire conclure que les marchandises en liaison avec ces marques de commerce étaient fabriquées ou vendues par la même personne.

2. Cette pratique était en violation des termes prévus à l'article 20 de la Loi, combiné avec les sous-paragraphes (1) et (2) de l'article 6 de la *Loi sur les marques de commerce* (ch. 49—S. du C., 1952, 1953).

3. La demande de l'injonction est accueillie en partie.

4. L'exposé de la demande ne contenait pas d'allégué à l'infraction prévu à l'art. 20 et les défendeurs n'ayant pas soulevé ce moyen, la Cour est justifiée de recourir aux pouvoirs d'amendements qui lui sont conférés par la Règle 119, des Règles et Ordonnances Générales de la Cour de l'Échiquier.

5. Il n'y a pas lieu ici, pour protéger les droits de la demanderesse, d'émettre contre les défendeurs une ordonnance de livrer les montres qui sont en leur possession ou contrôle, marquées du nom de: «Vido».

6. Les défendeurs contreviendront à l'injonction s'ils offrent en vente ou vendent lesdits objets sans oblitérer complètement la marque de commerce qui viole les droits de la demanderesse.

7. Il n'apparaît pas nécessaire que la protection des droits de la demanderesse requière une défense d'importer lesdits objets.

8. La Cour n'accorde aucun dommage à la demanderesse qui n'a pas spécifiquement allégué ni prouvé les dommages qu'elle a pu subir en vertu de l'infraction imputée aux défendeurs de leur marque de commerce.

**ACTION** en redressement de l'infraction d'une marque de commerce.

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La cause fut instruite devant l'honorable Juge Noël, à Ottawa.

*Donald F. Sim, c.r. et Jean D. Richard* pour la demanderesse.

*Arcadius Denis, c.r.* pour les défendeurs.

Les faits et questions de droit sont exposés dans les motions que rend maintenant (19 mars 1965) monsieur le JUGE NOËL:

La demanderesse est propriétaire d'une marque de commerce enregistrée en vertu de la *Loi sur les marques de commerce*, c. 49 des Statuts du Canada, 1952-53, par un enregistrement en date du 7 juin 1926 sous la *Loi des marques de commerce et dessins de fabrique*. L'enregistrement dont il s'agit est de la marque de commerce «MIDO» qui fut enregistrée sous le numéro 180/39967 relativement à la vente d'horloges, de montres et de pièces d'iceux.

Le défendeur Turcotte exerce un commerce sous la raison sociale ou le nom commercial de Vido Enrg.

Les montres fabriquées par la demanderesse ont été vendues au Canada sous le nom commercial de «MIDO» depuis trente années et y possèdent une excellente réputation.

Le défendeur commença à vendre des montres au Canada sous la marque de commerce «VIDO» il y a environ sept ans.

La demanderesse procéda contre les défendeurs devant cette Cour par le moyen d'une action en date du 5 septembre 1963, qui contient l'exposé détaillé de ses prétentions. Cet exposé de la demande fut amendé subséquemment par un ordre de cette Cour en date du 20 février 1964. La demande, après avoir exposé les faits que j'ai ci-haut résumés, allègue que:

7. En vertu des actes ci-haut mentionnés des défendeurs, ces derniers, et chacun d'eux, ont:

- (a) Enfreint les droits de la demanderesse dans ladite marque de commerce enregistrée;
- (b) Illégalement obtenu les bénéfices de l'achalandage créé par la demanderesse relativement à ladite marque de commerce enregistrée;
- (c) Appelé l'attention du public sur ses marchandises et son entreprise de manière à causer ou à vraisemblablement causer de la confusion au Canada entre ses marchandises et son entreprise et ceux de la demanderesse;
- (d) Fait des actes ou adopté des méthodes d'affaires contraires aux honnêtes usages industriels ou commerciaux ayant cours au Canada.

8. Tous les actes ci-haut mentionnés commis par les défendeurs sont contraires à la *Loi sur les marques de commerce*.

Par sa déclaration, la demanderesse réclame les remèdes suivants:

- (a) Une injonction contraignant les défendeurs et chacun d'eux, leurs officiers, serviteurs, agents et employés à cesser de continuer à enfreindre ladite marque de commerce enregistrée de la demanderesse;
- (b) Une injonction contraignant les défendeurs, et chacun d'eux, leurs officiers, serviteurs, agents et employés à cesser d'attirer l'attention du public sur ses marchandises en employant la marque de commerce ou le nom commercial «VIDO»;
- (c) Une injonction contraignant les défendeurs et chacun d'eux, leurs officiers, serviteurs, agents et employés à cesser d'utiliser la marque de commerce ou le nom commercial «VIDO» ou toute autre marque de commerce ou nom commercial qui crée de la confusion avec la marque de commerce «MIDO»;
- (d) Des dommages au montant de \$100,000 ou toute somme additionnelle ou autre que cette honorable Cour pourra décréter;
- (e) Un ordre les contraignant à livrer sous serment toutes les montres en la possession ou sous le contrôle des défendeurs ou chacun d'eux, de leurs officiers, serviteurs, agents et employés qui ont été ainsi marquées de la marque de commerce «VIDO» qui enfreint la marque de commerce de la demanderesse; ou un ordre décrétant que lesdites montres soient détruites sous serment;
- (ee) Un ordre prohibant l'importation future de marchandises sur lesquelles la marque de commerce «VIDO» ou le nom commercial Vido Enrg. serait appliqué;
- (f) Les dépens de la présente action;
- (g) Tout autre remède approprié que la nature de la cause peut exiger et qui pourrait sembler à cette Cour juste et équitable.

Bien que la déclaration comprenne des allégués soulevant d'autres causes d'action, la seule que la demanderesse tenta d'établir à l'enquête fut celle touchant à l'infraction de sa marque de commerce enregistrée. D'autre part, il appert également que bien que les défendeurs se réfèrent dans leur plaidoyer à plusieurs moyens de défense, la seule qu'ils firent valoir sérieusement à l'enquête fut la prétention qu'il n'y avait eu aucune infraction à la marque de commerce enregistrée de la demanderesse. Les défendeurs soulevèrent dans leurs procédures et durant la plaidoirie orale à l'enquête un moyen basé sur la prétention que la demanderesse n'avait pas établi que sa marque de commerce enregistrée avait été légalement renouvelée conformément à l'art. 45 de la Loi et que par conséquent l'action telle que prise devait, par suite de ce manquement, faillir. Je puis disposer rapidement de ce moyen en signalant que la procédure prévue à l'art. 45 de la *Loi sur les marques de commerce* ne peut

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disposer d'une marque de commerce que lorsque le registraire transmet au propriétaire un avis «portant que si dans les quatre mois de la date dudit avis, le droit prescrit de renouvellement n'est pas versé, l'enregistrement sera radié.» Et il ressort évidemment de la preuve qu'aucune telle initiative n'a été prise par le registraire dans le présent cas. D'ailleurs, à la face même du certificat de cette marque de commerce, produit comme pièce 18, et qui contient les entrées faites au registre des marques de commerce relativement à cette marque de commerce, il appert clairement que cette marque, ayant été enregistrée sous la *Loi des marques de commerce et dessins de fabrique* en 1926, a été, conformément à la Loi renouvelée en 1951, et ne requerra, par conséquent, en vertu de l'art. 4(d), un nouveau renouvellement qu'en 1966, soit quinze ans après l'année 1951 et, par conséquent, ledit enregistrement est encore en pleine vigueur.

Les dispositions pertinentes au présent débat sur la *Loi sur les marques de commerce* sont les suivantes:

2. Dans la présente loi, l'expression

...

c) «créant de la confusion» lorsqu'elle est employée comme qualificatif d'une marque de commerce ou d'un nom commercial, désigne une marque de commerce ou un nom commercial, dont l'emploi créerait de la confusion en la manière et les circonstances décrites à l'article 6;

6. (1) Aux fins de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionné cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionné, de la manière et dans les circonstances décrites au présent article;

(2) L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce lorsque l'emploi des deux marques de commerce dans la même région serait susceptible de faire conclure que les marchandises en liaison avec ces marques de commerce sont fabriquées, vendues, données à bail ou louées, ou que les services en liaison avec lesdites marques sont loués ou exécutés, par la même personne, que ces marchandises ou ces services soient ou nom de la même catégorie générale.

...

(5) En décidant si des marques de commerce ou des noms commerciaux créent de la confusion, la cour ou le registraire, selon le cas, doit tenir compte de toutes les circonstances de l'espèce, y compris

- a) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;
- b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;
- c) le genre des marchandises, services ou entreprises;

d) la nature du commerce; et

e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le son, ou dans les idées qu'ils suggèrent.

19. Sous réserve des articles 21, 31 et 65, l'enregistrement d'une marque de commerce à l'égard de marchandises ou services, sauf si son invalidité est démontrée, donne au propriétaire le droit exclusif à l'emploi, dans tout le Canada, de cette marque de commerce en ce qui regarde ces marchandises ou services.

20. Le droit du propriétaire d'une marque de commerce déposée à l'emploi exclusif de cette dernière est censé violé par une personne non admise à l'employer selon la présente loi et qui vend, distribue ou annonce des marchandises ou services en liaison avec une marque de commerce ou un nom commercial créant de la confusion; mais aucun enregistrement d'une marque de commerce ne doit empêcher une personne

- a) d'utiliser de bonne foi son nom personnel comme nom commercial, ni
- b) d'employer de bonne foi, autrement qu'à titre de marque de commerce,
  - (i) le nom géographique de son siège d'affaires, ou
  - (ii) toute description exacte du genre ou de la qualité de ses marchandises ou services,

d'une manière non susceptible d'entraîner la diminution de la valeur de la clientèle attachée à la marque de commerce.

Il appert clairement qu'il n'y a pas eu violation de la marque de commerce de la demanderesse dans le sens que les défendeurs auraient fait quelque chose que la demanderesse avait seule le droit de faire. En effet l'art. 19 ne donne pas à la demanderesse le droit exclusif d'employer «VIDO» comme marque de commerce en liaison avec des montres.

En effet, à l'enquête, le débat entre les parties et la seule question en litige relativement à l'infraction des droits de la demanderesse, ainsi que la preuve amorcée, se confinèrent à une seule question, soit celle de savoir si, par le truchement de l'art. 20 de la *Loi sur les marques de commerce*, la marque de commerce «VIDO» est censé être une infraction de la marque de commerce «MIDO» de la demanderesse. Bien que strictement parlant, l'exposé de la demande ne contenait pas d'allégué relatif à l'infraction prévu à l'art. 20, combiné avec l'art. 6 de la *Loi sur les marques de commerce*, les défendeurs ne soulevèrent pas ce moyen, et les parties procédèrent à l'enquête comme si cette question en litige avait été soulevée dans les plaidoiries et, par conséquent, j'ai bien l'intention de la traiter comme si la déclaration contenait les allégations nécessaires pour soutenir ce moyen. En effet, dans les circonstances, je me crois parfaitement justifié

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de recourir aux pouvoirs que me donne la règle 119 des *Règles et ordonnances générales* de cette Cour pour ce faire. Cette règle 119 se lit comme suit :

Règle 119

La Cour ou un juge a le pouvoir d'amender

Outre les pouvoirs d'amendement précités, au cours d'une action, poursuite ou autre procédure, la Cour ou un juge peut, à la demande de l'une des parties, effectuer tous les amendements qui lui semblent nécessaires, que la nécessité de l'amendement requis soit occasionnée ou non par l'erreur, l'acte, le défaut ou la négligence de la partie qui demande l'amendement, ou sans une telle demande.

Il appert donc que la seule question à être décidée est celle de savoir si la marque enregistrée de la demanderesse doit être tenue pour avoir été enfreinte en vertu de l'art. 20 lorsque les défendeurs ont vendu leurs montres en liaison avec la marque de commerce «VIDO». La réponse à cette question dépendra de la réponse que je devrai donner à une autre question, soit celle de savoir si la marque de commerce «VIDO» est, relativement à la marque de commerce «MIDO», une marque de commerce «créant de la confusion» dans le sens de l'expression utilisée à l'art. 20. La réponse à cette dernière question se trouve dans l'application des sous-paragraphes (1) et (2) de l'art. 6 de la *Loi sur les marques de commerce*. En vertu de ces dispositions, l'emploi de la marque de commerce «VIDO» créerait de la confusion avec la marque de commerce «MIDO» si l'emploi des deux marques de commerce dans la même région était susceptible de faire conclure que les marchandises en liaison avec ces marques de commerce sont fabriquées ou vendues par la même personne. En d'autres mots, si je décide comme question de fait que l'emploi du mot «MIDO» et que l'emploi du mot «VIDO» en liaison avec des montres vendues dans la même région serait susceptible de faire conclure que les montres Vido et les montres Mido sont fabriquées ou vendues par la même personne, le défendeur serait alors, par le jeu de l'art. 20, censé avoir enfreint la marque de commerce enregistrée de la demanderesse.

Je n'ai pas le moindre doute que l'emploi de ces deux marques de commerce dans la même région serait susceptible de faire conclure que les marchandises en liaison avec ces marques de commerce sont fabriquées et vendues par la même personne. En arrivant à cette conclusion, j'ai tenu compte des différents facteurs énumérés au sous-paragraph

(5) de l'art. 6 de la *Loi sur les marques de commerce* et je ne crois pas que cela pourrait être d'aucune utilité d'entrer dans le détail des facteurs y mentionnés.

Je suis par conséquent d'avis que la demanderesse a le droit à une injonction contre les défendeurs conformément aux termes des sous-paragraphes (b) et (c) des conclusions de sa demande. Je ne crois pas qu'il y ait lieu pour protéger les droits de la demanderesse, d'émettre contre les défendeurs une ordonnance de livrer les montres qui sont en leur possession ou contrôle et qui auraient été marquées du nom de «VIDO» en violation des droits de la demanderesse. Les défendeurs contreviendront à l'injonction s'ils offrent en vente ou vendent lesdits objets sans oblitérer complètement la marque de commerce qui viole les droits de la demanderesse. De plus, il ne m'apparaît pas nécessaire que la protection des droits de la demanderesse requière une défense d'importer lesdits objets.

Bien que la demanderesse ait un allégué général relativement aux dommages subis, elle n'a pas spécifiquement allégué ni d'ailleurs prouvé les dommages qu'elle a pu subir en vertu de l'infraction imputée aux défendeurs de leur marque de commerce.

Dans les circonstances, il n'y aura aucun jugement pour dommages. La demanderesse aura droit à ses dépens.

*Jugement conforme.*

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BETWEEN :

GEORGE H. STEER ..... APPELLANT;

AND

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

*Revenue—Income—Income tax—Deductibility as an income loss of amount paid by taxpayer as guarantor on default of payment by borrower—Guarantee of loan for consideration as a “business” and adventure in the nature of trade—Meaning of “source” of income—Deductibility of loss in subsequent year with respect to a “source” of income falling outside statutory definition of “business”—Scheme of Income Tax Act as to taxation of net profit or gross revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a) and (b), 139(1)(e) and (x).*

In 1951 the appellant and another person contracted with the two owners of all the shares of Locksley Petroleums Ltd. to endorse or guarantee the company's promissory notes at the bank to the extent of \$125,000, and in consideration for so doing they were to receive one-half of the shares of the company and certain royalty interests. The appellant received his share of the consideration under the contract in 1951 and was assessed in that year for income tax thereon, the consideration being valued at \$4,500. In 1957 the appellant was required to pay to the bank the sum of \$62,500, being his share of the loan to Locksley Petroleums Ltd. which he had guaranteed and in payment of which the company had defaulted.

The respondent refused to take the \$62,500 payment made by the appellant into consideration in assessing him for income tax for the 1957 taxation year and the appellant unsuccessfully appealed his assessment to the Tax Appeal Board. This appeal follows from that decision.

*Held:* That the transaction between the appellant and the owners of the shares of Locksley Petroleums Ltd. was a business transaction and whether or not it was a venture in the nature of trade so as to be a “business” within the statutory definition of that term, it was clearly a “source” from which income might arise within the meaning of s. 3 of the *Income Tax Act*, and, this being so, there is no doubt that the \$62,500 paid by the appellant is deductible in computing his 1957 income.

2. That s 3 of the *Income Tax Act* defines “income for a taxation year”, to be “income for the year from all sources”, which is a single concept. It is not merely the aggregation of one's income from all sources from which there were incomes in the year but it is made up of the gains from all sources minus the losses from these sources or, expressed otherwise, the net income from all sources of income taken together.
3. That the transaction in question was a venture in the nature of trade and therefore a “business” within the statutory definition.
4. That even if the transaction be regarded as a “source” of income that falls outside the statutory definition of business, a loss arising in a subsequent year with respect thereto is deductible.

5. That it would take very clear language to indicate a parliamentary intention to tax gross receipts from "sources" falling outside the classes specifically named in s. 3 of the *Income Tax Act*, rather than "income" in the sense of profit or gain, and, in the absence thereof, s. 12(1)(a) should not be interpreted as altering the general scheme of the Act, in respect of certain sources, and its meaning should not be extended so as to tax gross revenue rather than net profit.
6. That the respondent chose to tax the appellant for the 1951 taxation year on a form of "cash basis" and cannot be heard to refuse to now accept the same basis for determining the profit or loss from the same source for 1957.
7. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Noël at Ottawa.

*H. H. Stikeman, Q.C.* and *P. N. Thorsteinsson* for appellant.

*D. S. Maxwell, Q.C.* and *D. G. H. Bowman* for respondent.

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

NOËL J. now (March 31, 1965) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board<sup>1</sup> confirming the appellant's income tax assessment for the 1957 taxation year. The only question raised by the appeal is whether the appellant was entitled, when computing his income for the year, to deduct an amount of \$62,500 paid by him in 1957 to a bank pursuant to an obligation incurred by him in an earlier year (1951) in which he, in effect, guaranteed a loan made by the Bank to a limited company.

The relevant facts are very fully set out in the Reasons for Judgment of the Tax Appeal Board and I shall not review them at length. There is no dispute as to the basic facts. The question to be decided depends upon the proper characterization of certain transactions fully described in the Board's Reasons. In other words, the question is what inferences are to be drawn from the basic facts.

The appellant is a well-known and highly respected practising lawyer in the Province of Alberta who, quite apart from his practice of law, has, on at least one occasion,

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embarked on a business venture in connection with oil and gas properties resulting in profits upon which he has paid income tax. In my view, neither of these facts is particularly relevant or helpful in determining the issue in this appeal which depends rather upon the proper analysis of an isolated transaction or group of transactions. Indeed the tax consequences would, in my view, be the same regardless of the appellant's profession and, similarly, unrelated ventures in the nature of trade are irrelevant to the particular problem raised by this appeal.

The transaction which gave rise to the disbursement in issue here was a contract between the appellant and one Montague on the one hand and two persons, whose names were Buechner and Yeske, on the other hand. Buechner and Yeske owned all the shares in a company called Locksley Petroleums Ltd., which company was in need of funds. By the contract, which was entered into on February 15, 1951, the appellant and Montague agreed to furnish \$125,000 to the company "by endorsing or guaranteeing" the company's promissory notes "at the . . . Bank"; and, as consideration for the money so "furnished", Buechner and Yeske agreed to transfer to the appellant and Montague one-half the shares in the company and certain "royalty interests".

The appellant fulfilled his part of the bargain, by guaranteeing the company's notes at the Bank, and received the promised consideration therefor. The respondent thereupon assessed him for income tax for 1951 upon the value of the property so received (the shares and the royalty interests) which it established at \$4,500.

In 1957, the appellant was required to pay to the Bank his share of the loan, which the company could not pay, namely, \$62,500.

The respondent now says that that payment is not one that can be taken into account in determining the appellant's income under the *Income Tax Act* for the 1957 taxation year.

The relevant provisions of the *Income Tax Act* are the following:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(a) businesses,

- (b) property, and
- (c) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

. . .

12. (1) In computing income, no deduction shall be made in respect of
- (a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
  - (b) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

. . .

139. (1) In this Act
- (e) "business" includes a profession, calling trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

. . .

- (x) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 28 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained;

In considering whether the amount of \$62,500 is deductible in computing the appellant's income for 1957, it is helpful to consider whether the appellant was properly taxed on the amount of the consideration received by the appellant in 1951 and, if so, on what basis he was so taxable.

The Tax Appeal Board, at p. 199, appears to have analyzed the agreement of February 15, 1951, as one for the acquisition by the appellant and Montague of an interest in the Locksley Petroleums Ltd:

The substance of the transaction was the acquisition of shares and a royalty interest in Locksley Petroleums Ltd., and deferring payment therefor . . .

There is some justification for that view, in that the agreement describes Buechner and Yeske as "the Vendors" and the appellant and Montague as "the Purchasers". It would then appear to me that if that is the correct characterization of the transaction, the respondent was wrong in taxing the appellant on the value of the property so acquired in 1951 and the Tax Appeal Board is now correct in holding that the

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\$62,500 is not deductible in computing the appellant's income for 1957.

I do not believe, however, that the above is a correct appraisal of the agreement of February 15, 1951. By its terms, that agreement is, in substance, one whereby the appellant and Montague agreed to guarantee the company's loans from the Bank and, in consideration therefor, Buechner and Yeske agreed to transfer certain property to them. In other words, the appellant received the property from Buechner and Yeske as consideration for pledging his credit for the company. On that view of the character of the agreement, the appellant was properly taxed on the value of the property received by him in 1951 and this would be in conformity with the decision in *Ryall v. Hoare* and *v. Honeywill*<sup>1</sup> where two gentlemen who were directors of a company and who received a commission for guaranteeing the company's overdraft with a bank were held liable to be assessed to income tax in respect of those commissions.

It is clear that this was a business transaction pursuant to which the appellant received a payment for doing certain things. Now, whether such a transaction is a venture in the nature of trade so as to be a "business" within the statutory definition or cannot be so regarded, it is clearly, in my view, a "source" from which income may arise within the meaning of section 3 of the *Income Tax Act*.

Once it is accepted that the transaction in question is a "source" from which income may arise, there is no doubt in my mind that the \$62,500 is deductible in computing the appellant's 1957 income. Section 3 of the *Income Tax Act* defines "income for a taxation year" to be "income for the year from all sources" which is a single concept. It is not merely the aggregation of one's incomes from all sources from which there were incomes in the year but it is made up of the gains from all sources minus the losses from these sources or, expressed otherwise, the net income from all sources of income taken together. Support for such a view can be found in section 139 (1)(x) of the Act referred to above which also confirms that this is the proper meaning of income for a taxation year when it states that:

<sup>1</sup> (1923) 8 T.C. 521.

(x) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* . . . minus any amount by which a loss operated to reduce the taxpayer's income from *other sources* for purpose of income tax for the year in which it was sustained. (the emphasis is mine)

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There is however still further confirmation of this in the very history of the legislation which dealt with this matter prior to the year 1952 when section 13 of chapter 52 of 1948 would have operated to prevent such a loss from reducing the appellant's income below his income from "his chief source of income". This rule however was abrogated by section 4 of chapter 29 of 1952, and the enactment and its repeal would now clearly indicate that losses from one source are otherwise deductible in computing income from all sources.

It therefore follows that as the 1951 arrangements are a "source" within the meaning of that word in section 3, the loss arising from that source in 1957 must be taken into account in determining the appellant's income from all sources in 1957.

Counsel for the respondent, however, argues that section 12 (1) (a) operates to prohibit the deduction of the \$62,500 because it is an outlay or expense that was not incurred for the gaining or producing of income "from property or a business". The argument is that under the authority of *Ryall v. Hoare, supra*, the consideration that was received by the appellant was for an isolated service, that the expenditure of \$62,500 was not therefore an expenditure in relation to a "business" and that its deduction is therefore prohibited by section 12 (1) (a). There are, I believe, two answers to this.

In the first place, in my view, the transaction in question is a venture in the nature of trade and therefore a "business" within the statutory definition. There is indeed no doubt that if the appellant kept an office and employed a staff on a permanent basis for the purpose of entering into transactions whereby he pledged his credit for a consideration, he would be carrying on a business or at least some sort of an undertaking as comprised in the word business under the definition of same under the Act. If that is so, then an isolated transaction of that kind is a venture in the nature of trade, or should be regarded as a business for the purposes of the *Income Tax Act* and the following two cases are

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sufficient authority for this view: *Barry v. Cordy*<sup>1</sup> and *Drumheller v. Minister of National Revenue*<sup>2</sup> per Thurlow J. at pp. 286-7.

However, even if the transaction be regarded as a "source" that falls outside the statutory definition of business, I am of the view that a loss arising in a subsequent year is deductible. Section 3 defines income for a taxation year as being "income . . . from all sources" for the year, which concept necessarily involves the setting off of losses from income sources for the year. Had the necessity of paying the \$62,500 arisen in 1951, it would have been quite clear that there was no income from the transaction but rather a loss and it would seem to me that the effect of the payment can be no different when the necessity for the payment arose in a later year.

The obvious purpose of section 12 (1)(a) is to prohibit the deduction of an outlay or expense, in computing income from property or a business "except to the extent that it was made or incurred . . . for the purpose of gaining or producing income from property or a business". Now while the language of the provision, read literally, might be taken to prohibit the deduction of any outlay or expense involved in earning income from a "source" that falls outside the classes of sources of income specifically named in section 3 (i.e., businesses, property, and offices or employments), it would take very clear language to indicate a parliamentary intention to tax the gross receipts from such sources (if there be any such sources) rather than "income" in the sense of profit or gain. Such a parliamentary intention is clearly indicated, subject to many exceptions, in relation to income from an office or employment, by the words "but without any other deduction whatsoever" at the end of section 5. However, in the absence of any such clear indication with regard to sources that fall outside the classes of sources specifically named in section 3, section 12 (1)(a) should not be interpreted as altering the general scheme of the Act, in respect of certain sources, and its meaning should not be extended so as to tax gross revenue rather than net profit.

<sup>1</sup> [1946] 2 All E.R. 396.

<sup>2</sup> [1959] Ex. C.R. 281.

In *Gresham Life Assurance Society v. Styles*<sup>1</sup>, Lord Halsbury, at p. 315, stated clearly the underlying scheme of any taxation statute as follows:

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The thing to be taxed is the amount of profits and gains. The word "profits" I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits, or the charge which has been made on those profits by previous agreement or otherwise, is perfectly immaterial. The tax is payable upon the profits realized, and the meaning to my mind is rendered plain by the words "payable out of profits".

It would be an extraordinary thing to suggest that where a business consists of granting annuities it is to be taxed upon a different principle from any other commercial concern, and no one I suppose could doubt that in any other commercial concern the cost of the thing sold to the trader is one of the expenses incident to the carrying on of the trade.

If an annuity seller is to be treated differently from a seller of any ordinary article of commerce—coals or corn or the like—one would have expected to find some words in the statute rendering him obnoxious to a different system of taxation and enforcing a different mode of ascertaining profits, whereas it seems to me that the application of the general words "profits and gains" or "balance of profits and gains" are equally applicable whatever the commercial concern carried on may be.

At p. 316, Lord Halsbury further stated:

Profits and gains must be ascertained on ordinary principles of commercial trading, and I cannot think that the framers of the Act could be guilty of such confusion of thought as to assume that the cost of the article sold to the trader which he in turn makes his profit by selling was not to be taken into account before you arrived at what was intended to be the taxable profit.

In the same case, with regard to this matter, Lord Herschell, at pp. 321 and 322, stated:

It cannot, of course, be denied that, as a matter of business, profits are ascertained by setting against the income earned the cost of earning it; nor that, as a general rule, for the purpose of assessment to the income-tax, profits are to be ascertained in the same way. "Money wholly and exclusively laid out or expended for the purposes of a trade, manufacture, adventure, or concern" may, by the first of the "rules applying to both the preceding cases", be taken into account in estimating the balance of profits or gains to be charged. It seems to me beyond question that the payments made by the society to its annuitants are within these words. And those carrying on the business of selling annuities would be assessed on quite a different principle to those carrying on other businesses if their gross receipts were to be treated as profits without regard to the payments to which, in consideration of those receipts, they had bound themselves.

<sup>1</sup> [1892] A.C. 309.

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Finally, I should refer to the suggestion by counsel for the respondent that the appellant was entitled, if he had sought it, to set off against the \$4,500 receipt in 1951 the value of the guarantee liability as of that time, and that that is the only relief to which he might have been entitled in respect of that liability. I cannot accept that suggestion.

When two businessmen enter into a contract negotiated at arm's length, there is an exchange of rights or obligations which, having regard to the arm's length nature of the transaction, are, *prima facie*, of equal value. If I pay \$X in the open market for a parcel of land, that is evidence that that parcel of land is worth \$X. There can never be a profit or loss on a mere purchase or sale. It is only when a person whose business is to buy and sell buys for \$X and re-sells for more or less than \$X, that, as a matter of business, he makes a gain or a loss. That is why, in an ordinary trading business, profit for a year is estimated by the ordinary formula involving proceeds of sales during the year, acquisitions during the year and inventories at the beginning and end of the year. cf. *Minister of National Revenue v. Irwin*<sup>1</sup>. That formula is designed to determine the profit made on all sales completed during the year.

If the problem were merely one of determining the profit from the whole life span of a business undertaking or other source of income, it would be relatively simple. When the undertaking or other source comes to an end, you add up all the receipts therefrom and deduct all the expenses thereof and the balance is the profit or loss. Under the *Income Tax Act*, it is not so simple because you must determine the taxpayer's profit from a source for each taxation year. This raises problems of allocation as between various years where the life of the undertaking or other source extends over more than one year. These problems have been solved for the most part in the case of businesses and other sources that fall into common categories. The solutions adopted, however, vary greatly even within the same categories. It may well be acceptable to adopt a "cash basis"—i.e., taking into account for each year any cash receipts and cash expendi-

<sup>1</sup> [1964] S.C.R. 662.

tures in the year—for one business and equally acceptable to adopt, for a very similar business, some quite sophisticated so-called “accrual basis”.

In *Sun Insurance Office v. Clark*<sup>1</sup>, Earl Loreburn, dealing with the case of an insurance company that, each year, had to make allowances for unexpired risks on policies outstanding at the end of the year, stated at pp. 450 and 451:

If it were practicable the accurate way, I suppose, would be to add together the premiums which the company became entitled to receive in each year, say 1903, upon contracts made in that year, and then to add up the losses which the company became bound to pay upon those contracts made in the year 1903. The difference between these two sum totals would shew precisely what the gain of the company or their loss in respect of the contracts made in the year 1903.

But this is impracticable because contracts of fire insurance are made all through the year, from January 1 to December 31, and most of them, or at all events many of them, are made to cover fire risks for a year, some, we are told, for five or six or seven years, from the date of their making. The premium is paid in advance. So the result in the way of gain or loss could not be ascertained as a fact until after the period of time had elapsed. Now the tax collector cannot be asked under the Income Tax Acts to wait till the end of that period.

Thus it appears that you cannot base the assessment of income tax upon the actual facts of the business done and the actual pecuniary results of it in the case of fire insurance companies who take single premiums to cover risks for a year or for more years. This is such a company, and I believe nearly all companies are in the same position.

If that be so, it follows that in assessing such fire insurance companies you must proceed wholly or in part by estimate.

An estimate being necessary and the arriving at it by in some way using averages being a natural and probably inevitable expedient, the law, as it seems to me, cannot lay down any one way of doing this. It is a question of fact and of figures whether what is proposed in each case is fair both to the Crown and to the subject.

In the present case, the respondent chose to tax the appellant for the 1951 taxation year on a form of “cash basis” and cannot, in my view, be heard to refuse to now accept the same basis for determining the profit or loss from the same source for 1957.

It would also appear to me that on the same reasoning, dividends from the company’s bankrupt estate received by the appellant since 1957 (\$6,119 on December 7, 1959, and \$3,200 on February 1, 1961) in respect of the payment to

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<sup>1</sup> [1912] A.C. 443.

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the Bank, may be profits from the same source in the years in which they were received. This indeed would seem to be the proper approach when losses from a particular source have been determined on a "cash basis". However, even if some form of "accrual basis" had been adopted, the result would probably be the same with reference to the dividends. Until 1957, when the appellant was required to implement the guarantee by paying \$62,500 to the Bank, the appellant had no claim against the company. Once he made that payment to the Bank, he became entitled to have the company reimburse him. Whether or not he would be reimbursed was contingent upon the outcome of the winding up of the insolvent company.

This right to a contingent dividend or dividend is comparable to the contingent right that was the subject-matter of the decision of the House of Lords in *John Cronk & Sons Ltd. v. Harrison (H. M. Inspector of Taxes)*<sup>1</sup> where it was held that the contingent claims dealt with therein (i.e., guarantees given by builders to a building society for sums advanced to purchasers) should be brought in at actual value and not at face value, when they arose, but that in the event of a valuation being impracticable they shall not be treated as receipts of the business except insofar as they are actually received during the particular trading period.

The appeal is allowed with costs and the assessment is referred back to the Minister for adjustment of the figures consequential upon permitting a set-off of the loss of \$62,500 against the appellant's income from other sources for the 1957 taxation year.

<sup>1</sup> 20 T.C. 612 and 613.

BRITISH COLUMBIA ADMIRALTY DISTRICT

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Aug. 24

BETWEEN:

THE BRITISH COLUMBIA SUGAR } PLAINTIFF;  
REFINING COMPANY LIMITED }

AND

THE SHIP THOR I ..... DEFENDANT.

*Shipping—Damage to cargo of sugar by salt water—Leakage at valve in sanitary line—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. III, R. 1; Art. IV, R. 1; Art. IV, R. 2(a)—The Hague Rules—Whether ship seaworthy—Onus on carrier to exercise due diligence to make ship seaworthy—Whether onus established—Whether defect latent—Want of care of vessel distinguished from want of care of cargo—Liability of carrier.*

A cargo of sugar on the ship *Thor I* was damaged by salt water in the course of a voyage from the Fiji Islands to Vancouver in January 1962. The water entered the hold through a leak near a valve in a sanitary line which discharged from the hold into the sea below the level of the cargo. The leak was discovered when the ship was some days at sea and although the pumps were operated continuously the leakage increased to the point that the ship became unstable shortly before putting into San Pedro, California. On inspection the line was found to be badly corroded near the valve. The valves in the line had last been inspected by the carrier in 1960 when the ship was in dry dock but there was no evidence as to what had been done with them or as to the condition of the line at that time.

*Held:* The owners of the ship were liable for the damage to the sugar.

- 2. The sanitary line was corroded at the flange to an extent which rendered the vessel unseaworthy at the inception of the voyage, and the damage to the sugar was the result of that unseaworthiness. [*Gitroy, Sons & Co. v. Price & Co.* [1893] A.C. 56, per Herschell, L.C. at p. 63 applied.]
- 3. The evidence as to the inspection of the valves in 1960 was not sufficient to discharge the onus on the carrier of proving the exercise of due diligence to make the ship seaworthy, as required by Art. III, Rule 1, and Art. IV, Rule 1, of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291 (which is in the same terms as the *Fiji Carriage of Goods Ordinance, 1926*). The defect in the pipe was not latent, i.e. one which could not be discovered by due diligence. [*Riverstone Meat Co. Property Ltd. v. Lancashire Shipping Co. Ltd.* [1961] A.C. 807, referred to.]
- 4. The damage to the cargo was caused by want of care of the cargo and not by want of care of the vessel indirectly affecting the cargo, and consequently the carrier was not relieved of liability by Art. IV, Rule 2(a) of the *Water Carriage of Goods Act*. [*Gosse Millerd Ltd. v. Canadian Government Merchant Marine*, [1928] 1 K.B. 717, per Greer L.J.; [1929] A.C. 223, per Lord Sumner at p. 236, applied.]

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ACTION for damages for damage to cargo.

The action was tried by the Honourable Mr. Justice Norris, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

*J. I. Bird, Q.C.* for plaintiff.

*V. R. Hill* for defendant.

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

NORRIS D.J.A. now (August 24, 1964) delivered the following judgment:

This is an action by the plaintiff against the ship *Thor I* and the owners thereof in respect of a claim for damage to a cargo of raw sugar by salt water which entered Nos. 2 and 3 holds of the ship, being in effect a common hold without partition, during the course of a voyage from Fiji to Vancouver, B.C. Part of the cargo of sugar was loaded in No. 1 hold but it was not damaged and there is no claim in respect of this part of the cargo. The facts are as follows:

Under Bill of Lading dated December 30, 1961, there was shipped by Colonial Sugar Refining Co. Ltd. from Labasa, Fiji Islands to be delivered at Vancouver to Czarnikow (Canada) Ltd., of Montreal or their assigns in terms of a Charter-Party dated November 2nd, 1961 between that Company and the owners of the Ship *Thor I*, Dahls Hvalfangerselskap A/S of Sandefjord, Norway, 3,647.81 tons of raw sugar (in good order and condition). The plaintiff is the assignee of the Bill of Lading and at all material times was the owner of the sugar. Nothing in this action turns on the terms of the Bill of Lading or of the Charter-Party save that the Bill of Lading was expressed to be subject to the *Fiji Sea Carriage of Goods Ordinance, 1926* and amendments. It was agreed between counsel that the provisions of that Ordinance and in particular the rules thereunder (commonly known as the Hague Rules) were for all practical purposes the same as the provisions of the *Water Carriage of Goods Act* and Rules thereunder. Czarnikow (Canada) Limited were brokers for the plaintiff and the bill of lading was endorsed in blank and delivered to the plaintiff.

After leaving Labasa on December 30, 1961, the vessel went to Suva on the same day and left on that day. The vessel called in at Pago Pago on December 31 and sailed from there on January 3, 1962 for Los Angeles, California, enroute to Vancouver, B.C.

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On January 14, 1962, it was discovered that the ship was leaking. The sugar in the common hold Nos. 2 and 3 was several feet deep in the hold. On January 12, 1962 on soundings it had been found that there were 15 centimetres of water in the starboard bilge of the common hold. On the afternoon of the 14th the water had increased to 85 centimetres, there being at this time 100 centimetres of water in the port bilge of the common hold. The bilge pump was started at six o'clock and the engineer discovered that there was sugar in the water, indicating to the Acting Chief Officer, Ignir Larsen, that the bilge had overflowed into the cargo of sugar. The bilge pump was kept going continuously. On the 15th when the soundings were again taken it was found that the common hold, starboard, contained 190 centimetres of water; on the port side the soundings showed 95 centimetres. A second sounding on the same day showed 230 centimetres of water starboard and 100 centimetres on the port side. The increase in the level of the water existed in spite of the fact that the bilge pumps were operating. The Master noticed that there was a slight list of the vessel to starboard and the vessel was unstable on January 15th and 16th. On the 15th, the inflow of water was so serious that the cargo in the tween decks was shifted and the First Officer Larsen went into the lower hold with the carpenter and one other seaman. It was found that the hold was awash, sugar having dissolved in the water. Another pump was brought to the tween decks and rigged up, but the pumps did not operate satisfactorily owing to the fact that the sugar got into the motor.

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On the starboard side of the ship there was a sanitary overboard discharge line which took the waste from the lavatories and the wash basins down and out into the sea. This pipe went through the tween decks and down through the main deck into the lower hold. The pipe went through the side of the ship about ten to twelve feet above the bottom of the hold and about the middle of the hold and discharged into the sea below the level of the cargo of sugar.

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It was protected by wooden battens. In its downward reach the pipe was close to the ribs of the ship and there was an elbow at the place where the pipe was carried to the skin of the ship. On the pipe at the outside of the ship there was a gate valve which was opened and closed from the main deck, and close to the elbow the pipe was cut and flanged on both sides to receive what was stated in the evidence to be a clapper valve. Although there was some suggestion that this clapper valve was not a true non-return valve, but was merely there to prevent the "swish of water in the pipe", to all intents and purposes it performed the function of a non-return valve. Because of the list and as some of the sugar on the port side was dry, the First Officer was suspicious that the leak was in the sanitary line and the gate valve was therefore closed. Because of the position of the cargo of sugar, the lower part of the sanitary line could not be inspected. Several times during the 15th the First Officer went down to the hold. The Master of the ship stated in evidence that with water in the area of the size of the common hold, the vessel "might go right over." The vessel arrived at Los Angeles, California, on January 16, and on January 17 at San Pedro the water on top of the sugar was pumped out. As a result of the sinking of the sugar on the water being pumped out, the crew were able to get to the sanitary line and found that there was a hole in the sanitary line at a flange adjoining the non-return valve. The pipe was removed and replaced and the vessel left San Pedro on January 19 and San Francisco on the 21st, arriving at Vancouver on the 24th.

There was evidence that the valves had been taken out in 1960 while the ship was in dry dock, but there was no evidence as to what was done with them or as to the condition of the pipe at that time. The gauge of the pipe was  $\frac{3}{8}$  of an inch and according to Captain Jeans, a Marine Surveyor who inspected the vessel at San Pedro on January 17, where the hole was, the metal was knife edge thin. The Court had the opportunity of inspecting the section of pipe in which the hole appeared, it being Exhibit 12 at the trial. A survey report by a classification surveyor for the Norske Veritas, the classification standards of which are similar to those of Lloyds, was also filed as Exhibit 15. He inspected

the vessel on January 17 and 18. His report reads in part as follows:

Water in Nos. 2 & 3 (common) hold due to a leak in the starboard soil pipe at the shell connection at approximate mid-length of No. 3 lower hold.

*Found*—Soil Pipe wasted and holed at flanged connection to overboard flap valve. Flap valve leaking and adjoining shut-off gate valve controlled from main deck also leaking.

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In my opinion from the whole of the evidence, assisted by an inspection of the exhibits, including the section of the pipe in which the hole appears, the cause of the damage was the corrosion of the sanitary pipe at the flange. It is clear that the pipe was badly corroded and that this corrosion existed to such an extent as to render the vessel unseaworthy at the inception of the voyage. Under these circumstances, I find that the vessel was unseaworthy at that time and that the damage was the result of such unseaworthiness.

The First Officer on his examination *de bene esse* gave evidence as follows:

- Q. How much water was there in the port and starboard bilges abreast of No. 3 hold on January 14th when you received this report?
- A. There was ninety-five centimetres on the port side and one hundred centimetres on the starboard side.
- Q. At that time were you aware that there must have been sea water entering the ship through some hole in either the ship's side or the pipes?
- A. Yes.
- Q. Is that something that you would expect if the vessel had been in sound condition when she left Labasa?
- A. No.

The condition of the pipe itself supports this evidence. As to the standard of seaworthiness I refer to *Gilroy, Sons & Co. v. Price & Co.*,<sup>1</sup> Lord Herschell, L.C. at p. 63:

Now, my Lords, I apprehend that those findings amount to a finding of unseaworthiness at the time when this vessel started on her voyage. Seaworthiness is thus defined by Lord Cairns, in the case to which I have already called attention:—"That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed. Now, my Lords, how is it possible to say that in that sense this vessel was seaworthy? Laden in that way, and being a ship such as she was, she had a pipe uncased in such a position and of such a character that if the ship rolled the water must be let in. That is a short statement of the facts; and

<sup>1</sup> [1893] A.C. 56.

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really to say that a vessel of which that, under the circumstances, is a proper description is seaworthy would be, as it seems to me, to reduce the definition of seaworthiness to an absurdity. Therefore, my Lords, it appears to me that the findings amount to a finding that the vessel was not seaworthy.

The valves were not examined after 1960. The evidence of inspection at that time is not satisfactory and in any event, that inspection, such as it was, was not sufficient to discharge the onus on the carrier of exercising due diligence under all circumstances.

Rennie, a Lloyds' surveyor, whose evidence I accept, stated in answer to a question by the Court referring to the date when the valves were taken out:

Q. Now, bearing those assumptions in mind, first of all what have you to say as to whether or not these, this sanitary discharge line would be a vulnerable spot in a ship?

A. I consider it very vulnerable, especially put in a long hold as described in this, and No. 2 and 3 holds around a sanitary discharge below the water line.

Q. And why do you say it is vulnerable?

A. Because the ship's side valve—

THE COURT: Q. Because what?

A. The ship's side valve, the gate valve, my lord, is below the water line, and the pipe discharges waste from bathrooms, toilets, pantry and other items, . . .

Q. Yes, it is said that the clapper disc in the non-return valve on this vessel had five  $\frac{3}{8}$  inch holes in it when it was inspected after the damage was found. What have you to say as to whether a valve in that condition is in fit condition so far as seaworthiness is concerned?

A. In my opinion the valve is not serving the functional purpose for which it is designed.

THE COURT: That isn't the question, I am sorry, Mr. Rennie.

MR. BIRD: Would you just read the question back.

THE REPORTER: "Q. It is said that the clapper disc in the non-return valve on this vessel had five  $\frac{3}{8}$  inch holes in it when it was inspected after the damage was found. What have you to say as to whether a valve in that condition is in fit condition so far as seaworthiness is concerned?"

A. I would add the valve was inefficient.

MR. BIRD: Q. Inefficient?

A. Is that sufficient, my lord?

THE COURT: Q. No, that isn't. Does it go to seaworthiness as counsel has asked you?

A. In that condition it reduces the efficiency of the valve, and so conduces, in a measure, a lack of seaworthiness.

Q. Conducting a lack of seaworthiness?

A. In a measure.

.....

Q. Now, remember the master of the "THOR I" said that it was the engineer's job to inspect, look after these valves. Assuming that is correct, would you, being an engineer on the vessel, consider it your duty to do anything about these valves before loading?

A. I consider it prudent, yes.

Q. Would you, as a matter of routine?

A. I think it should be done.

Q. And would you do it?

A. Yes.

Q. And did you ever do it yourself?

A. No, I never. When I was at sea I had no such similar case with valves in a hold.

Q. Apart from similar cases, you see Mr. Bird has put it up that this ship was loading, you see, and he doesn't suggest that you wouldn't know whether it was leaking or not at this stage; would you yet, being the engineer, and as far as you knew everything was running along as usual, would you go down and look at that valve and do something about it before loading, before the ship went off to sea?

A. I think so, yes.

Q. As a matter of routine you would inspect all valves?

A. Yes, my lord.

Q. And would inspect that valve?

A. Yes, my lord.

Q. Assuming there is no indication there was anything wrong with it?

A. I would feel it was my duty to open it and close it again to satisfy myself that it was satisfactory to operate before it was buried in cargo.

Q. I see. What about the other valve?

A. The other valve is a union valve, and it wouldn't be opened out except at periodic surveys.

.....

Q. Now, Mr. Rennie, I was directing your attention to this pipe, and you observed it some months ago, I believe, and we have heard about the heavy scale in it. Now, we also heard from the Master with respect to the fact that at Moore Dry Dock both valves were completely removed. Now, as a surveyor, a classification surveyor, with these valves removed, would you consider it, or what would you have to say about any inspection of the pipe itself?

A. I would consider that an excellent opportunity to examine the interior surface of the—

THE COURT: It doesn't need a marine surveyor to tell us that, Mr. Bird. "It would be an excellent opportunity". We can all see that. That is not the question.

Q. Having yourself taken this out, and you being the engineer in charge of all such matters, would you consider it your duty to inspect this sanitary line?

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A. Yes, my lord, an excellent opportunity.

Q. And would you consider it part of your duty to do so, and would you do it?

A. Yes, my lord.

In my opinion, the judgments of the House of Lords in *Riverstone Meat Co. Pty. Ltd. and Lancashire Shipping Co. Ltd.*<sup>1</sup> (the *Muncaster Castle* case) are applicable to the case at bar. The *Fiji Sea Carriage of Goods Order* of 1926 and the rules thereunder apply. These are similar to the rules under the Canadian statute, the *Water Carriage of Goods Act* and similar to the rules considered in the *Muncaster Castle* case, *supra*. The rules Article III, Rule 1 provide:

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,
  - (a) make the ship seaworthy;
  - (b) properly man, equip, and supply the ship;
  - (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article IV, Rule 1 reads as follows:

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph I of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

In my opinion the vessel being unseaworthy, the carrier did not exercise due diligence "to make the ship seaworthy" and the defendant has not discharged the onus resting on him to prove that such diligence was exercised, in the circumstances of this case, within the requirements of "seaworthiness" referred to by Lord Herschell, L.C.

In the *Muncaster Castle* case Lord Simonds stated at page 844:

. . . no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done.

At page 866 Lord Radcliffe quoted with approval from the 13th edition of Scrutton on Charterparties as follows:

<sup>1</sup> [1961] A.C. 807.

. . . The 13th edition of that work, published in 1931 and edited jointly by Mr. (later Lord) Porter and Mr. McNair (now McNair J.) makes the following comment on that article (p. 513, note (z)): "In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For . . . the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover, e.g., in the case of latent defects not discoverable by due diligence."

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There is no case, on the evidence here, of latent defect within the terms above quoted by Lord Radcliffe.

Lord Sterndale, M.R. in *The Dimitrios N. Rallias*<sup>1</sup> quoting Carver on Merchant Shipping, page 366:

It was suggested to us that the definition contained in a work of authority, Carver, gathered from American decisions, is a better statement of what is meant by latent defect. That definition is:—

A defect which could not be discovered by a person of competent skill and using ordinary care.

In this case I do not think it necessary to say whether that is the true and precise definition of latent defect which would meet every case. But I am prepared to say this, that a defect which does not comply at any rate with these words could not be a latent defect; and I think it is important in bearing in mind the effect of these words, . . .

On the evidence, I have no doubt that there were no proper inspections for the security of the cargo and that the weakness in the pipe could have been discovered had the simple precautions of ordinary care indicated by Rennie been taken. He gave the following evidence in answer to questions by the Court:

THE COURT: Q. I take it a pipe is like a human being; when he is born he starts to grow old,—

A. Yes, my lord.

Q. —and I suppose from the time that pipe was in there would be some evidence of some corrosion?

A. Yes, my lord. I would take a hammer to the pipe and see if I could detect any weak spots if the corrosion was sufficiently pronounced, and probably as a matter of routine.

MR. BIRD:

Q. And how could you tell? You say you would use a hammer. What can you tell from that?

A. Well, even the parts in any steel structure have a different tone, or note, than a thick and solid part.

MR. BIRD: Yes.

THE COURT: Q. I am trying to reduce these matters to homely terms. I suppose it's like hammering a wall to see where the studding is to hang a picture?

A. Exactly the same thing, my lord.

<sup>1</sup> (1922-23) 13 L.L.R. 363.

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MR. BIRD:

Q. So if there were any weaknesses there you could detect it by the hammer test?

A. I believe so, my lord.

The evidence of Larsen, the Chief Officer, taken *de bene esse* makes it clear that no routine or proper inspections of the pipe line were made.

See also *Canadian Transport Co. v. Hunt, Leuchars, Hepburn Ltd.*<sup>1</sup> Sidney Smith D.J.A. at pp. 656-7.

The duty of the carrier as to inspections is well set out by Lord Radcliffe in the *Muncaster Castle* case at page 867:

It is plain to me that this conclusion turns on the consideration that the causative carelessness took place at a time before the carrier's obligation under article III (1) had attached and in circumstances, therefore, when the builders and their men could not be described as agents for the carrier "before and at the beginning of the voyage to . . . make the ship seaworthy." This is a tenable position for those who engage themselves upon the work of bringing the ship into existence. The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put it right. This is recognized in the judgment. But if the bad work that has been done is "concealed" 118 *Ibid* 462, and so cannot be detected by any reasonable care, then the lack of diligence to which unseaworthiness is due is not to be attributed to the carrier.

Some evidence was given as to whether or not the pipe had been galvanized in accordance with the original classification rules, but in view of the opinion I have of the matter that due diligence was not exercised by the carrier this question is not of importance.

I do not think that the damage was caused by any error of ship builders but because of the lack of due diligence on the part of the owners. The evidence showed that there was little or no inspection and that whatever inspection was made falls short of the exercise of diligence in the circumstances.

It was argued by counsel for the defendant that the errors were errors in handling, in management, and not errors connected with the cargo. It is my opinion that the errors are not errors which fall within the words "management of the vessel" and indicate a direct want of care in respect of the cargo. As the sanitary line ran through the hold used by

<sup>1</sup> [1947] 2 D.L.R. 647.

the carrier to stow the cargo of sugar, a commodity particularly susceptible to damage from leakage, the due diligence which should have been exercised regarding the pipe line was diligence required with respect to cargo. I find little difference between the lack of diligence which existed in the *Muncaster Castle* case and the lack of diligence existing in the case at bar, and with respect, I am satisfied that what was involved here was a "want of care of the cargo" and not a "want of care of the vessel indirectly affecting the cargo", to use the words of Lord Hailsham L.C. in *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine*<sup>1</sup>.

With respect I think also that the words of Greer L. J. in the *Gosse Millera*<sup>2</sup> case in the Court of Appeal as quoted by Smith D. J. A. in *Kalamazoo Paper Company et al v. C.P.R. Co. et al*<sup>3</sup> are in point:

Further, I think it is incumbent on the Court not to attribute to Art. IV, r. 2(a), a meaning that will largely nullify the effect of Art. III, r. 2, unless they are compelled to do so by clear words. The words "act, neglect or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III, r. 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last-mentioned rule. In my judgment, a reasonable construction of the Rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV, r. 2(a). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Art. IV, r. 2(a), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of Art. IV, r. 2(a), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes.

Lord Sumner in concurring with the judgment of Greer L. J. who had dissented in the Court below, but who was upheld

<sup>1</sup> [1929] A.C. 223 at 233.

<sup>2</sup> [1928] 1 K.B. 717.

<sup>3</sup> [1949] Ex. C.R. 287 at 297.

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in the House of Lords said in *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine*, supra at p. 236 of the report:

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My Lords, for the following reasons I am unable to accept either of their views. I concur in the judgment of Greer L.J. The intention of this legislation in dealing with the liability of a ship owner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption. If management of the ship includes any part of the ship or any operation with regard to the ship as a whole, which is carried out for ship's purposes and not merely in relation to cargo, I think that the shipowner's position would be certainly no less favourable than it was before under voluntary bills of lading and probably more so; for on this construction the obligation of Art. III., r. 2, to take care of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect, and to my mind they are not.

In my opinion the judgment of Greer L. J. and the concurring judgment of Lord Sumner are in the circumstances of this case, conclusive against the submission of the defendant that the negligence of the carrier was an error in management of the vessel, only indirectly affecting the cargo.

There will be judgment for the plaintiff as claimed and a reference to the Registrar to determine the quantum of damages.

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BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

McKEEN & WILSON LTD. . . . . PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. }  
and RAYMOND McCULLOUGH . . . } DEFENDANTS.

*Shipping—Discovery—Oral examination of officer of corporation—British Columbia Supreme Court Rules, Order XXXIA, Marginal Rule 370c—Whether officer bound to inform himself of matters not within his personal knowledge.*

In an action for negligence causing damage to a barge an officer of plaintiff corporation was examined for discovery under Order XXXIA

of the British Columbia Supreme Court Rules. He declined to answer certain questions on the ground that the matters were not within his personal knowledge. The defendant moved for an order to compel him to answer the questions.

*Held:* Since the 1960 amendment to the applicable Rule (Marginal Rule 370cc) an officer of a corporation on examination for discovery may be required to inform himself of the matters in question from the corporation's records and from other officers and servants of the corporation. (*Brydone-Jack v. Vancouver Printing and Publishing Co. Ltd.*, (1911) 16 B.C.R. 55, explained.)

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APPLICATION by defendant company for fuller discovery by officer of plaintiff.

The application was heard by the Honourable Mr. Justice Norris, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

*Robert J. Harvey* for plaintiff.

*C. C. I. Merritt, Q.C.* for defendant Gulf of Georgia Towing Co. Ltd.

*V. R. Hill* for defendant Raymond McCullough.

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

NORRIS D.J.A. now (September 22, 1964) delivered the following judgment:

This is a motion on behalf of the Defendant Gulf of Georgia Towing Co. Ltd. for an order "that Robert P. Husband, an officer of the Plaintiff Company, search the documents in the Plaintiff Companies' possession and power relating to the matters in question in this action and inform himself so as to be able to answer the questions put to him; and to so answer the questions put to him on this issue numbered 49, 50, 57, 92, 96, 98, 100, 101, 103, 104, 106, 107, 109, 126, 127, 128, 129, 131, 138, 159, 160, 163, 164, 181, 197, 200, 202, 203, 204, 205, 206, 211, 212, 213, 214, 216, 223, 224, 229, 236, 237, 238, 239, 250, 252, 253, 254 and 291, in the Examination for Discovery of Robert P. Husband, and failing this and in the event that he still refuses to do so, the Writ and Statement of Claim be struck out and the action dismissed." The motion is supported by counsel for the defendant McCullough.

Counsel for the defendants submit that the officer of the plaintiff company, Husband, was tendered for examination

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on discovery as being the sole person representing the plaintiff company capable of giving adequate discovery, that this is not a case of the examination of a witness with limited knowledge of the company's affairs and whose lack of knowledge on examination could be remedied by the examination of another officer on order of the Judge and that as all questions are relevant to issues which appear on the pleadings, all the questions should be answered. Counsel for the defendant Gulf of Georgia Towing Co. Ltd. further agreed that if this Court ordered that questions 92, 96, 98, 100, 101, 103, 106, 107, 109, 128 and 129 be answered, Husband informing himself as to the matters referred to therein, then the said defendant would withdraw the application to the extent that it asked for an order in respect of questions 236, 237, 238 and 239.

Counsel for the plaintiff in his argument divided the questions into seven groups. It will be convenient to deal with the application following such grouping.

1. GROUP ONE: Q. 49-50, 163-164:

Counsel for the plaintiff argues that the question as to whether the defendants knew or should have known that Barge No. 43 was owned by McKeen & Wilson Ltd. is irrelevant.

In paragraph (1) of the Statement of Claim the plaintiff alleges that it was the owner of Barge 43 which it was alleged was damaged by the negligence of the defendants. In another action by the Straits Towing Ltd. against the same defendants the same barge is referred to as the barge of the plaintiff in that action. These actions have now been consolidated for the purpose of trial.

There is no doubt in my mind that the questions objected to may raise matters which are relevant to issues raised on the pleadings. This is all that the defendants are required to show. As to whether or not they are relevant and admissible at the trial is a matter for the learned trial Judge.

See *Tisman v. Rae*<sup>1</sup> Bird J.A. at p. 81; *Lawryshyn v. Aquacraft Products Ltd.*<sup>2</sup> and cases cited by Aikins J. at pps. 343-4.

<sup>1</sup> [1946] 4 D.L.R. 78.

<sup>2</sup> (1963) 42 W.W.R. (N.S.) 340.

2. GROUP TWO: Q. 57, 92 and 96, 98, 100, 101  
103-4, 106-7, 109, 129-131  
138, 211-213, 216, 229.

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Counsel for the plaintiff submits that under the authority of the majority judgment of the Court of Appeal of British Columbia in *Brydone-Jack v. Vancouver Printing and Publishing Company, Limited*<sup>1</sup>. Husband being an officer of the plaintiff company being examined under Order XXXIA of the Rules of the Supreme Court of British Columbia, might not be ordered to inform himself of matters not within his personal knowledge. He also relied on *Dudley v. C.P.R.*<sup>2</sup>; *Haswell v. Burns & Jackson Logging Co. Ltd.*<sup>3</sup>; *In re Electric Power Act*<sup>4</sup>. He alleged that the judgment of Whittaker J. in *Dallas v. Dallas*<sup>5</sup> was distinguishable.

The judgments in the first three of these cases were based on the majority judgment in the *Brydone-Jack* case. In *Dallas v. Dallas*, Whittaker J. said at p. 324 of the Report:

Counsel for the defendant, however, relies upon a decision of the court of appeal of this province, *Brydone-Jack v. Vancouver Printing and Publishing Co Ltd.*, (1911) 16 WLR 262, 16 B.C.R. at 55. In that case Macdonald, C.J.A. with whom Galliher, J.A. agreed, held that a witness, an officer of a company, being examined for discovery, may not be ordered to inform himself of the knowledge of his fellow-officers touching the issues in the action. Irving, J.A. delivered a dissenting judgment. The court held that, following the English practice, the witness could be so ordered if the discovery were by way of interrogatories. No doubt this decision, unless and until reviewed by the court of appeal, would bind this court where the witness is being examined as an officer of a corporation. Any remarks of the learned Chief Justice which may be construed as applying to discovery generally were not necessary for the decision and with the greatest respect, should, I think, in view of the great volume of authority to the contrary, be regarded as *obiter*.

The defendant in this case carries on his business through the agency of Bradley Oils Corp'n. Ltd, a company which he controls. The company is defendant's servant or agent.

If relevant information is not within a party's personal knowledge but is within the knowledge of his servant or agent, derived in the course of the employment, the party must make reasonable efforts to obtain the information: *Bolchow v Fisher* (1882) 10 QBD 161, 52 LJQB 12; *Horton v. MacLean* (1911) 2 O.W.N. 804, and 1493; *Vanhorn v. Verral* (1911) 3 O.W.N. 439; *Bondar v. Usinovitch* (1918) 1 W.W.R. 557, 11 Sask L.R. 64; *Burns v. Henderson* (1918) 1 W.W.R. 885; *Culver v. Lloydminster (Town) and Flint & Stephenson* (1928) 1 W.W.R. 406, 22 Sask L.R. 314.

<sup>1</sup> (1911) 16 B.C.R. 55.

<sup>2</sup> (1963) 42 W.W.R. 60.

<sup>3</sup> [1947] 2 W.W.R. 394 at 397.

<sup>4</sup> [1949] 1 W.W.R. 75 at 78.

<sup>5</sup> (1961) 34 W.W.R. 322.

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I make no reference to the cases in which it has been held that a person under examination as an officer of a company must obtain from his fellow-officers relevant information not within his own personal knowledge.

He directed that the defendant inform himself. It is to be noted that in *Brydone-Jack v. Vancouver Printing and Publishing Company Limited, supra*, Macdonald, C.J.A. said at p. 57:

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I have no doubt that the English practice should prevail here, where discovery is sought by means of interrogatories under our rule in that behalf. On the other hand, I do not think that that practice is applicable on the point here involved, where discovery is sought by oral examination under Order XXXIA. Even if we had not the English rule of practice in addition to that in the above mentioned order, I should hesitate to follow the Ontario practice. The oral examination is expressly declared to be subject to the rules of examination applied to a witness, and I do not think that a witness may be ordered off the witness stand to inform himself concerning the knowledge of his fellow servants or agents, so that he may return and give evidence based on the information so obtained.

In his dissenting judgment Irving J.A. made it clear that the decision turned on the wording of Marginal Rule 370C as it then was. At p. 58 and 59 he said:

The difficulty is raised by the use of the expression in Rule 370c. (1) "He shall testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness"—and it is said that a witness is not required to go away and ascertain a lot of facts of which he knows nothing—but I think that full effect may be given to those words by regarding them as laying down directions for the conduct of the examination itself, and not to the preparation for it, nor as to the principle which should govern the scope of it.

That the issue turned on the words as quoted by Irving J.A. is supported by the note of the argument of E. P. Davis K.C. contained on p. 56 of the Report as follows:

*Davis*, in reply: The system here is that the examination is to be the same as at a trial, therefore the witness could not be compelled to give hearsay evidence.

At the time of the *Brydone-Jack* decision the rule as to discovery by a corporation read as follows:

370c. In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination may be used as evidence at the trial if the trial Judge so orders.

However, when the rules were amended in 1960 to become effective in 1961 the words quoted in the *Brydone-Jack* case

and which were the foundation for that decision were deleted as affecting corporations. Marginal Rule 370cc, Order XXXIA(2) now reads:

Where a corporation is a party to an action or issue, any person who is or has been an officer or servant of a corporation (other than the external auditor of the corporation) may, without order, and the external auditor of the corporation may, by order of a Judge, be orally examined before trial touching the matters in question by any party adverse in interest to the corporation.

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It is fair to assume that the reason for the change was that it was realized that the result of the *Brydone-Jack* decision was not reasonable, as an officer of a corporation put forward for examination on discovery as representing the corporation, would often have no personal knowledge of matters in question in the action. Knowledge of these matters on the part of other officers or servants would be imputed to the corporation as the corporation as such could have no personal knowledge. The officer to be examined representing the corporation, could in such cases, have only such knowledge as he might gain from the company records or from other officers or servants and, therefore, should inform himself through such sources. Support is given for this assumption by the trend of decisions of this Court since the *Brydone-Jack* case, holding that hearsay evidence is permissible on discovery which would not be admitted on trial. See *Haswell v. Burns & Jackson Logging Co. Ltd.*<sup>1</sup>, Robertson J.A. at 395-6; *Trans-Canada Forest Products Ltd. v. Heaps, Waterous Ltd.*<sup>2</sup>, Bird, J.A. at 441-2. This last case was a case of interrogatories, but on this point the principle as enunciated by my brother Bird is the same.

Counsel before the Court on this application did not argue the important change in the Rule and with respect, it would appear that in the cases in the Supreme Court of this province since the 1961 amendment came into force viz.: *Dallas v. Dallas* and *Dudley v. C.P.R.* neither the change in the Supreme Court Rules nor the effect of the same on the authority of the judgments in *Brydone-Jack v. Vancouver Printing and Publishing Company Limited*, *supra*, were drawn to the attention of the learned Supreme Court Judges presiding. In *Dallas v. Dallas* the learned Judge was not required to deal with the question which arises on this motion.

<sup>1</sup> [1947] 2 W.W.R. 394.

<sup>2</sup> [1950] 2 W.W.R. 433.

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In my respectful opinion, in view of the amendment of 1960 as it appears from the 1961 Rules, the *Brydone-Jack* case is no longer a binding authority on the question as to the right to require that an officer of a corporation presented for examination under Marginal Rule 370cc of the Supreme Court Rules, inform himself on the matters in question in the action.

In addition to the foregoing it is to be noted that if the submission of the plaintiff were sound, British Columbia would be the only Province in Canada which on the matter of examinations for discovery, did not follow the English practice in the case of interrogatories and the Ontario practice as to examinations for discovery. In these circumstances I may say with the greatest respect, that as District Judge in Admiralty, I would not follow the judgment of Macdonald C.J.A. in the *Brydone-Jack* case. I find the dissenting judgment of Irving J.A. in that case convincing.

3. GROUP THREE: Q. 159-160, 197-206:

Counsel for the plaintiff submits that it is not relevant to ascertain whether the plaintiff knew or should have known the contractual terms between the tugboat owner and the scow charterer, as an answer in the affirmative would not affect the liability of the defendants in the action.

The remarks made as to the objection to answer the questions in Group One apply equally here. I draw attention particularly to the judgment of Hunter C.J. in *Hopper v. Dunsmuir*.<sup>1</sup>

4. GROUP FOUR: Q. 126, 127, 180-181, 291:

Counsel for the plaintiff submits that the examining solicitor cannot conduct a discovery of documents on the examination, and he refers to the fact that there is no applicable Admiralty Rule and relies on Rule 307J. of the Supreme Court Rules.

This objection is, in my opinion, a trifling one and, in any event, the questions would appear to be proper ones in an effort to obtain the admission referred to in Marginal Rule 370J. The questions are such as may raise matters which are

<sup>1</sup> (1903) 10 B.C.R. 23 at 28

relevant to issues raised on the pleadings within the terms of the judgments in *Hopper v. Dunsmuir (No. 2)* and *Tisman v. Rae, supra*.

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5. GROUP FIVE: Q. 223-224 incl.

Counsel for the plaintiff submits that these questions deal with damages, that it does not lie in the mouth of the witness to assess damages, that the witness is not a legal man and not qualified or required to assess the damages and that the examining solicitor should merely ask questions which will enable him to have the damages assessed.

This again is a trifling objection. There is no doubt that the questions were quite clear and proper. They did not tend to confuse or mislead the witness and such is not the objection.

6. GROUP SIX: Q. 236-239 incl.:

Upon answers being given to questions 92, 96, 98, 100, 101, 103, 104, 106, 107, 109, 128 and 129, there will be no order as to these four questions.

7. GROUP SEVEN: Q. 250, 252-254 incl.:

Counsel for the plaintiff submits that the questions asked are as to the opinion of the plaintiff and cannot be asked on discovery even although they might be asked on trial. He submits that the questions are tantamount to saying, "In what respect do you say that we were negligent", and that such is the function of pleadings and particulars. He cites an unreported judgment of Maclean J. in the Supreme Court of British Columbia in *British Columbia Forest Products Ltd. v. Yarrows Ltd.* delivered on April 27th, 1964 and the judgment of Coady J. in *Ball et al v. British Columbia Electric Company Limited*.<sup>1</sup> In both these cases the questions asked were pure questions of opinion, and with respect, were properly excluded. In the present case, as counsel for the plaintiff submits, what is being asked is, "In what respect do you say we were negligent". Matters covered by questions such as this are undoubtedly referred to in the pleadings and particulars, but this does not render the questions objectionable. The case is rather the reverse. The questions are not as to the opinion of the witness as an expert, but as representing the corporation and as to its claim in the action.

<sup>1</sup> (1951-52) 4 W.W.R. 478.

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The witness Husband must inform himself on the matters referred to in all the questions set out in the motion paper save the questions in Group Six, and will attend at his own expense before the Registrar, on appointment given by him, and will answer such questions.

The defendants will have their costs of the motion and of the further examination in any event of the cause.

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BETWEEN:  
 SAMUEL DUBINER ..... PLAINTIFF;

AND

CHEERIO TOYS AND GAMES LTD ..... DEFENDANT.

*Contempt of Court—Breach of terms of injunction—Breach of injunction by corporation and President thereof—Contumacious disregard of order of Court—Order for sequestration—Order for committal for contempt—Penalty for contempt of Court—Apology to Court.*

This is an application for an order committing Albert Krangle, the President of the defendant, to prison for his contempt in disobeying the judgment of this Court dated July 29, 1964, or, alternatively, granting the plaintiff leave to issue a writ of attachment for the said Albert Krangle, for leave to issue a writ of sequestration against the estate and effects of Albert Krangle and the defendant because of this breach of the injunction and of the order for destruction and delivery up and for an order requiring the said Albert Krangle and the defendant to answer for the plaintiff's costs arising from the defendant's acts in breach of the judgment and injunction contained therein.

By the terms of the judgment the defendant was enjoined from infringing the plaintiff's trade marks and was required to deliver up to the plaintiff all infringing articles in its possession, or to destroy them. The judgment further provided that if the defendant could remove the labels or other inscriptions on the infringing articles, the injunction would be stayed for one month in order to permit it to do so.

The evidence established that the defendant in fact dealt with the infringing merchandise after the date of judgment and after the expiration of one month from the date of judgment.

*Held:* That the President of the defendant, Albert Krangle, has chosen to discharge his duties with regard to having the defendant comply with the terms of the judgment of this Court, with a casualness, a carelessness, a neglectfulness, which borders on dereliction and which, in itself, apart from the outright breach of the injunction, contains some measure of contumacy.

2. That the conduct of Mr. Krangle and of the defendant corporation is not to be considered as a casual or accidental and unintentional disobedience to the order of the Court and that a contempt of Court has been committed and its order has been contumaciously disregarded.

3. That the defendant and Albert Krangle shall be jointly and severally liable for the payment of the costs of this application and of a fine of \$1,000 00.
4. That there will be made an order for sequestration against the defendant and Krangle, which shall issue only if the fine of \$1,000 and the costs of this application which are fixed at \$500 are not paid within 30 days of the date of this judgment.
5. That a committal order will be made against Albert Krangle, under which he shall be imprisoned in the common gaol of the County of Carleton for a period of 30 days, but this order shall issue only if the said Albert Krangle has failed to appear before this Court within a period of 30 days from the date of this judgment, to tender a suitable apology for his conduct in breaching the order of this Court.

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APPLICATION for order to commit for contempt.

The application was heard by the Honourable Mr. Justice Noël at Ottawa.

*Weldon F. Green* for the application.

*David Watson* and *E. A. Foster contra.*

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

NOËL J. now (April 5, 1965) delivered the following judgment:

This is an application for orders (a)(1) committing Albert Krangle, President of the defendant herein, to prison, for his contempt in the disobedience of the judgment rendered by this Court on July 29, 1964, or (2) in the alternative, granting the plaintiff leave to issue a writ of attachment for the said Albert Krangle; and (b) granting the plaintiff leave to issue a writ of sequestration against the estate and effects of the said Albert Krangle and the defendant corporation by reason of its breach of the injunction and the order for destruction and delivering up herein; (c) requiring the said Albert Krangle and the defendant jointly and severally to answer for the plaintiff's costs in full, arising from the defendant's acts referred to in the preceding paragraphs; (d) requiring the said Albert Krangle and the defendant, jointly and severally, to answer for the damages sustained by the plaintiff arising from the defendant's acts; (e) exemplary damages and (f) such further relief as this honourable Court deems just.

The reasons for judgment in the present case, which the defendant and its president is alleged to have contravened,

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were issued on July 29, 1964, the pertinent conclusions of which read as follows:

There will also be judgment in favour of the plaintiff that the following trade marks Yo-Yo (N.S. 94/24465), Bo-Lo (N.S. 48/12848), 99 (N.S. 83/21541) and PRO (N.S. 85/22066) have been infringed by the defendant company, and for the injunction sought by him restraining the defendant company by its servants, agents or workmen or otherwise from further infringement of the above mentioned trade marks and an order for the delivering up to the plaintiff all infringing articles in the possession or control of the defendant or that the said infringing articles be destroyed under oath unless the defendant corporation can remove the labels or other inscriptions on the infringing articles in which case the said injunction shall be stayed for one month to enable it to perform this operation.

The minutes of the said judgment were settled only on October 7, 1964, and they, in brief, read as follows:

THIS COURT DOTH ORDER AND ADJUDGE: that the trade marks Yo-Yo, registered under No. N.S. 94/24465, Bo-Lo, registered under No. N.S. 48/12848, 99, registered under No. N.S. 83/21541, Pro, registered under No. N.S. 85/22066 and Tournament, registered under No. N.S. 85/22096 have been infringed by the defendants;

That the defendant by its servants, agents, workmen or otherwise be and it is hereby restrained from further infringement of the above trade marks Yo-Yo, Bo-Lo, 99, Pro and Tournament;

That the defendant deliver up to the plaintiff all infringing articles in the possession or control of the defendant or that the said infringing articles be destroyed under oath unless the defendant can remove the labels or other inscriptions on the infringing articles in which case the said injunction shall be stayed for one month to enable the defendant to perform this operation;

That the defendant do, within ten days after the date of service of this judgment upon the defendant, make and file an affidavit by an officer of the defendant stating the number and kind of articles at August 29, 1964, in its possession or control and marked with the trade marks Yo-Yo, Bo-Lo, 99, Pro and Tournament and serve a copy of such affidavit forthwith upon the plaintiff;

That the defendant do within ten days after the date of the filing of the said affidavit deliver up to the plaintiff those articles in the possession or control of the defendant at August 29, 1964, bearing the trade marks Yo-Yo, Bo-Lo, 99, Pro and Tournament or that the said articles be destroyed and in the latter case the destruction of the said articles be established by an affidavit of an officer of the defendant to be made and filed and a copy served upon the plaintiff within the said ten days.

On September 17, 1964, the defendant filed a notice of motion that an application would be made to this Court on September 24, 1964, for an order staying the injunction and the proceedings pending the outcome of the appeal taken by the defendant to the Supreme Court of Canada. This notice of motion was supported by an affidavit of Mr. Albert Krangle, President of the defendant company, dated September 18, 1964, wherein the affiant relates the action taken

by the plaintiff herein and the judgment of this Court, dated July 29, 1964, specifically stating that the Court held that the marks Yo-Yo and Bo-Lo could no longer be used by the defendant, that such use would constitute infringement and that the defendant was to be restrained by injunction of any future use thereof, and the said Albert Krangle was cross-examined on his affidavit on September 23, 1964.

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Upon application of the plaintiff on October 1, 1964, the said Albert Krangle was *inter alia* ordered to attend before the Registrar of this Court, at his own expense, and be further examined on his affidavit of September 18, 1964, and that he fully inform himself of the following matters and answer questions relating thereto:

1. The number and kind of articles in the possession, power or control of the defendant at the time of the pronouncement of judgment in this action bearing the trade marks YO-YO, BO-LO, PRO, 99 and TOURNAMENT.
2. The number of return tops bearing the trade mark YO-YO to which the labels referred to in his answers to Questions 20, 21, 22, 23, 24, 25, 26 and 27 of his cross-examination on the said affidavit dated the 23rd day of September, 1964, were applied.
3. The number of return tops bearing the trade mark YO-YO that were sent to the defendant's agents since the date of pronouncement of judgment in this cause on July 29, 1964.
4. The number of return tops disposed of, distributed or sold by the defendant itself or by its agents since July 29th, 1964, and the place or places of such disposition, distribution or sale.

AND IT IS FURTHER ORDERED that the Defendant produce to the Plaintiff forthwith for the purpose of inspection and taking copies, and at the continuance of the cross-examination of Albert Krangle all documents in its possession, power or control relating to its use of the trade marks YO-YO and BO-LO, PRO, 99 and TOURNAMENT since the date of the pronouncement of judgment in this action, and particularly documents relating to the manufacture, disposition, distribution, use, sale or advertisement of wares by the defendant in association with the said trade marks;

AND IT IS FURTHER ORDERED that the Defendant produce at the continuance of the cross-examination of Albert Krangle and deposit with the Court a sample of each class or category of return top bearing the trade mark YO-YO or bat bearing the trade mark BO-LO, and wares bearing the trade marks PRO or 99 or TOURNAMENT in the possession, power or control of the defendant at August 29th, 1964, and at any subsequent date therefrom;

On October 14, 1964, the defendant produced a further notice of motion that an application would be made to this Court for an order extending the period of delivering up to the plaintiff of infringing articles in the possession or control of the defendant and permitting the defendant within such

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extended period to remove the labels or other inscriptions on the infringing articles or otherwise rendering them non-infringing and produced an affidavit dated October 15, 1964, to the effect

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...that during the stay period of 30 days provided in the reasons for judgment of the Honourable Mr. Justice Noël, the defendant company endeavoured to render non-infringing the articles in his possession found by the Court in the said judgment to infringe the trade marks of the plaintiff named therein. The defendant rendered such articles non-infringing by the use of a gummed label which it affixed to the return tops for the purpose of concealing from the public any infringing trade marks inscribed thereon. For this purpose, the defendant ordered a number of labels, exhausted its supply of labels and expected a further supply shortly. In the meantime, in the absence of labels, the defendant has been unable to render all the infringing articles non-infringing. Similarly, the defendant has ordered new labels to replace those of its stocks or BO-LO merchandise but such labels were not received during the said 30-day period and, accordingly, the defendant for that reason was unable to comply with the 30-day period and requires a further period of time for the purpose of rendering its BO-LO bats non-infringing.

This request for an extension of time was not granted and the plaintiff was then permitted to cross-examine the President of the defendant company, Mr. Albert Krangle on his affidavits dated September 18, 1964, October 15, 1964, October 23, 1964, as well as on two affidavits dated November 2, 1964. This cross-examination of Mr. Krangle on his affidavits in support of his applications, as well as on those dealing with the delivering up of the offending wares disclosed that although he admits having received a copy of the reasons for judgment in the present case around August 4 or 5, 1964, he did not abide by the said judgment and caused to be distributed, advertised or sold in Canada by the defendant since the date of the said judgment, articles and wares marked with the trade marks Yo-Yo, Bo-Lo and Pro; he also failed to direct the removal from the articles in the possession, power and control of the defendant in the month following the pronouncement of the said judgment of the said trade marks and instead directed and applied or caused to be applied, even after August 29, 1964, September 18, 1964 and September 23, 1964, labels or stickers over the imprint of the said trade marks on certain of the said articles and then directed and/or caused to be distributed, advertised and sold in Canada by the defendant, the said illegally labelled articles as appears from Exs. 43, 44, 45 and 46 which Mr. Krangle admitted had been labelled and shipped after September 23, 1964.

He also after the date of August 29, 1964, and September 23, 1964, and even up to October 20, 1964, directed and or caused to be erased, struck out, cut off, or in other ways defaced the trade marks Yo-Yo, Bo-Lo and Pro on certain articles in the possession, power or control of the defendant as appears from Ex. B, filed December 4, 1964, and particularly from a letter dated September 23, 1964, addressed to H. H. Marshall Co. Ltd., of Halifax, where he directs:

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Please cut off from your Big "C" window banners the words YO-YO which appear on the bottom of same and supply these new revised banners to the individual accounts.

and also from a letter dated October 20, 1964, addressed to Mr. Krangle by Mr. Schimpf of H. H. Marshall Ltd., of Halifax, wherein it is stated:

As instructed by your Cheerio representative, Mr. Ronald Henri, we had a couple of our employees go through all of the replacement stock shipped by you and removed the units containing the word YO-YO *and removed the word YO-YO from the boxes by cutting the same off with scissors.* We enclose herewith our invoice to cover the cost of the time amounting to \$60.16. We would appreciate your crediting this amount to our account and oblige. (The emphasis is mine)

He further, as president of Contest Toys Limited, an associate of the defendant herein, caused to be distributed, advertised and sold in Canada by the said Contest Toys Limited, since the date of the judgment herein, articles marked with the trade mark YO-YO; and as manager of Dulev Plastics Limited, a corporation owned by his wife, he caused to be advertised, distributed and sold by the corporation since the date of the judgment herein, articles marked with the trade mark YO-YO and arranged for broadcasting throughout the eastern and western provinces, television films in association with which the trade mark YO-YO is displayed or spoken, although in the case of Contest and Dulev, I must say that he did what he could, after his cross-examination of September 23, 1964, to withdraw from trade the offending articles.

Mr. Krangle was called upon to give reasons why he did not comply with the injunction nor with the judgment of the Court which he explained as follows: He admitted, as we have seen, that he had received copy of the judgment on August 4 or 5, 1964, but at p. 9 of the transcript of his cross-examination of September 23, 1964, he stated:

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A. ... I was evidently, under the erroneous impression until this morning, that by virtue of the fact that we are appealing the case, the judgment would automatically be stayed until the appeal had been dealt with. I learned, to my surprise, this morning from Mr. McClenahan, this is not the case, and so we are making all due haste to correct any merchandise we have still on hand, and we have advised the distributors in Halifax and other areas, to return—to pick up all merchandise and return it to us, and that it would be replaced with merchandise that is non-offending. This applies, as well, to banners and so on.

And at p. 10 of the transcript of September 23, 1964, he was asked the following question:

Q Did you make any other shipments after the date of July 29, 1964, that might have had offending merchandise?

A. We made shipments in connection with the promotions which we planned as far back as May and June, under the mistaken assumption that the appeal in itself would stay the decision until such time as the appeal had been dealt with.

And at p. 11:

A. I don't know the date of the notice of appeal. I had been given, possibly erroneously, to understand that the actual judgment had not—did not take effect until the Court sat on September 1st, and since they advised me that we had thirty days from that date then, I was of the mistaken opinion I found, that we had until the end of September in which to correct any merchandise.

And at p. 35:

Q. And that prohibition from July 29th, in your knowledge, 1964?

A. In my knowledge it ran from September 1st, which I understood was to commence, that is September 1st, for thirty days, and if the matter were appealed, then this matter would be deferred until the Court had heard it, and come down with a decision.

Q. From whom did you get that information?

A. Well, it was more or less what I had been given to understand, and possibly I misunderstood, but Mr. Kilgour indicated to me that the time for appeal ran from September 1st, for a sixty day period. I therefore, assumed that if the time for appeal ran for sixty days from September 1st, that the judgment commenced from September 1st. As I was aware of the reasons for judgment, I didn't see any judgment. That, I think was the cause of my misunderstanding.

And at p. 176:

Q. What other information would you have had from Mr. Kilgour?

A. I have the copy of the reasons for judgment, that is all I have seen.

Now although the judgment provided a procedure of destruction or delivering up of the offending articles in the power and control of the defendant

...unless the defendant corporation can remove the labels or other inscriptions on the infringing articles in which case the said injunction shall be stayed for one month to enable it to perform this operation ...

the defendant here again was under the false and erroneous impression that he could merely stick labels (which could be removed) over the inscribed trade marks and thereby comply with the judgment of the Court. He gave no explanation, however, as to his authority to relabel the wares in that fashion after the expiry of the month given for this purpose by the judgment and which expired on August 29, 1964, and Exs. 43, 44, 45 and 46 show that a mere sticker was placed over the inscription of the trade mark YO-YO even as late as subsequent to September 23, 1964.

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The explanation given by Mr. Krangle that it was only on the morning of September 23, 1964, when he was called upon to be cross-examined on his affidavit of September 18, that he was told and heard that the appeal to the Supreme Court of Canada did not stay the judgment can hardly be relied on when one considers this man's sworn affidavit of September 18 wherein it appears that he refers to the judgment of this Court and particularly to the fact that:

as of December 28, 1963, the defendant was no longer a permitted user and

that any use of the plaintiff's trade marks by the defendant thereafter would constitute an infringement and that the defendant was to be restrained by injunction from any future use,

and then concluded by stating that:

The defendant earnestly desires to proceed with its appeal to the Supreme Court of Canada as quickly as possible but in the meantime the defendant will experience considerable hardships in its promotional activities if it is *unable to use the trade mark YO-YO and BO-LO pending the said appeal*

and that:

the defendant to keep its business going must proceed with its promotional campaign during the pendency of the said appeal and will be forced for its forthcoming campaigns *to employ other trade marks than YO-YO or BO-LO if the injunction of this Court is not stayed during the appeal* and the benefit of a successful appeal would be largely lost if the defendant has in the meantime been forced to establish and make known a new trade mark in association with its business. (the emphasis is mine)

His answer with regard to the above affidavit, at p. 296 of the November 4, 1964, cross-examination, is not only unreasonable but I may add incredible:

1152. Q. Mr. Krangle, did you not understand at the date that you swore this affidavit that an application was being made to the Court to stay the injunction? In other words, to permit your

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company to go ahead and use the trade mark "YO-YO" and "BO-LO" which, on the orders, you couldn't do it, you did not understand that ...

A. No, sir.

Q. At the date you swore that affidavit?

A. No, sir. I did not understand that.

And at p. 297:

1156. Q. Why did you give your instructions to make an application of this kind if you understood that you could go ahead and use the trade mark? Why would you instruct ...

A. I am not sure ...

The above explanation of Mr. Krangle in itself is most unconvincing, however, his cross-examination not only on his affidavits in support of his applications but also on those in connection with the defendant's obligation to deliver up the offensive wares discloses other matters from which it appears that he knew from the date of judgment that he could no longer use the said trade marks of the plaintiff.

From page 3 of his examination of September 23, 1964, it indeed appears from his answers that he must have understood the prohibition of the judgment:

11. Q. Can you give some indication of the date in August in which you would have read the judgment?

A. Well, it would be somewhere around the 4th or 5th day in August, thereabouts.

12. Q. Do you recall what the Defendant Company did on that day to comply with the judgment, if anything?

A. My recollection is that we immediately started to check over all of our merchandise with a view to eliminating any of the offending wares.

He also knew that he could not, after August 29, 1964, relabel or correct the wares but he nevertheless, after those dates, in addition to relabelling after the permitted date, sent out infringing wares to a number of distributors in Halifax, Newfoundland, Moncton, Saint John, N.B., Moose Jaw, Regina. Indeed in the course of his September 23, 1964, examination, Mr. Krangle refused to give information as to the whereabouts of his campaigns except with regard to Halifax. It is only when the Court ordered that invoices be produced that it was discovered that the defendant corporation had entered into contracts and was conducting campaigns in the five other places.

As a matter of fact, many of the infringing items might never have been discovered if one Al Gallo, at the request

of the plaintiff, had not gone to Halifax, Moncton and Saint John, N.B., on October 12, 13, 14 and 15, 1964, and served copies of the judgment on the defendant's distributors. cf. Gallo's affidavit of October 19, 1964.

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The examinations also disclose that Contest Toys Limited and the Dulev Company, carried out campaigns in Vancouver and Winnipeg using infringing trade marks, although as Krangle admitted on September 23, 1964, he had, at the time, non-infringing wares on hand. Cf. p. 17 of his cross-examination of September 23, 1964:

- Q. Well, Mr. Krangle, I am a little bit puzzled, you say the merchandise that you shipped later in August of 1964 may or may not have borne the trade mark YO-YO. Now did it bear it or did it not?
- A. Well, I would say, I think eighty-one per cent of it did not bear the trade mark YO-YO because since January of 1963 all of the merchandise which we have ordered does not bear the trade mark YO-YO.

It further appears that although the defendant in the later part of August 1964 was shipping infringing wares to far off places, he was doing no business at all in Toronto where his head office was or in Montreal or in any city close at hand. The plaintiff suggests that this is indicative of the defendant's attempt to get rid of a quantity of infringing wares outside of the knowledge of the plaintiff and if the unsatisfactory explanation given by Mr. Krangle of his reasons for not dealing with offending wares in Toronto is taken, there might well be some substance to the accusation. Indeed, at p. 16 of the September 23, 1964, cross-examination, Mr. Krangle gave to the following questions the following answer:

- Q. Well, if you were shipping to your agents merchandise that did bear the mark YO-YO later in August, what stopped you from merchandising wares, return tops, in Toronto bearing the trade mark YO-YO?
- A. As I indicated to you it was my impression that having decided to appeal this judgment, that the judgment itself would be stayed until the appeal was heard.
- Q. Well, that seems to be more reason why you would go ahead with selling return tops.

I do not intend to go any further in dealing with the facts disclosed in the examination of Mr. Krangle than to say that perusal of the examinations reveal that the same reluctance permeates his conduct with regard to the delivering up and the affidavits of delivering up when, for instance,

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on behalf of the defendant, he swears to certain set quantities of offending wares and then later corrects them by saying that the previous amounts sworn to by him were either mere estimates or were counted and checked by someone else or that he did not read the affidavits or that it was prepared by one of his numerous lawyers.

I refer, merely as an example of his attitude, to p. 4 of his examination of September 23, 1964 (which was the first examination he was subjected to) where upon being asked by counsel for the plaintiff whether he had in his possession on the day he received notice of the judgment (4th or 5th of August, 1964) any wares bearing the trade marks "YO-YO", "BO-LO" and "PRO", he answered that he did not when later it developed that he had thousands of infringing wares.

17. Q. Nowhere in your possession on the day you received notice of your judgment was merchandise bearing these last three mentioned Trade Marks?

A. Not that I am aware of.

His conduct has left me with a feeling, to say the least, that he has chosen to discharge his duties in this regard with a casualness, a carelessness, a neglectfulness, which borders on dereliction and which, in my view, in itself, (apart from the outright breach of the injunction) contains some measure of contumacy.

I might, however, point out (as there has been protracted discussions on this point) that although the plates which bore infringing marks were not delivered and were corrected only after August 29, 1964, by removing the offending marks and then used by the defendant for the purpose of printing new boxes, I do not feel that these boxes, which contain no infringing marks, should be considered as infringing and therefore they should not be delivered up to the plaintiff. The fact, however, that the defendant, through Mr. Krangle, made changes on the offending plates after the permitted date, should and will be taken into consideration with regard to the contempt proceedings.

At the hearing on the motion for committal, Mr. Krangle stood up and stated that he apologized to the Court for any inconvenience he has caused for failing to properly comprehend the judgment adding that he wished to assure this Court that he had not wilfully disregarded the order of this Court.

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I am not, in view of the above related facts, convinced that the above is an expression of humble apology which the Court can accept as sincere. Mr. Krangle indeed must be brought to appreciate that compliance with an order of a Court is not a battle of wits but that such an order must always be complied with in spirit as well as in letter. Cf. *Kerr on Injunctions*, 6th ed., p. 688:

An order for an injunction must be implicitly observed and every diligence must be exercised to obey it to the letter.

In view of the protracted and costly proceedings initiated and conducted to insure the proper compliance of the defendant with the judgment of this Court and for which I intend to hold both the defendant and Mr. Krangle liable (the latter not only for the breach of the injunction but also on the ground that he has aided and abetted the defendant in the said breach) I do not feel that there would be anything gained by sending him to prison unless, as hereinafter set down, he persists in his behaviour. However, I do feel that some measure should be taken against him in order to enable him to reflect on the gravity of his conduct and although the formal judgment was served on him on October 13 only, his admission that he had the reasons for judgment on or about August 4 or 5, 1964, and therefore had in fact notice of the injunction, and the fact that he breached the said judgment even after October 13, would make him amenable to some sanction. I would also think that the fact that he was the sole directing authority in the defendant company and that he alone gave the orders and instructions which caused the said defendant company to breach the judgment of this Court would also be a determining factor in taking sanction against him as a director of the company.

The conduct of Mr. Krangle and of the defendant corporation, as hereinabove related, in my view, is not to be considered as a casual or accidental and unintentional disobedience to an order of the Court and I am satisfied that a contempt of court has been committed and that its order has been contumaciously disregarded.

I have given due thought to the question of penalty and I do feel that in addition to the costs of the above mentioned application, the quantum of which I shall establish hereunder and for which the defendant and the said Albert

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Krangle shall be held jointly and severally liable, a fine of \$1,000 should also be paid jointly and severally by both the defendant herein and the said Albert Krangle to the Registrar of this Court or any other officer acting in his place in his absence. What I shall do, therefore, is to make the orders for sequestration against both the defendant and Mr. Krangle and for his committal to 30 days imprisonment for his contempt. The said orders for sequestration against both the defendant corporation and the said Albert Krangle, however will not be issued for a period of 30 days from the date of this judgment. If within that period of 30 days the said fine of \$1,000 and the costs which I hereby fix in the amount of \$500 have not been paid, then the said sequestration orders will issue to enforce payment thereof, and if within that time they have been paid then the sequestration orders shall not be issued. The committal order against the said Albert Krangle will likewise not be issued for a period of 30 days from the date of this judgment; if within that period the said Albert Krangle does not appear before this Court and indicate that he is now in a frame of mind appropriate to a person having breached a Court order, regrets the impropriety of his actions and subscribes to an expression of humble apology which the Court could accept as sincere, then the said Albert Krangle is to be imprisoned by the sheriff of the County of Carleton, in the common gaol of the said County to be there confined for a period of 30 days unless the required apology be sooner made.

I do feel that *Phonograph Performance Ltd. v. Amusement Caterer's (Peckham) Ltd.*<sup>1</sup> is sufficient authority to enable me in a case of civil contempt such as here to impose a lesser penalty than committal, namely a fine.

<sup>1</sup>[1964] L.R. 195.

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BETWEEN:  
 SILHOUETTE PRODUCTS LIMITED..... PLAINTIFF;  
 AND  
 PRODON INDUSTRIES LTD. .... DEFENDANT.

*Trade marks—Infringement—Trade mark related to wares it is used with—Confusing trade marks—Trade mark invalid because not distinctive—Validity of registration of trade mark—Abandonment of trade mark—Identification of wares carrying trade mark as those*

of trade mark owner—*Trade Marks Act, S. of C. 1952-53, c. 203, ss. 2(f), 6, 7(b) and (c), 18, 19 and 20.*

*Practice—Amendment of pleadings during trial—Rule 119 of General Rules and Orders.*

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From prior to 1939 until 1953 one Olve Matilda Grunsky of Toronto, carrying on business as Mondo Trading Company, was the sole Canadian importer of beauty preparations and other similar goods manufactured in Germany by one Hans Schwarzkopf. In addition Mondo Trading Company sold during the war years and thereafter a line of similar goods manufactured by it. All of the said goods were sold in Canada under a trade mark described as "the silhouette of a woman's head" and which was registered by Hans Schwarzkopf in 1938 in respect of "hair treating preparations and devices". Mondo Trading Company also used the trade name "Silhouette Products Reg'd" in association with the said products.

In 1953 the plaintiff was incorporated by agreement between Mondo Trading Company and Hans Schwarzkopf and it took over the business carried on under the name, Silhouette Products Reg'd. and among the assets transferred to it was the registered trade mark, until then owned by Hans Schwarzkopf, consisting of a woman's head in black, and the registered word mark "Silhouette". The plaintiff has continued the business previously carried on by Mondo Trading Company under the name, Silhouette Products Reg'd., and has consistently used the silhouette of a woman's head on the products it sells in Canada, both those manufactured by itself and those manufactured in Germany by Hans Schwarzkopf.

Since 1960 the defendant has manufactured and sold a hair spray under a label on which there is depicted the silhouette in black of a woman's head in profile. The evidence established that this label was designed for the defendant without any knowledge of the plaintiff's trade mark and without the products or business of the plaintiff in mind and that the silhouette used by the defendant is a reproduction of the head of the wife of the defendant's president.

The plaintiff brought this action for infringement of its trade mark rights and for breach by the defendant of s. 7(b) of the *Trade Marks Act*.

*Held:* That when a trade mark is so closely related to the wares in respect of which it is used as the human head is to wares used for the care of the hair, it cannot be said that the use of two or more such trade marks in association with such wares would be likely to lead to the conclusion that such wares are all manufactured or sold by the same person.

- 2 That the use of a silhouette of a head in the same area as the plaintiff's trade mark would not lead to the inference that the wares associated with both marks were manufactured or sold by the same person unless the silhouette alleged to be confusing was so similar in appearance to the plaintiff's mark that one would be likely to be mistaken for the other.
3. That a reproduction of a human head, closely related, as in this case, to the wares used for the care of the hair, is *prima facie* non-distinctive.
4. That the plaintiff's registered trade mark is invalid because it was not distinctive at the time these proceedings were commenced, as required by s. 18(1)(b) of the *Trade Marks Act*.

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5. That the registration of the plaintiff's trade mark is invalid, by virtue of s. 18(1)(c) of the *Trade Marks Act* because it has been abandoned, the evidence being that the particular silhouette which is registered as a trade mark, i.e., the silhouette of a man's head, has never been used in Canada by the plaintiff or its predecessors in title.
6. That because each of the labels used by the plaintiff on its products carries one or more trade names or marks in addition to its trade mark of the silhouette of a woman's head, any identification in the eyes of the public of wares so marked as being those of the plaintiff because of the presence of the silhouette thereon is somewhat diluted or attenuated.
7. That the use by the defendant of a silhouette of a woman's head in connection with wares having to do with the care of the hair when the plaintiff is already using a silhouette of a woman's head in connection with such wares does not necessarily establish a breach of s. 7(b) of the *Trade Marks Act*, and, in fact, the plaintiff has failed to establish a breach of that section of the Act on the part of the defendant because in this case the silhouettes used by the plaintiff and defendant are different and the labels used and the advertising done by them are quite different.
8. That the action is dismissed.

ACTION for infringement of rights in a registered trade mark.

The action was tried by the Honourable Mr. Justice Noël at Ottawa.

*Gordon W. Ford, Q.C.* and *David M. Rogers* for plaintiff.

*Donald F. Sim, Q.C.* and *Weldon F. Green* for defendant.

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

NOËL J. now (April 7, 1965) delivered the following judgment:

This is an action for infringement by the defendant of the plaintiff's rights in a registered trade mark and for breach by the defendant of section 7(b) of the *Trade Marks Act* by directing public attention to its wares and business in such a way as to cause or be likely to cause confusion between its wares and business and the wares and business of the plaintiff.

The registered trade mark upon which the plaintiff bases its infringement claim was registered originally on January 21, 1938, as No. N.S. 10081 in the name of Hans Schwarzkopf, Kommanditgesellschaft, of Berlin-Tempelhof,

Alboinstr. 36-42, for a mark described as “The silhouette of a woman’s head” in respect of “Hair Treating Preparations and Devices”. The trade mark as registered is here reproduced as follows:

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(One is immediately struck by the fact that the trade mark is in fact a silhouette of a man’s head and not, as described in the registration, of a woman’s head.) Subsequently, an application was made to the Registrar to change the registration from the name “Hans Schwarzkopf, Kommanditgesellschaft” to “Hans Schwarzkopf”, it appearing that the owner of the trade mark is a kommanditgesellschaft (i.e., some sort of a partnership with a form of limited liability) but that the word “Kommanditgesellschaft” does not form part of its name. On January 4, 1940, a notation was placed on the Register, reading “Evidence has been submitted establishing that the correct name of the proprietor of this trade mark at the time of registration was Hans Schwarzkopf”.

For some years prior to the outbreak of war in 1939, Hans Schwarzkopf sold beauty preparations and toilet preparations (including shampoo and hair treatments, oil treatments, spray treatments) to Olive Matilda Grunsky, of Toronto, Ontario, carrying on business under the name “Mondo Trading Company”, who re-sold such goods in Canada. The goods so purchased, as well as literature, letterheads, etc., received by the Mondo Trading Company during that period from Hans Schwarzkopf, had imprinted somewhere on it the following silhouette:



During the period from 1936 to 1939, Mondo Trading Company imported such goods to the value of approximately

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\$30,000. For the purpose of dealing in such goods, the Mondo Trading Company adopted another trade name, "Silhouette Products Reg'd.", and it published literature and advertising to the trade, using that name in association with the silhouette that I have just reproduced. The larger part of the sales during that period was to professional hairdressers and the remainder was to the retail trade. After the registration referred to above, Mondo Trading Company continued to use the silhouette as a trade mark. It had no licence agreement but it did have an agreement under which it was the sole Canadian importer from Hans Schwarzkopf. Upon the outbreak of war in 1939, Mondo Trading Company could no longer import from Hans Schwarzkopf and it therefore started to manufacture in Canada products of the same kind as some of those that it had been importing and it sold those products "right through the war and after the war years". The goods so sold were all marked with the silhouette of a woman's head reproduced above because, according to the manager of Mondo Trading Company, who gave evidence at the trial, "it was our only sign of distinction at that time".

By virtue of the *Trading with the Enemy Regulations*, enacted by the Governor-in-Council shortly after the outbreak of war under the *War Measures Act*, all property of Hans Schwarzkopf, who was an enemy alien, automatically vested in the Custodian of Enemy Property, who was the Secretary of State.

On August 20, 1940, Mrs. Grunsky applied under section 6 of *The Patents, Designs, Copyright and Trade Mark (Emergency) Order*, 1939, for an order that the rights in connection with the trade mark regulations referred to above be suspended for the duration of the war to such extent as to enable her "to use the said mark in connection with hair treating preparations and devices and wares similar thereto within the meaning of *The Unfair Competition Act*, 1932". (No copy of such emergency order presumably made under the *War Measures Act* being filed, the significance of the order sought does not therefore appear.) An order was made pursuant to this application with a restriction that the trade mark could only be used on products "of at least substantially as good quality as those on which the said trade mark has been used by the registrant."

From 1940 until 1950 or 1951, Mondo Trading Company manufactured products and sold them under the name "Silhouette Products Reg'd." in association with the Silhouette trade mark set out above and, during that period, it did everything possible, by way of demonstrations, advertising in trade papers, and so forth, to make the trade mark known to hairdressers in Canada. From 1940 to 1948, it sold about \$275,000 worth of such goods, about half to beauty parlours and one-half to retailers.

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In 1951 Mondo Trading Company commenced importing from Hans Schwarzkopf in Germany again, and from 1951 to 1953 sold goods that it so imported as well as goods that it manufactured in Canada. The silhouette of a woman's head was used on the goods that it imported from Hans Schwarzkopf and sold as well as on the goods that it manufactured itself and sold. During this period, its sales increased and it expanded its advertising.

In 1953, pursuant to an agreement between Mondo Trading Company and Hans Schwarzkopf (the limited company), the plaintiff company was incorporated and took over the business that had been carried on under the name Silhouette Products Reg'd. The parties to the agreement had specifically agreed that, among the assets to be transferred to the plaintiff were "all trade marks and trade names presently held by Silhouette or held in trust for it by the Custodian of Enemy Property, including specifically . . . the Trade Mark consisting of a woman's head in black registered as trade mark No. 10566 and the Word Mark 'Silhouette' registered as Trade Mark No. 10081". (It appears, however, that the numbers used are inaccurate as the registration of the head is 10081 and that of Silhouette is 10566). This agreement was implemented by a formal agreement dated August 14, 1953, whereby Mondo Trading Company and "Schwarzkopf G.m.b.H." (meaning in German a company with limited liability) through their agents, purported to transfer to the plaintiff, among other things, the aforesaid trade marks.

Since its incorporation, the plaintiff has continued the business previously carried on by Mondo Trading Company under the name of Silhouette Products Reg'd. The business has been expanded and the advertising has been increased but the general character of the business is unchanged from the point of view of the issues in this case.

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The plaintiff has consistently used the silhouette of a woman's head set out above in connection with various word marks on the goods it sells in Canada whether manufactured by itself or by Hans Schwarzkopf in Germany. (It is of interest to note that the word "Schwarzkopf" is German for "black head", schwarz meaning black and kopf meaning head). Prior to its incorporation, Silhouette Products Reg'd. had used the silhouette with a circle around it but the plaintiff used it without the circle. The plaintiff uses the silhouette in connection with many different word marks, including "Schwarzkopf", and has sometimes used the head in a colour other than black.

A document dated March 21, 1955, recited that "Hans Schwarzkopf, formerly of 28 Martinstrasse, Vienna 18, and now of the City of Toronto, Ontario" was the registered owner of trade mark No. 39, N.S. 10566, registered in the Trade Marks Office on December 18, 1937, and that the plaintiff had acquired that trade mark "and the goodwill of the business carried on in Canada in association with the wares with which the said trade mark had been used" and purported to be an assignment from "the said Hans Schwarzkopf" to the plaintiff of the registered trade mark in question.

On April 26, 1956, the Custodian of Enemy Property relinquished any right or interest he might have in the aforesaid trade mark.

The defendant company has, since August, 1960, manufactured a hair spray, which it sells under a label, the front half of which is reproduced hereafter: *See* p. 507.

Without reviewing the evidence in detail, I hold that this label was designed for the defendant company without any thought or knowledge of the plaintiff's registered trade mark, or the silhouette of a woman's head used by the plaintiff, or the products or business of the plaintiff in the minds of those who designed it for the defendant. I am satisfied that the silhouette in this label is a reproduction of the head of the wife of the defendant's president and was employed, upon advice of a designer retained to prepare the label, to tie in with the fact that the lady was to participate actively in the launching of the new product, which was named "Lady Patricia" because the lady's first name was "Patricia".

**GIANT SIZE** ONLY **99¢**  
 COMPARABLE VALUE \$2.00



**Firm Control**  
**HAIR SPRAY**  
*with lanolin*

**HOLDS HAIR STYLE  
 NEATLY IN PLACE**

**MONEY BACK GUARANTEE**

Return partially used container to Prodon Industries Ltd. 30 Tongue Rd. Scarborough, Ontario for refund if not completely satisfied.  
**"NO FIRMER HAIR SPRAY AT ANY PRICE!"**

**GARANTIE DE REMBOURSEMENT**

Retournez le contenant partiellement utilisé à Prodon Industries Ltd. 30 Tongue Rd., Scarborough, Ontario pour un remboursement et vous n'avez pas satisfaction satisfait.

**TO KEEP HAIR IN PLACE:** Style hair with comb, then spray

**TO SET LASTING PIN CURLS**

Dampen hair, spray one section at a time, curl and pin up. When dry, comb out, arrange, respray lightly

**FOR QUICK SET:** Pin curl hair without moistening, spray, let d.y., brush or comb out style and respray lightly

**DIRECTIONS:** Hold container upright, 10 inches from hair, press down valve, spray evenly

**CAUTION:** Do not use near fire or flame. Do not incinerate container or expose to heat. Keep spray out of eyes.

Net Weight 11 ozs.

**PRODON INDUSTRIES LTD.**  
 MONTREAL • TORONTO  
 ANAHEIM, CALIF.

**POUR GARDER LES CHEVEUX EN PLACE:**

Placez les cheveux puis vaporisez

**POUR CREER UNE MISE EN PLUS DURABLE:** Mouillez la chevelure et vaporisez une section à la fois, enroulez et épinglez. Laissez sécher, peignez, placez et vaporisez de nouveau

**POUR UNE MISE EN PLUS RAPIDE:** Faites des bouclette sans mouiller, vaporisez, laissez sécher, peignez, placez et vaporisez de nouveau.

**MODE D'EMPLOI:** Tenez le contenant droit, 10 pouces de la chevelure. Pressez le bouton et vaporisez uniformément

**PRECAUTION:** Ne vaporisez pas près d'une flamme. N'incinerez pas le contenant vide. Evitez que le jet atteigne la vue.

Poids Net 11 ozs.

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The defendant sells its product to drug wholesalers, drug chains and drug stores, to department stores, to food wholesalers and food chains, to variety stores such as Woolworths, Kresges, Metropolitan, Zellers and Beamish, and to miscellaneous wholesalers. They also sell a relatively small amount to "beauty" wholesalers. The defendant has been successful in developing a market for its product. In 1963, its sales of Lady Patricia hair spray amounted to \$1,400,000.

I now turn to the redress claimed by the plaintiff. As indicated at the commencement of this judgment, the plaintiff is only claiming relief in respect of infringement of its registered trade mark and under section 7(b) of the *Trade Marks Act*. The other claims in the Statement of Claim were abandoned during argument.

The allegation of infringement is contained in paragraph 5 of the Statement of Claim, which reads as follows:

5. The defendant has sold, distributed and advertised in association with the silhouette of a woman's head similar to and confusing with the plaintiff's trade mark, a hair spray, not being wares of or sold by the plaintiff and the defendant is continuing to do so.

This claim is apparently framed with reference to section 20 of the *Trade Marks Act*, which reads as follows:

20. The right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade mark or trade name, but no registration of a trade mark prevents a person from making

- (a) any bona fide use of his personal name as a trade name, or
- (b) any bona fide use, other than as a trade mark,
  - (i) of the geographical name of his place of business, or
  - (ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade mark.

Section 20 must be read with section 6 of the *Trade Marks Act*, the relevant portion of which reads as follows:

6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

...

(5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;
- (b) the length of time the trade marks or trade names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

To bring the claim within section 20 read with section 6, strictly speaking, the Statement of Claim should have alleged that the trade mark employed by the defendant, if it were employed in the same area as the registered trade mark, would be likely to lead to the inference that the wares associated with such trade marks are manufactured or sold by the same person. While this was not pleaded, this was, in effect, the issue to which both parties addressed their evidence and I therefore direct (under Rule 119 of the General Rules and Orders of this Court) that the pleadings be amended to raise the issue as to whether such an allegation is or is not established.

The plaintiff's registered trade mark (silhouette of a man's head) and the woman's head on the defendant's label are silhouettes of heads within the first sense given by the Shorter Oxford English Dictionary to the word "silhouette", viz.

1. A portrait obtained by tracing the outline of a profile, head, or figure, and filling in the whole in black; an outline portrait cut out of black paper; a figure or picture drawn or printed in solid black . . .

Apart, however, from each of them being a silhouette of a head of a human being, the two marks do not appear to have anything in common. One is of a man, the other is of a woman. In addition, the physical characteristics of the two heads are quite different.

Unless, therefore, one concludes that the use of any silhouette of a head of a human being in the same area where the registered trade mark is used would be likely to lead to the conclusion that the wares associated with both marks are manufactured or sold by the same person, there is no basis for a finding of infringement in this case. While such a broad effect might be given to the use of some part of the human anatomy as a trade mark if it were being used in relation to wares that had no possible association with the

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part of the anatomy employed as the mark, in my view, no such conclusion can be drawn when the mark chosen is so closely related to the wares in relation to which it is used as the human head is related to wares used for the care of the hair. Quite apart from the evidence in this case, judicial knowledge can be taken of the fact that a reproduction of the human head is commonly used to indicate wares or services related to the care of the hair. Assuming the validity of the registered trade mark, I am of the view that the use of a silhouette of a head in the same area as the registered trade mark would not lead to the inference that the wares associated with both marks were manufactured or sold by the same person unless the silhouette alleged to be confusing was so similar in appearance to the registered silhouette that one would be likely to be mistaken for the other. In my view, there is no possibility of the Lady Patricia silhouette employed by the defendant being mistaken for the silhouette of a man that is the subject matter of the registered trade mark.

The other defence to the claim for infringement is that the registration of the trade mark is invalid. Section 19 of the *Trade Marks Act* defines the exclusive right conferred on the owner by the registration of a trade mark. That section reads as follows:

19. Subject to sections 21, 31 and 65, the registration of a trade mark in respect of any wares or services, unless shown to be invalid, gives to the owner the exclusive right to the use throughout Canada of such trade mark in respect of such wares or services.

As may be seen, the exclusive right does not subsist if the registered trade mark is "shown to be invalid." Whether a registration of a trade mark is invalid depends on section 18, which reads as follows:

18. (1) The registration of a trade mark is invalid if

- (a) the trade mark was not registrable at the date of registration;
- (b) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced;

or

- (c) the trade mark has been abandoned;

and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

(2) No registration of a trade mark that had been so used in Canada by the registrant or his predecessor in title as to have become distinctive at the date of registration shall be held invalid merely on the ground that evidence of such distinctiveness was not submitted to the competent authority or tribunal before the grant of such registration.

There are several questions in my mind as to the validity of this registration, some of which were urged by the defendant. I propose only to refer to two of them, namely, that the trade mark was not "distinctive" at the time these proceedings were commenced and that it has been abandoned.

The word distinctive, in this context, is defined by section 2(f) of the *Trade Marks Act*, which reads as follows:  
2. In this Act,

...  
(f) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so as to distinguish them;

The registered trade mark—i.e., the silhouette of a man's head—has, on the evidence, never been used in Canada by the plaintiff or its predecessors in title and does not therefore "actually distinguish" wares or services in association with which it is used. Moreover, I am of opinion that a reproduction of a human head, closely related such as here to the wares used for the care of the hair, is *prima facie* non-distinctive. Evidence would therefore be required to establish that it actually serves to distinguish the wares of the plaintiff from those of another and there is no such evidence here. I am therefore of opinion that the registered trade mark is invalid because it was not distinctive at the time these proceedings were commenced as required by section 18(1)(b) of the *Trade Marks Act*.

I am further of opinion that the registration is invalid, by virtue of section 18(1)(c), because it has been abandoned. The evidence is clear that the particular silhouette which is registered as a trade mark—that is the silhouette of a man's head—has never been used in Canada by the plaintiff or its predecessors in title.

In the circumstances, I do not find it necessary to examine the other attacks on, or doubts concerning, the validity of the registration and the validity of the plaintiff's title thereto.

I now turn to the matter of "passing off" and to section 7(b) of the *Trade Marks Act* which together with section 7(c) is supplementary to the common law action for "passing off" so far as concerns "passing off" by substitution of wares by imitating a trade mark used in association with wares. This section reads as follows:

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7. No person shall

- ...  
 (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

The plaintiff's claim under this provision is based on the fact that it had, for several years, been selling in Canada wares related to the care of the hair using the silhouette of a woman's head (reproduced by itself above), together with numerous different words also used as trade marks at the time when the defendant commenced to sell its hair spray using a label, the front panel of which is reproduced above, on which there appears a silhouette of a woman's head. It is clear on the evidence, and I so find, that the defendant did not have in mind the plaintiff's business or wares in adopting the label in question. In these circumstances, the question is whether the sale by the defendant of its hair spray constitutes an act whereby it directed public attention to its wares in such a way as to be likely to cause confusion between its wares and the wares of the plaintiff. Moreover, the matter should be resolved bearing in mind that there is no evidence of actual confusion.

The plaintiff's claim under section 7(b) depends upon

- (a) a finding that the public, prior to the use of a silhouette or black head by the defendant, identified the wares as being of a particular manufacture by the silhouette or black head placed on each article sold, and  
 (b) a finding that the defendant, by using its label, including the silhouette on it, on its wares, has directed public attention to them in such a way as to likely cause confusion between its wares and those of the plaintiff in the sense that members of the public would probably be caused thereby to think that the defendant's wares are wares identified in their minds by the plaintiff's silhouette.

In the first place, although the evidence discloses that the plaintiff has sold and sells a substantial amount of goods in Canada and has spent and spends substantial sums on advertising those goods in Canada and that, therefore, the silhouette or black head can be taken to identify in the eyes of the public the wares so marked as being of a particular

manufacture, such an identification is somewhat diluted or attenuated by the fact that each of the plaintiff's labels carries one or more trade names or marks in addition to the silhouette. An examination of the folder of labels filed by the plaintiff (Exhibit 18) illustrates what I mean. The very first label shown has at the top the word "Schwarzkopf" and across the centre the word "Lecitol" and each of these words is much more prominent and uses much more space than the silhouette of the woman's head. Moreover, there is no evidence that the "treatment for dry hair" sold under this label is identified in the minds of the public by the silhouette rather than by the word "Schwarzkopf" or the word "Lecitol", or both those words. A similar comment may be made with reference to each of the other labels filed by the plaintiff. If those members of the public who know the plaintiff's wares (a large portion of whom are hairdressers who are, presumably, reasonably well acquainted with hair dressing wares) know them as being wares of Schwarzkopf, or of Silhouette Products Ltd., or by reference to a special name such as "Lecitol", then there is going to be much less identification (if any) in the minds of the public of the wares of the defendant by means of the silhouette or the black head.

That claim under section 7(b) must, however, in my view, fail on a further ground. Indeed, even if it is assumed that the public does identify the wares by the silhouette of a woman's head as being of a particular manufacture, the defendant has not directed public attention to its wares in such a way as to be likely to cause confusion between its wares and the plaintiff's wares.

In dealing with this aspect of the claim under section 7(b), it is to be emphasized that the plaintiff's claim under section 7(b) is based on its actual use of a silhouette of a woman's head as a trade mark and not upon its registered trade mark, which, it will be recalled, is a silhouette of a man's head. Nevertheless, while they are both silhouettes of women's heads, in my view, the two silhouettes in question—that of the defendant and that of the plaintiff—are quite different in appearance.

The mere use by the defendant of a silhouette of a woman's head in connection with wares having to do with the care of the hair when the plaintiff is already using a

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silhouette of a woman's head in connection with wares having to do with the care of the hair does not, in my view, necessarily establish a breach of section 7(b). The matter is always a question of fact to be determined in accordance with the circumstances of each case. If the plaintiff used its silhouette of a woman unassociated with any other identifying mark or name and the defendant did likewise, this might have been likely to cause confusion even though the women's heads were quite different. If the defendant imitated, on its label and other literature, the material appearing on the plaintiff's label and other literature with the plaintiff's silhouette, that might have been likely to cause confusion, even though the women's heads were quite different. If the defendant used a silhouette that was the same as or very similar to, the plaintiff's silhouette, whether it is used with other different identifying marks or names, that might have been likely to cause confusion. Here however, the silhouettes are different and the labels and advertising generally are quite different.

I am of opinion that the plaintiff has not established a breach of section 7(b).

The action is dismissed with costs.



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BETWEEN:  
 BEN ARTHUR SHUCKETT ..... APPELLANT;

AND

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

*Revenue—Income—Income tax—Acquisition and resale of real property—Real property acquired in discharge of debt—Taxability of profit from sale of real property—Burden of proof—Motivating reason for acquisition of real property—Venture in the nature of trade—Income Tax Act, R.S.C. 1952, c. 148.*

This is an appeal from the decision of the Tax Appeal Board dismissing the taxpayer's appeals from his assessment for the taxation years 1953 to 1957 inclusive, whereby profits made by him on the sale of certain building lots in the City of Winnipeg were included in computing his income for those years.

The evidence established that the appellant, a practicing solicitor, a substantial part of whose business consisted in acting for builders,

assisted many of his builder-clients during the period from 1946 to 1950 in their acquisition of vacant land from the City of Winnipeg, not only by acting as their solicitor but also, on occasion, by advancing on their behalf a part at least of the funds required to be paid by them under the option agreements negotiated with the City of Winnipeg.

In 1951 the appellant made bargains with some of his builder-clients who were in financial difficulty whereby he released them from liability to repay to him the money he had advanced on their behalf under the option agreements in return for a transfer to him of their interest in the properties. He subsequently acquired full legal title to the lots by paying the balance of the money called for under the agreements with the City of Winnipeg. The appellant sold these lots during the years 1953 to 1957 and realized total profits of about \$35,000.

*Held:* That if a person who has lent money to a borrower who is unable to raise the money to repay it, accepts from the borrower some asset that cannot readily be turned into money at the moment in settlement of the obligation to repay the loan, the acquisition of such asset does not in itself constitute the launching of a venture in the nature of trade.

2. That if one of the motivating reasons for the acquisition by the appellant of the lots in question was his expectation and hope that he would be able to resell them at a profit, even if there was another motivating reason consisting of the appellant's desire to collect loans from borrowers who were in financial trouble, the acquisition was the inception of a venture in the nature of trade.
3. That the appellant has failed to discharge the burden resting on him of establishing that he did not acquire the lots in question with a view to profit by turning them to account or trading in them and that the bargains with his builder-clients for their rights were only the first stage of a scheme involving the venturing of an additional substantial amount of money in respect of a large number of parcels of land.
4. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice JACKETT, President of the Court, at Winnipeg.

*C. V. McArthur, Q.C.* and *R. B. McArthur* for appellant.

*G. R. Hunter, Q.C.* for respondent.

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

JACKETT P. at the conclusion of the argument (April 9, 1965) delivered the following judgment, orally:

This is an appeal from a decision of the Tax Appeal Board dismissing appeals from the appellant's assessments under Part I of the *Income Tax Act* for the taxation years 1953 to 1957, inclusive. While another issue is raised by the Notice of Appeal to this Court, the only portion of the appeal that was proceeded with by the appellant at this hearing is the appeal against the assessments in respect of

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profits made in those years on the sale of certain building lots in the City of Winnipeg.

It is common ground that the appellant did make the profits in question in the years in question by selling certain building lots previously acquired by him. The only question is whether such profits were properly included in computing his incomes for those years under Part I of the *Income Tax Act*.

By paragraph 8 of the respondent's reply to the Notice of Appeal filed in this Court pursuant to section 99 of the *Income Tax Act*, the respondent alleges

8 . . . that in re-assessing the Appellant for the 1953, 1954, 1955, 1956 and 1957 taxation years, Notices of which were each posted on the 9th day of March, A.D. 1959, the Respondent included in the Appellant's income for the 1953, 1954, 1955, 1956 and 1957 taxation years the sums of \$17,766 91, \$9,633.87, \$4,677.12, \$163 84 and \$2,787 89, respectively, which sums represented the net profit received by the Appellant in each of the above taxation years from the acquisition of certain lots of vacant real property and their subsequent re-sale, and that in re-assessing the appellant he acted on the assumption that the Appellant acquired the said lots of vacant real property with a view to profit by turning same to account or trading in them and that all profit arising from the purchase and subsequent re-sale of the said vacant lots constituted part of the Appellant's income since it was a profit from a business or an adventure in the nature of a trade.

In the circumstances of this case, the onus was on the appellant to establish that he did not acquire the lots in question with a view to profit by turning them to account or trading in them. To determine whether he has discharged the onus it is necessary to examine the events leading to the appellant's acquisition of the lots. Those events took place during a period commencing in 1946 and ending in 1950 or early 1951.

During that time, the appellant was a practicing solicitor, a substantial part of whose business consisted in acting for builders—that is, persons who acquired appropriate vacant lots, built houses on them and resold the lots with the houses on them.

Among the services rendered by the appellant to such clients was that of assisting them in the acquisition of appropriate vacant land, which, during the period in question, could be acquired from the City of Winnipeg. The practice followed by the City was to grant an option for the desired property upon a payment of 5 per cent of the option price, on terms that a further more substantial payment would be made before the expiration of the option period

and that the balance would be paid on or before a stipulated date. The appellant not only played some part, on occasion, in assisting his builder-clients to ascertain the availability of appropriate land, and in the negotiation of the option-agreements on behalf of his builder-clients, but he did, on many occasions, advance to such clients the 5 per cent payments as well as some of the other payments that had to be made by the builder-clients under the agreements. Monies so advanced by the appellant to his clients were paid by him on their behalf to the City.

An appreciation of the character of these transactions requires that I make reference to the fact that the appellant cannot now recall that he had any arrangement with his builder-clients to charge interest on the very substantial sums of money that he had out on loans of this kind during the period in question. The reason would appear to be that making these loans was part of a scheme whereby the appellant made very substantial profits in other ways. On the one hand, he received commissions from the City of Winnipeg in respect of each transaction in which he acted as agent for a builder-client in the acquisition of a lot from the City and, on the other hand, he used the transactions as a means of securing remunerative legal work.

As long as the affairs of the builder-clients prospered, the appellant was in due course re-paid the monies so advanced. At some point in the period 1950-1951, however, the appellant found that some of the clients in question were in financial trouble. Some were even on the verge of bankruptcy. As a consequence, in 1951 the appellant made bargains with certain of the builder-clients. As a result of the bargains, in the case of each of the lots referred to in paragraph 8 of the reply to the Notice of Appeal, the builder-client who had an option or agreement to purchase it transferred to a nominee on the appellant's behalf all of his interest in the option or agreement in consideration of the appellant releasing him from his liability to repay the amounts that the appellant had advanced to him to pay on account of the agreement. In other words, in 1951 the appellant, who until that time had had absolutely no interest in the properties in question, either by way of charge or otherwise, acquired the rights of his builder-client in each such property in consideration of a discharge of a debt owing to him by the builder-client.

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To summarize the transactions briefly, the appellant acquired the rights of his builder-clients in the lots in question by releasing them from liabilities to repay loans totalling approximately \$11,000. After acquiring the rights of his builder-clients under the agreements, he acquired legal title to the lots by making further payments under the agreements to the City of Winnipeg, totalling approximately \$33,000. In addition, he paid some \$3,000 in respect of taxes and interest. The total cost of the lots to the appellant in 1951 was therefore between \$45,000 and \$50,000. He sold these lots during the years 1953 to 1957, inclusive, for amounts totalling over \$80,000, yielding profits totalling about \$35,000.

There is, in my mind, no doubt that, if a person who has loaned money to a borrower who is unable to raise the money to repay it, accepts from the borrower some asset that cannot readily be turned into money at the moment in settlement of the obligation to repay the loan, the acquisition of such asset does not in itself constitute the launching of a venture in the nature of trade. Normally, in any such case, at the time of the settlement transaction, the lender does not know whether he will ultimately be able to obtain, upon disposition of the asset accepted in lieu of cash, an amount equal to the amount of the loan, an amount less than the amount of the loan or an amount greater than the amount of the loan. Nevertheless, if the sole motivating reason for the transaction as far as the lender is concerned is the lender's desire to obtain repayment of the loan, the acquisition of the asset is, as far as the lender is concerned, merely receipt in kind of repayment of the loan.

On the other hand, the fact that the property acquired was paid for by discharge of a debt owing to the vendor by the purchaser is not incompatible with the acquisition being the inception of a venture in the nature of trade. Neither is the fact that the vendor of the property is unable to pay money owed by him to the purchaser of the property incompatible with acquisition being the inception of a venture in the nature of trade.

If, here, one of the motivating reasons for the acquisition by the appellant of the lots in question in 1951 was his expectation and hope that he would be able to resell them at a profit, even if there was another motivating reason con-

sisting of the appellant's desire to collect loans from borrowers who were in financial trouble, the acquisition was the inception of a venture in the nature of trade.

As indicated earlier the onus in this case was on the appellant to show that he did not acquire the lots in question with a view to profit by turning them to account or trading in them. I have come to the conclusion that the appellant has failed to discharge that burden. There is no evidence to show that the expectation or hope that he could sell them at a profit was not one of the motivating reasons for the appellant's acquisition of the lots.

The appellant says that he became concerned about the money owed to him by the builder-clients and that he had to decide whether to sue them or to take the properties over and realize whatever he could. Assuming the correctness of this statement, I am of opinion that it does not tell the whole story.

The appellant has had a long and varied experience in real estate in the City of Winnipeg. He owns a great deal of real property. He has bought and sold real property. He manages, and has substantial interests in, companies that own real property and that buy and sell real property. In addition the acquisition of these lots was not a simple case of taking payment in kind so as to realize what he could from the assets so acquired. The bargains with his builder-clients for their rights were only the first stage of a scheme involving the venturing of an additional substantial amount of money in respect of a large number of parcels of land.

Having regard to his background in real estate transactions and to his vague and evasive way of answering many of the questions put to him on cross-examination, as well as my conviction, having regard to the evidence as a whole, that the appellant recognized in the situation that faced his builder-clients a very favourable opportunity to acquire properties that, having regard to his experience, he must have known would almost certainly become more valuable with the passage of time, I am of opinion that one of the reasons that moved the appellant to acquire these lots in 1951 was a hope and expectation that he could resell them at a profit. In any event, I am not persuaded by the evidence that the appellant has discharged the onus of showing that such was not one of such reasons.

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I desire to add that the difference between the facts as found by the Tax Appeal Board and the facts as found in this Court is probably entirely attributable, as the appellant admitted under questioning by the Court when giving evidence in this Court, to the unfortunate and misleading language used by him in giving his evidence before the Tax Appeal Board.

The appeal is dismissed with costs.

1965  
Apr. 5, 6  
Apr. 7

BETWEEN :

THE INVESTORS GROUP ..... APPELLANT;

AND

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

*Revenue—Income—Income tax—Capital cost allowance—Meaning of “franchise, concession or license”—Income Tax Act, R.S.C. 1952, c. 148. s. 11(1)(a)—Income Tax Regulations, Schedule B, Class 14.*

In 1960 the appellant acquired a controlling interest indirectly in The Western Savings and Loan Association, a company carrying on the business of selling investment contracts to the public. By virtue of the same contract the appellant purchased the rights owned by W. & F. Limited, created by a contract entered into between Western Savings and Loan Association and W. & F. Limited in 1953, to, *inter alia*, procure salesmen required by The Western Savings and Loan Association in its business of selling investment contracts, pay Western's selling expenses except salesmen's commissions, and provide any financing required for such salesmen in return for payment of \$7.50 for every \$1,000 of face or maturity value of the investment contracts sold by Western to the public. The contract between Western and W. & F. Limited was to remain in force for twenty-five years from January 1, 1953.

The only issue dealt with on this appeal is whether or not the rights acquired by the appellant from W. & F. Limited constitute a “franchise, concession or license . . . in respect of property” within the meaning of those words in Class 14 of Schedule B to the Income Tax Regulations, thereby entitling the appellant to capital cost allowance in respect of the capital cost of those rights.

*Held:* That in their context the words “franchise” and “concession” must be given the meaning or sense in which they are employed by business men on this continent and that, in this sense, they extend, not only to certain kinds of rights, privileges or monopolies conferred by or pursuant to legislation or by governmental authority, but also to analogous rights, privileges or authorities created by contract between private parties.

2. That the words "franchise" and "concession" are not used, in the context under consideration to refer to a contract under which a person is entitled to remuneration for the performance of specified services.
3. That what the appellant acquired from W. & F. Limited was not a franchise, concession or license.
4. That the appeal is dismissed.

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APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

*H. Heward Stikeman, Q.C., Maurice A. Regnier and Hugh W. Cooper* for appellant.

*G. W. Ainslie, D. G. H. Bowman and T. G. Mathers* for respondent.

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

JACKETT P. at the conclusion of the argument (April 7, 1965) delivered the following judgment, orally:

This is an appeal from a decision of the Tax Appeal Board dismissing an appeal from the assessment under the *Income Tax Act* of the appellant for the 1960 taxation year. The principal issue raised by the appeal is whether the rights acquired by the appellant by assignment of an agreement referred to as a "Sales Management Agreement" constitute a "franchise, concession or license . . . in respect of property" within the meaning of those words in Class 14 of Schedule B to the *Income Tax Regulations*. A second issue has been raised as to whether the transaction whereby the appellant acquired such rights was a transaction between persons not dealing with each other at arm's length so as to bring into play the rule contained in subsection (4) of section 20 of the *Income Tax Act*.

The basic facts as established before the Board are set out in some detail in the judgment of the Tax Appeal Board and, as so set out, do not differ in any important respect from the facts as established in this Court. I shall, therefore, refer to the facts in quite general terms.

A company, whose name is "The Western Savings and Loan Association" (hereafter referred to as "Western"), carries on a business that, for present purposes, may be described as "selling" investment contracts to the public.

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Under such a contract a "purchaser", in consideration of a payment or payments that he promises to make to Western becomes entitled to have Western make a specified payment or payments to him. Such contracts are "sold" to the public by means of an organization of salesmen operating as independent contractors.

In 1953, Western entered into a contract with a company known as "W. & F. Limited", all the shares of which belonged to two individuals who had, indirectly, a controlling interest in Western. By virtue of the 1953 contract, W. & F. Limited undertook to perform certain services for Western, namely:

- (a) it undertook to procure and recommend for employment by Western "all salesmen required for offering for sale and obtaining applications" for the investment contracts that it was Western's business to sell;
- (b) it undertook to pay all of Western's selling expenses except the commissions earned by the salesmen; and
- (c) it undertook to provide any financing for such salesmen that it might deem necessary or advisable.

The 1953 contract provided that, as "remuneration for the performance of its obligations", W. & F. Limited was entitled to be paid \$7.50 for each \$1,000 of the face or maturity value of the investment contracts so sold to the public. The 1953 contract contained a clause under which it was to have force and effect for 25 years from January 1, 1953.

In 1960, the appellant acquired a controlling interest indirectly in Western, including all the interest therein of the two individuals who owned the shares in W. & F. Limited. At the same time, and by virtue of the same contract pursuant to which it acquired the controlling interest in Western, the appellant, for a money consideration, became entitled to W. & F. Limited's rights under the 1953 agreement between W. & F. Limited and Western. In other words, pursuant to the acquisition agreement, there was what might be described as a novation arrangement whereby the appellant replaced W. & F. Limited in the 1953 agreement and became obligated to perform for Western the services that W. & F. Limited had been bound by that agreement to perform and became entitled to receive from Western the remuneration that W & F. Limited had been

entitled to receive. In effect therefore, in 1960, the appellant, for a money consideration, acquired W. & F. Limited's rights under the 1953 agreement. Such rights had a substantial value as appears from the fact that the net earnings under the agreement for 1960 were approximately \$104,000 before any write-off for amortization or allowance for income tax.

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The question raised by the appeal is whether the appellant is entitled to capital cost allowance under section 11(1)(a) of the *Income Tax Act* and the relevant regulations in respect of the capital cost of the rights so acquired. It is common ground that the appellant is entitled to such an allowance if such rights constitute a "franchise, concession or license" in respect of property within the meaning of the introductory words of Class 14 of Schedule B to the *Income Tax Regulations*, which words read:

Property that is a patent, franchise, concession or license for a limited period in respect of property . . .

Even if the appellant is entitled to such an allowance, the amount of the allowance might be only nominal, by virtue of the rule in section 20(4) of the *Income Tax Act*, if the transaction whereby those rights became vested in the appellant was a transaction between persons not dealing at arm's length.

I shall deal now with the question whether what the appellant acquired was a "franchise, concession or license".

In my view, it is clear that what the appellant acquired is not a license in any ordinary sense in which that word is used and I did not understand the appellant to contend that it was. Whether or not it is a franchise or concession is a more difficult question.

I accept the submission of the appellant that, in their context, the words "franchise" and "concession" must be given the meaning or sense in which they are employed by business men on this continent and that, in this sense, they extend, not only to certain kinds of rights, privileges or monopolies conferred by or pursuant to legislation or by governmental authority, but also to analogous rights, privileges or authorities created by contract between private parties. I do not propose, however, to attempt to formulate a definition of the kinds of rights, privileges or monopolies that can fall within those words. It is sufficient for the

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purposes of this appeal to say that, in my view, those words are used to refer to some right, privilege or monopoly that enables the concessionaire or franchise holder to carry on his business, or that facilitates the carrying on of his business; and that they are not used to refer to a contract under which a person is entitled to remuneration for the performance of specified services. No example was suggested to me of a case where either word was used with reference to what is, in effect, a contract for services and my own understanding of the sense of the words "franchise" and "concession" does not embrace such a contract.

It follows that what the appellant acquired when it acquired W. & F. Limited's rights under the 1953 contract is not a franchise or concession. As I understand that contract, it is a contract under which the appellant is now bound to perform certain services and is entitled to be paid for performing them. If such a contract were a franchise or concession, so would be any other contract to perform a certain class of services for a defined remuneration for a definite period as, for example, a management contract, a contract to provide engineering or accounting services or any of the other similar contracts under which the modern business man avails himself of specialized services that it is uneconomic to provide for himself. To apply either of the words "franchise" and "concession" to contracts of that class would be to give them a meaning far beyond any usage of which I am aware.

In view of the conclusion that I have reached concerning the meaning of the words "franchise, concession or license", it is unnecessary to consider, for the purposes of this appeal, the arguments that have been addressed to the Court concerning the effect of the words "in respect of property" in the introductory words of Class 14.

I am therefore of opinion that the appeal fails on the first issue and that it is unnecessary to deal with the second issue.

The appeal is dismissed with costs.

BETWEEN:

ALGER B. FERRISS ..... APPELLANT;

1964  
Mar. 16-19  
Nov. 4

AND

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

*Revenue—Income tax—Method of income computation—Change from cash to accrual method—Whether cash of earlier year received after change to accrual method reportable in later year—Income Tax Act, R.S.C. 1952, c. 148, ss. 14(1), 141(6)—Reserve for doubtful debts, calculation of—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(e).*

Appellant carried on a retail hardware business in Harrow, Ontario, in partnership with his brother and his nephew, from 1945 to 1959. Prior to 1957 the firm's annual income from the business was ascertained by including only cash actually received each year and deducting expenditures incurred in that year. In December 1956 the Department of National Revenue indicated dissatisfaction with this basis of income computation and in 1957 and 1958 the firm calculated its annual income by including the gross amount of the year's sales, deducting expenditures incurred in that year and a reserve for doubtful debts. In 1957 the firm received \$15,506 and in 1958 \$2,662 in respect of accounts payable to it for 1956 and earlier years; but did not report these sums in its income tax returns for 1957 and 1958. The Minister, invoking s. 141(6) of the *Income Tax Act*, assessed the partners to income tax for 1957 and 1958 on these two sums.

The firm's accounts receivable for which a reserve for doubtful debts could be claimed under s. 11(1)(e) of the *Income Tax Act* amounted to \$16,992 at the end of 1957. Of this sum \$8,331 remained unpaid on the date appellant prepared his 1957 income tax return, viz., on April 16, 1958; and \$3,493 remained unpaid on October 31, 1958. For the year 1958 \$3,200 remained unpaid on accounts receivable at the time appellant prepared his 1958 income tax return and \$3,558 was unpaid at the end of October 1959. In the income tax assessments for 1957 and 1958 the firm was allowed a reserve for doubtful debts of \$2,171 for 1957 and \$1,401 for 1958.

Appellant appealed against the assessments, contending (1) that the cash received by the firm in 1957 and 1958 on accounts payable for years prior to 1957 was not to be taken into account in computing the firm's income for 1957 and 1958; and (2) that the Minister should have allowed a larger reserve for doubtful debts for the years 1957 and 1958.

*Held:* 1. That s. 141(6) of the *Income Tax Act* applied and accordingly the sums received in 1957 and 1958 on the accounts receivable for 1956 and earlier years were properly included in the partners' income for 1957 and 1958. Section 141(6) is not excluded from application where the only taxation years involved are years to which the 1948 *Income Tax Act* applies. Section 141(6) applies even though appellant's income computation for 1956 and earlier years may not have complied with the *Income Tax Act*. (*Ken Steeves Sales Ltd. v. Minister of National Revenue* [1955] Ex. C.R. 118 referred to.) If, as

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argued by appellant, the firm's pre-1957 computation was not an acceptable method of computing income under the *Income Tax Act*, s. 14(1)\* of the Act could not be applied to require computation of the firm's 1957 income in the same manner. If, on the other hand, it was an acceptable method the evidence established that a different method had been adopted in 1957 by the appellant and the Minister. Section 14(1) of the *Income Tax Act* did not require any formal application for leave to change a method of accounting. The evidence did not support appellant's contention that he had not voluntarily adopted the accrual method for 1957 and 1958.

2. That on the evidence with respect to the 1957 receivables, viewing the position as nearly as possible as of the time when the 1957 return was made, a reasonable reserve for doubtful debts under s. 11(1)(e) of the *Income Tax Act* would have amounted to at least \$2,700. On the same basis the reserve for 1958 should have been maintained at \$2,700.
3. That the appeal is allowed in part.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Thurlow in Windsor.

*Arthur B. Weingarden* for appellant.

*G. W. Ainslie* and *M. Barkin* for respondent.

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

THURLOW J. now (November 4, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board which dismissed the appellant's appeal from re-assessments of income tax for the years 1957 and 1958. During both of these years the appellant was a partner in a business carried on under the name of L. T. Ferriss Hardware and the first issue in the appeal is whether the appellant's share in amounts of \$15,506.05 and \$2,662.52 representing payments of accounts owing to the partnership at the end of the year 1956 but received in the years 1957 and 1958 respectively, was properly included in computing his income for the years in question. The other issue in the appeal is whether the appellant's portions of the amounts of \$2,171 for the year 1957 and \$1,401 for the year 1958 were in the circumstances reasonable amounts as a reserve for his share of the doubtful debts owing to the partnership in respect of which the

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\* Section 14(1) of the *Income Tax Act* was repealed by S. of C. 1958, c. 32, s. 6.

partners were entitled to such a reserve in computing income for the years in question.

The business was that of a retail dealer in hardware and builders' supplies and was carried on at Harrow, a rural community in southern Ontario. It had been established by the appellant's father, L. T. Ferriss, in 1905, and was carried on later by the appellant and his brother, David E. Ferriss, and from 1945 to the end of 1958 by a partnership consisting of the appellant, his brother, David E. Ferriss, and the latter's son, Edwin Meredith Ferriss. In computing income from the business for the year 1956 and for the years prior thereto the partners had followed a practice of including in the receipts only amounts received in cash during the year but amounts so received were included regardless of whether they represented payments for goods sold during the year or for goods sold in earlier years. Accounts owing to the partnership at the end of the year for goods sold in the year or in previous years were shown in the balance sheet but they were not included as receipts in the profit and loss statement nor was any deduction made therein in respect of any of them which might have become bad or doubtful. Expenditures on the other hand were deducted in the year in which they were incurred whether or not they had been paid at the end of the year. This was called a "cash receipts and expenditures system" of computing profit.

However, in the statements with respect to the partnership business which accompanied the appellant's 1957 income tax return a different method of computation was followed. This was an accrual system and in it the amount shown as receipts included the gross amount of merchandise sales for the year regardless of whether the price of the merchandise sold had been received by the end of the year. The profit and loss statement did not include any amounts received in the year in payment for goods sold in any earlier year nor did it include any item in respect of a reserve for doubtful debts provided for in any earlier year. Expenditures were deducted on the same basis as had been followed in previous years but in this computation for the first time a deduction entitled "Bad Debt Expense" was made in respect of the debts owing to the partnership, the amount deducted being \$2,171. Though called bad debt expense the item was in substance and in fact a deduction of a reserve in

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respect of doubtful debts. For the year 1958 the statements were again prepared on the same basis but the reserve for doubtful debts was not included on the revenue side of the profit and loss statement. Instead the list of expenditures included a credit amount of \$770 entitled "Bad Debt Expense" the net effect of which was to reduce the \$2,171 reserve in that year to \$1,401.

In adding to the appellant's declared income for the 1957 and 1958 taxation years his share of the \$15,506.05 and \$2,662.52 received in those years respectively in payment of debts owing to the partnership at the end of 1956 the Minister purported to do so on the ground that "Due to a change in the method of accounting in the 1957 calendar year, the opening accounts receivable in that year have never been taxed" and in confirming the reassessment following notice of objection he ruled that these amounts were properly included "in accordance with the provisions of subsection (6) of section 141 of the Act".

The subsection referred to is one of a group of provisions appearing in Part VIII of the *Income Tax Act* R.S.C. 1952, c. 148 entitled "Transitional Provisions" and it reads as follows:

141. (6) Where, upon the application of a method adopted by a taxpayer for computing his income from a business or property for a taxation year to which this Act is applicable, an amount received in the year would not be included in computing his income for the year because on the application of that method it would have been included in computing his income for the purposes of this Act, *The 1948 Income Tax Act* or the *Income War Tax Act* for a previous year in respect of which it was receivable, if the amount was not included in computing the income for the previous year, it shall be included in computing the income for the year in which it was received.

It will be observed that while this subsection has application as a transitional provision it is not limited to situations in which on the application of the method the amounts referred to would have been included in computing income for years in which either of the two earlier statutes applied but by its terms applies as well to amounts which on the application of the method would have been included in computing income for an earlier year to which the *Income Tax Act* itself applies. I mention this because of a submission made by counsel for the appellant that the subsection was not intended to apply where the only taxation years involved were years to which the *Income Tax Act* applied.

On the wording of the subsection the submission in my opinion cannot succeed.

A further observation to be made is that, while in the circumstances described or, perhaps more accurately, on the occasion referred to in it, the subsection requires that there be brought into the computation of income for a particular taxation year an amount which would not ordinarily enter into the computation of the taxpayer's income for that year, and while to that extent the subsection alters the measure of income prescribed by ss. 3 and 4 of the Act, the subsection applies only "if the amount was not included in computing the income" for "a previous year in respect of which it was receivable". In my opinion this wording does not refer exclusively to the taxpayer or to what he has done but to whether the amount was in fact included in the computation of income upon which the taxpayer was assessed for the earlier year. What the taxpayer included may be material if the Minister has adopted the computation. But the Minister is not bound by the taxpayer's return. He may or may not have used the same method of computing the taxpayer's income and regardless of what the taxpayer included in his return the Minister may have included the amount in his computation. If he did, in my opinion there could be no room for application of the subsection.

However, no issue was raised on this point in the notice of appeal. Instead what the notice of appeal set forth was that prior to 1957 the appellant had calculated his receipts for the year by adding together his cash sales and the amounts received from persons to whom he had extended credit and that "for the taxation year 1957 and years following the appellant calculated his receipts for the fiscal year by adding together the amount of cash sales and the amount of sales made in which credit was extended during the fiscal year 1957". This appears to me to state that for the year 1957 the appellant changed from what is commonly referred to as the "cash" method which he had used prior to 1957 to what is known as the "accrual" method. Notwithstanding this statement, however, the appellant went on to plead that he had made no change in his method of computing income and had made no application to the Minister to concur in a change of method of computing income. The explanation for the apparent inconsistency in the appellant's pleas appears to lie

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in the contention to which reference is made later in these reasons that the practice followed prior to 1957 was not a method of computing income. In his reply the Minister did not admit these allegations but he stated that in re-assessing the appellant he assumed a number of facts with respect to what was included in the appellant's computation which appear to me to be substantially to the same effect as the appellant's allegations. He did not, however, state that the amounts in question had not been included in his computation of the appellant's income for a previous year or years in respect of which they were receivable or that he had assumed that the amounts had not been so included. The critical fact upon which the application of the subsection depended was thus neither put in issue by the appellant nor expressly alleged by the Minister in his reply. It had, however, been suggested by the wording of the notice of re-assessment and it appears from the Minister's notification that it was the basis for the re-assessment. It sufficiently appears, therefore, that the Minister did re-assess on the basis that the sums in question had not been "included in computing the income" of the appellant for "a previous year in respect of which (they were) receivable" and accordingly it must I think be taken that so far as this particular part of the subsection is concerned the fact required for its application exists. I should add, however, because of the argument advanced on the question, that in my view nothing in the evidence establishes that the sums in question were included by the Minister in computing the income of the taxpayer for any previous year.

The appellant's main point with respect to the application of the subsection was that the taxpayer had not "adopted" a method of computing his income from the business for the years 1957 and 1958 within the meaning of the subsection. It was argued first that since the appellant's computation for 1956 and earlier years was not in accordance with the Act (*vide Ken Steeves Sales Ltd. v. M.N.R.*<sup>1</sup>) it could not be regarded as a method of computing income and that the Minister was not entitled to treat it as an acceptable method for the purposes of the Act in assessing the appellant for 1956 and earlier years and then to treat the use by the taxpayer of the accrual method for 1957 as a

<sup>1</sup> [1955] Ex. C.R. 108.

change of method, but should have attributed the 1956 accounts receivable to the year in which they arose. Secondly, it was said that in any case the Minister was not entitled to treat the computation in the appellant's return as a change of method until the taxpayer had applied for and the Minister had granted his approval pursuant to s. 14(1) of a change of method of computing income. Finally, it was submitted that the adoption of a method involved an act by the taxpayer of a voluntary character and that, since no method of computing income from the business other than the accrual method used in 1957 and 1958 was in accordance with the requirements of the statute and the taxpayer therefore had no choice but to follow it, this voluntary character was lacking.

While there is something to be said for the argument that the accounts owing at the end of 1956 should have been brought into the computation and taxed as income for the years in which they arose, it is to be observed that the reason they were not brought in at the time probably was the failure of the appellant to report them in the appropriate year and moreover that the evidence does not disclose the year or years in which they did in fact arise. All that does appear is that they arose prior to 1957. To bring the accounts into the computation for the years in which they arose would at this stage involve an inquiry probably going all the way back to the time of the formation of the partnership, that is to say to 1945, when the *Income War Tax Act* applied, and a revision of the computations for all the intervening years in accordance with the accrual method. If this had been done there might have been a year, presumably the first year of the partnership, in which the revenues were understated to the extent of the receivables at the end of that year and in that case the amount of them would have to be brought into the computation for that year with consequent effect on the tax assessed and possibly would result as well in an assessment of upwards of ten years interest thereon. Adjustments in respect of other years might be expected to produce little if any change in net result. Alternatively, the computations might have been made on the accrual basis starting with the year 1949, the first year to which the 1948 *Income Tax Act* applied, and if

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the revision were being made at the instance of the taxpayer, who does not want s. 141(6) to apply for 1957, s. 141(6) would apply to require the inclusion in income of the 1948 receivables in the years when they were ultimately paid. On the other hand if the revision was not being made at the instance of the taxpayer the consequence would be that the 1948 receivables would not enter into the computation for any year and to that extent profits from the business might escape taxation.

It appears to me that s. 141(6) was designed to meet this kind of situation by providing as an alternative to reviewing and revising assessments for a number of years, as to some of which a limitation period may have come into operation, that the adoption by the taxpayer of a method of computing income should be the occasion for requiring that the receivables accumulated in earlier years should be added, when paid, to what would otherwise be the income for the year. On this basis the taxpayer is taxed on income which has in fact been earned in an earlier year but which was not brought into the computation and taxed as income for that year. The result is a rough and ready form of tax adjustment which, though it could turn out to be harsh in some cases, appears to me to be authorized and required by the subsection. The appellant's objection accordingly fails.

Turning to the second contention, which is based on s. 14(1), it appears to me that if it be assumed that the manner in which the appellant's income from the business was computed prior to 1957 was not a method of computing income capable of being accepted for the purposes of Part I of the Act there is no room for applying s. 14(1) to require computation for 1957 in the same manner. On the other hand if it be assumed that this manner of computing income was capable of being accepted and had in fact been accepted it appears to me that nothing in s. 14(1) requires any formal application for leave to change a method of computing income and that the evidence of the change actually made by the taxpayer in his return for 1957 coupled with the re-assessment and the confirmation of it by the Minister conclusively establishes the adoption of a different method by the appellant and the Minister's concurrence therein. This contention as well accordingly fails.

With respect to the final contention, that is to say, that s. 141(6) refers to a voluntary adoption of a method by a taxpayer, the short answer appears to me to be that nothing in the evidence establishes that the use by the appellant of the accrual method of computing his profit for the year 1957 was anything but voluntary. He had, according to the evidence, been computing profit by the cash receipts and expenditures system for many years when in December 1956 a letter from the department to his agent suggested that the Minister was not satisfied with this manner of reporting income. His agent replied with a suggestion that the method had been accepted as a method adopted by the taxpayer but that since in his opinion the accrual method would be a better method of computing income for the taxpayer and since the Minister presumably approved of it he would recommend that the taxpayer adopt it for 1956. In fact, however, it was not adopted by the taxpayer for 1956 but, with no explanation as to what considerations led to it other than that the agent considered that the *Ken Steeves* case required it, the appellant's computation for 1957 was prepared on the accrual basis. To my mind this is quite insufficient to establish that the use of the accrual method was not voluntary or that it was not "adopted" by the appellant within the meaning of that expression in s. 141(6). I am accordingly of the opinion that the additions to the appellant's income made by the Minister under s. 141(6) for the years 1957 and 1958 must stand.

This brings me to the question of the adequacy of the reserves claimed by the appellant and allowed by the Minister in making the re-assessment. The provisions with respect to reserves for doubtful debts are contained in ss. 6 (e) and 11 (1)(e) of the Act the relevant portions of which read as follows:

6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(e) the amount deducted as a reserve for doubtful debts in computing the taxpayer's income for the immediately preceding year;

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(e) a reasonable amount as a reserve for

(i) doubtful debts that have been included in computing the income of the taxpayer for that year or a previous year,

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As already stated deductions of \$2,171 and \$1,401 for the years 1957 and 1958 respectively were allowed by the Minister these being the amounts claimed by the appellant in his returns. In his notice of objection the appellant contended that these amounts were grossly inadequate and that they should be increased to 33½ per cent of the total accounts. The Minister, however, declined to increase them. At the trial evidence was given by Mr. David Lazonsky, a chartered accountant, who in November 1960 and again in November 1963 made a study of the accounts for the purpose of forming an opinion of what amounts would be reasonable. He stated that he took into account a number of considerations including payments actually received in January and February of the following year and he reached the conclusion that a proper reserve would consist of the whole amount of certain old accounts for which notes had been obtained plus two-thirds of the amount of the rest of the accounts outstanding at the end of the year which contained unpaid items more than 60 days old at the end of the year. The effect of this is of course to include in the reserve considerably more than two-thirds of the amount outstanding at the end of February in each year. This opinion is not borne out by what actually occurred later in payment of the accounts and I regard it as unsound. Evidence was also given by Mr. David Ferriss, who impressed me as a credible witness whose long experience in the business afforded a substantial basis of knowledge on which to form an opinion. He stated that while as a rule of thumb 10 per cent had been a useful guide in the business in the years before the depression in estimating probable losses on book accounts, it was not satisfactory for the years in question and he expressed the opinion that 10% was "not one-third enough".

The evidence and admissions indicate that at the end of 1956 the accounts receivable totalled \$20,220 of which \$15,506 was paid in 1957 leaving \$4,714 representing unpaid accounts of 1956 and earlier years which had not been taken into income. As total accounts receivable at the end of 1957 amounted to \$21,706 the receivables in respect of which a reserve for doubtful debts might be deducted under s. 11(1)(e) in computing 1957 income thus amounted to \$16,992. In the course of his study Mr. Lazonsky prepared

Exhibit 10 which is a list of accounts owing at the end of 1957 totalling \$16,425 all of which contained unpaid items which were then more than 60 days old. After allowing for the \$4,714 representing 1956 receivables, which must have been included, this list would thus include \$11,531 in 1957 receivables. As the statements accompanying the appellant's income tax return for 1957 are dated April 16, 1958 it appears to me to be reasonable to assume that the appellant when preparing his return for 1958 should have known how much of this \$11,531 had been paid at least up to the end of March 1958 and the particulars furnished by the appellant in this appeal indicate that roughly \$3,200 of the amount had in fact been paid by that date leaving a balance of about \$8,331 still outstanding. With respect to the portion of the 1957 receivables not included in Mr. Lazonsky's study as there is no evidence that any of them ever became overdue I think I must assume that they were paid when due and leave them out of my calculation. At the time of making the return therefore there was a total of about \$8,331 in unpaid receivables in respect of which a reasonable reserve might be deducted, all of which receivables were already more than three months old and portions of which were more than five months old. The particulars and Exhibit 10 indicate as well that by the end of October 1958, when some portion of the \$11,531 would have been a year old, and all of it would have been at least ten months old, some \$8,042 had been paid, the balance remaining unpaid being in the vicinity of \$3,493. Thus ten months after the end of the year in which the receivables were treated as income and taxed as profits of the year \$3,493 remained unpaid and against this the appellant had a reserve of but \$2,171.

Turning to 1958, Exhibit 11, Mr. Lazonsky's list of accounts owing at the end of the year containing items more than 60 days old, totals \$11,960. As \$2,662 of the \$4,714 remnant of 1956 receivables had been paid during the year the \$11,960 would therefore include \$2,052 in 1956 receivables and \$9,908 in 1957 and 1958 receivables. Of the latter amount about \$1,700 appears from the exhibit and from the particulars to have been paid by the end of March 1959 leaving some \$8,200 uncollected at the time of preparation of the 1958 income tax return. By the end of October 1959, when some portion of each of these accounts would have

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been more than a year old and all of them would have been at least ten months old, there was still, according to Exhibit 11, at least \$3,558 of the total unpaid. This experience with respect to both the 1957 and 1958 receivables appears to me to bear out Mr. Ferriss' opinion that a reserve of 10 per cent was not sufficient, and I think this is so whether the percentage is applied to the balance owing at the time of preparation of the return or to the amount of accounts owing at the end of the taxation year. I am moreover not impressed by the fact that by November 1963 most of the amounts had been paid. Had the appellant known in April 1957 and 1958 that he would have to wait for a matter of years for payment of these accounts he would I think have had good reason to regard them as doubtful and probably good reason to regard some of them as bad. On the whole viewing the position as nearly as possible as of the time when the 1957 return was made and having regard both to Mr. Ferriss' opinion and to the extent to which support for it may be found in the facts which I have mentioned with respect to the accounts I do not think a sound estimate made in April 1958 of the present value of the \$8,331 still remaining unpaid would have been in excess of two-thirds of the total that is to say \$5,554 and I am satisfied that a reasonable reserve for doubtful debts under s. 11(1)(e) for 1957 would have amounted to at least \$2,700. On the same basis I am also satisfied that for 1958 instead of being reduced to \$1,401 the reserve should have been maintained at \$2,700. To the extent indicated the appellant is accordingly entitled to relief in respect of both the 1957 and 1958 re-assessments.

In the course of the trial it also appeared that the merchandise sales for the year 1957 had by mistake been overstated at \$104,792 and the correct figure having subsequently been agreed upon at \$102,770 leave to amend the notice of appeal to allege this was granted and counsel for the Minister, very properly, in my opinion, consented to an order that the 1957 re-assessment be referred back to the Minister for reconsideration and re-assessment accordingly. The appellant is therefore entitled to relief in this respect as well.

In the result the appeal will be allowed and the re-assessments for both years will be referred back to the Minister for reconsideration and re-assessment in accordance with these reasons. As there is only one proceeding and the appellant has achieved success in respect of a portion of the matters raised against the re-assessments for both of the years involved in the appeal, he is entitled to his costs.

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*Judgment accordingly.*

BETWEEN:

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PLAINTIFF;

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AND

THE DIRECTOR, THE VETERANS' }  
 LAND ACT and MURRAY BER- }  
 NARD GRENN ..... }

DEFENDANTS.

*Expropriation—Compensation—Method of establishing value of expropriated property—Determination of value of property at date of expropriation—Valuation of land remaining after expropriation—Special value of expropriated land to former owner—Interest on amount of compensation.*

This action arises from the expropriation in 1963 by the plaintiff of about 10.5 acres of a 28.5 acre parcel of land consisting of part of the west half of lot 8, concession 5 in the Township of Scarborough, County of York, on the outskirts of the City of Toronto, which had been acquired by the defendant Grenn, in 1947. At the time of trial there was about \$1,885 00 owing by Grenn to his co-defendant, The Director, The Veterans' Land Act, under an agreement entered into between the defendants in 1949. This is the extent of the Director's interest in the land.

Prior to 1963 the defendant, Grenn, had cleared the land and had used part of it for market gardening and had raised turkeys on part of it for several years. He had also constructed a substantial residence and several other buildings, most of which were intended to be used in connection with his turkey-raising operations.

The 28 5 acre tract owned by the defendants was rectangular in shape, being some 1850 feet from north to south and 670 feet from east to west. The plaintiff expropriated the northerly 10.5 acres thereof, upon which were located most of the buildings including the defendant, Grenn's, residence.

The evidence established that the defendant, Grenn, intended to use the tract of land for a horse boarding project with the assistance of his son

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who had graduated as a veterinary surgeon, and to continue his market gardening and resume his turkey raising, which he had abandoned in 1956.

*Held:* That it is well established that the value of expropriated property should be estimated on the basis of the most advantageous use that could be made of it, whether present or future, but it must be remembered that, while consideration must be given to the future advantages and potentialities of the property, it is only the present value as at the date of expropriation of such advantages and possibilities that falls to be determined.

2. That with respect to damage to the property remaining to the defendant after expropriation, there would be no detriment if the land were used for agricultural purposes, there being no severance or restriction of access, although there would most certainly be some detrimental effect for residential purposes. However, in view of the uncertainty and remoteness of any higher use in the future, the "after" valuation of the land should remain the same as the "before" valuation and such valuation should include the prospect of any potential higher use. For similar reasons no benefit should be assessed which could be conferred upon the land by the presence of the railroad.
3. That the property in question had a special value to the defendant, Grenn, because of its location with respect to three major race tracks and the adaptability of the existing buildings for the purpose of the very special type of horse boarding which the defendant and his son had realistically and seriously considered and towards the realization of which tentative steps had been taken prior to the expropriation.
4. That the defendant is not entitled to interest on the amount of compensation for the period of time he remained in possession of the expropriated property without payment of rent following its expropriation, but is entitled to interest at the rate of five per cent per annum from the date on which he gave possession thereof to the plaintiff to the date of judgment.

ACTION to have the amount of compensation payable to defendants determined by the Court.

The action was tried by the Honourable Mr. Justice Cattnach at Toronto.

*W. P. Winslow* for plaintiff.

*J. D. Arnup, Q.C.* for defendant Grenn.

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

CATTNACH J. now (April 14, 1965) delivered the following judgment:

The information exhibited herein shows that a portion of the lands described in paragraph 2 thereof registered in the

name of the defendant, the Director, The Veterans' Land Act (hereinafter referred to as The Director) with whom the defendant, Murray Bernard Grenn, a qualified war veteran had entered into an agreement to purchase the said lands, were taken by the plaintiff for the purposes of a railway facility to be constructed by it by deposit of a plan of expropriation on March 11, 1963 pursuant to the *Canadian National Railways Act*, Chapter 29, Statutes of Canada, 1955 and amendments thereto and the *Expropriation Act*, Chapter 106, Revised Statutes of Canada 1952. The prior consent to the said expropriation by the Governor General in Council pursuant to subsection 1, section 24A of the *Veteran's Land Act*, Chapter 280, R.S.C. 1952, as amended by Chapter 37, Statutes of Canada 1959 was obtained and is evidenced by Order-in-Council P.C. 1963-298 dated February 21, 1963.

Therefore, as of March 11, 1963 the aforesaid lands became vested in the plaintiff and the defendants ceased to have any right, title or interest therein or thereto and the defendants' rights are limited to receiving compensation therefor in accordance with their several interests in the lands so expropriated.

The plaintiff, prior to expropriation and on occasions thereafter offered to pay to the defendants the aggregate sum of \$93,200 in full satisfaction of all their claims for the lands taken as well as all other consequential damage. The Director was prepared to accept that offer but the other defendant, Murray Bernard Grenn, refused and by his reply claims that the lands, buildings and appurtenances thereto which had been expropriated by the plaintiff had a value of \$150,000. It was agreed between the parties that the offer of \$93,200 was made to the defendant Grenn on May 3, 1963.

It has been agreed among the parties that the interest of the Director is limited to the amount owing to him under the agreement for sale between him and the defendant, Murray Bernard Grenn which amount is agreed to be \$1,885.87 as at December 1, 1964.

The contest is therefore, between the plaintiff and the defendant Grenn. There is thus a wide divergence between these parties as to the amount of compensation money to which the defendant, Grenn is entitled and these proceedings are brought for an adjudication thereof. Hereinafter

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when reference is made to the defendant it will mean the defendant, Murray Bernard Grenn.

The defendant, who is now sixty years of age came to Canada at the age of nineteen from the Ukraine, where he was raised on a farm. He worked as a farm labourer in the wheat fields of Alberta until 1928 when, upon his marriage, he began the operation of a country general store. This venture proved unsuccessful due primarily to the disastrous depression of 1929, during which year he went broke. He thereupon became a life insurance salesman in Vancouver, B.C. and in addition obtained part-time work in a retail store.

At the outbreak of war in 1939 he promptly enlisted and served until 1942 when he was honourably discharged on medical grounds. He had taken his discharge in Toronto, Ontario and obtained employment in war industries until 1944 when he again entered into retail trade, this time in Toronto. This retail venture apparently prospered because during the period between 1944 and 1952 he acquired four retail stores.

However, he stated in evidence that his most cherished ambition had always been to return to life on a farm because of his affinity for animals, particularly horses. In this professed ambition or dream, I believe there is a modicum of truth, despite his more extensive experience in the retail trade, because he enrolled his son in the Agricultural College at Guelph to study and qualify as a veterinary surgeon.

In 1947 he acquired a rectangular tract of land being the west half of Lot 8, concession 5, in the Township of Scarborough, County of York in the Province of Ontario, containing by admeasurement approximately 28.5 acres, excepting the most northerly 358 feet thereof for a consideration of \$2,000. The property is located at the extreme North East limit of the Metropolitan Toronto planning area and about 15.5 miles from downtown Toronto. It is an area that is predominately agricultural in use, with some golf courses, riding stables and rural housing scattered throughout. The northern boundary of the property runs for 670 feet, 358 feet south of and parallel to Steeles Avenue which is an east-west traffic artery surfaced with gravel and constitutes the northern boundary of Metropolitan Toronto.

The western boundary is Sewells Road on which the property has a frontage of 1850 feet. The southern and western boundaries do not front on any access roads.

The land when acquired by the defendant was devoid of buildings and in a run-down state having been abandoned for some years previous. Immediately upon his acquisition of the land the defendant began clearing it up by removing stumps and boulders which took about two to three years and the combined labour of the defendant himself and two hired men.

In 1949, the defendant, in order to take advantage of his war service gratuities entered into an arrangement with the Director, Veterans' Land Act whereby title passed to the Director under the usual agreement. The cost of the land to the Director was \$5,400 and to the defendant \$4,140, to be repaid by him to the Director over a period of twenty-five years.

In this year the defendant began market gardening on the land so acquired starting first upon a one acre plot which was gradually increased so that eventually he had from eight to ten acres under cultivation.

From 1953 to 1956 the defendant was engaged in raising turkeys although he supplemented that activity by continuing his market gardening operation.

In 1949 the defendant decided to dispose of the four retail stores he owned in the City of Toronto and devote himself exclusively to his farming activities.

Accordingly, he began the construction of a house on the farm land in 1949, moved into it with his family in 1951 although construction was not finally completed until 1952. Also in late 1952 or early 1953 he disposed of the last of his four retail stores.

The residence built by the defendant was of substantial proportions and good quality construction. It was designed and built to his specifications upon a concrete slab with radiant heating and consisted of four bedrooms, a large living-room opening through French doors onto a patio, a large reception hall, dining-room, an above average sized kitchen, an office, a utility room and two bathrooms. Also attached to the house and forming an integral part thereof was an apartment for use by hired help, usually a man and

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his wife. This apartment consisted of three rooms and a bath. There was also a two-car garage as well as a storage room, laundry and utility room.

Next constructed by the defendant was a concrete block story and a half storage building with a cinder block floor. The dimensions of this building were approximately 32 feet by 56 feet and it consisted of two sections, a stable area and a loft. The defendant stated this building was completed in 1953 or 1954 his recollection not being definite.

Upon the defendant's decision to raise turkeys he built a large single story turkey house, 56 feet, 6 inches in width and 208 feet in length divided into six sections of equal size being 32 feet by 56 feet, 6 inches, with a centre section of 16 feet in width and incorporating a pump house. This building was of block construction upon a concrete block foundation with a cement floor running the entire length of the building and covering the centre portion. It was covered by an aluminum roof. The defendant stated that this building was completed in 1954.

During either 1955 or 1956, according to the defendant's recollection, he completed construction of a pole turkey shed, 24 feet, 6 inches by 206 feet built by the use of cedar posts, with open sides to permit the turkeys to run, but which could be enclosed by the use of plywood panels which were designed and of the size for that purpose. This building was covered by a corrugated metal roof.

A similar shed of approximately the same proportions and construction was built in 1958, but was not roofed.

The defendant had contemplated building a swimming pool and had done the necessary excavation when he decided that a combined cottage and greenhouse would be more useful, which he built on the existing foundation. The cottage was 17 feet, 6 inches by 26 feet of frame construction covered with asbestos sheathing. The attached greenhouse was 12 feet, 5 inches by 17 feet, 6 inches. The cottage was for use by unmarried hired help and the greenhouse was for use in connection with the defendant's market gardening. The cottage was fit for occupancy and substantially completed in 1954 but was never fully finished inside.

Because of theft of turkeys the defendant built a frame shelter for use by a night watchman as well as eight small doghouses.

All of these buildings were constructed under the supervision of the defendant. He hired the labour and tradesmen required and purchased the building materials. Where necessary he consulted an architect and paid for the drawing of working plans. This was certainly done in connection with the residence although the evidence is not specific with respect to other buildings. In short the defendant acted as his own general contractor.

The plaintiff's plans for the construction of a large and complex freight marshalling yard north of Metropolitan Toronto necessitated the construction of an access line, the right of way for which would transverse the defendant's property diagonally.

The plaintiff's original plan had been to expropriate only sufficient of the defendant's property for the right of way which would be a strip 120 feet wide and which would sever the defendant's property into two parcels, but passing directly through and necessitating the demolition of his residence while the other buildings would remain intact. The defendant's son, Dr. Harvey Grenn was advised to this effect by a letter dated March 24, 1959 and I am positive that the content of such letter was communicated to the defendant forthwith upon its receipt.

Subsequently the plaintiff decided to expropriate the whole of that portion of the defendant's property lying north of the right of way consisting of 10.537 acres upon which all of the defendant's buildings had been erected, leaving in the defendant's possession the portion of the property to the south of the right of way consisting of 17.963 acres.

As mentioned before from 1949 to 1953 the defendant was engaged in market gardening exclusively upon the property. From 1953 to 1956 he became engaged in raising turkeys which then became his main enterprise. The defendant testified that his annual net from market gardening was consistently less than \$2,000 and that his annual net from turkeys during 1953 to 1956 was about \$5,000. However, I am of the opinion that the foregoing estimate of the defendant's net return from both these enterprises is excessive. He also testified that he filed no income tax returns respecting his farming activities because his income therefrom was less than his statutory exemptions of \$2,000.

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In 1956 he lost his entire turkey crop. Previously he had raised and marketed about 5,000 poults per year but in 1956 he doubled the number of poults to 10,000 presumably at the suggestion of his feed supplier. Because he could not market this larger number of birds through his normal channels the entire flock was processed and kept frozen in a processing plant at Brampton, Ontario on the recommendation of his feed supplier. The processor unlawfully converted the defendant's birds to its own use. The defendant sued the processor and recovered judgment in the amount of \$47,928.85 of which \$5,000 was awarded as exemplary damages. The defendant's loss was calculated according to the highest average wholesale prices prevailing during the year which would amount to \$42,928.85. The defendant had lost about 1,500 poults because the feed recommended and supplied to him was too high in protein count. The feed supplier sued the defendant for feed supplied and recovered judgment in the amount of \$40,000. The cost of the poults was \$1.00 per poult in addition to which there was a cost of between 10 to 20 cents per poult for heating and between \$500 to \$800 for litter. The defendant also employed two and sometimes three men to care for the turkeys at \$200 per month per man. In view of such costs it seems inconceivable to me that the defendant could have netted between \$5,000 and \$7,000 from his turkey raising as he testified, even when he conducted the operation on a lesser scale and even bearing in mind the spread between retail and wholesale prices.

After the defendant's disastrous experience in turkey raising in 1956 the germ of an idea which the defendant and his son were considering took fruit. This idea was that the premises should be converted to use for horse boarding. His son would practise as a veterinary surgeon there. During his course the defendant's son had a classmate, who was the son of a horse breeder and trainer through whom he had made or hoped to make the acquaintance of other horse trainers and owners. The defendant's property was located in close proximity to three major race tracks in the Toronto area all of which were within easy access of the defendant's property over good roads. There was a veterinarian who had conducted a similar enterprise with success in the immediate vicinity but who had moved his practice elsewhere. The defendant's son was due to graduate and did graduate in

1958. In that year the son lived at home and obtained employment with another veterinarian to gain experience. He also visited Lexington, Kentucky to see the progress in equine veterinary care in the heart of the horse racing country and spent some time assisting his classmate whose duties as a veterinarian took him to the local race tracks.

The defendant foresaw a lucrative venture. He planned to continue market gardening and to resume turkey raising, which he had abandoned in 1956, but on a reduced scale. The large poultry barn was to be converted into stables and the turkey raising moved to the covered pole shed. Considerable reconstruction would be required to convert these buildings to such uses. He optimistically estimated a prospective net return of \$7,000 from boarding horses and \$3,000 from raising turkeys. His son's income was to be derived from his profession. There was to be an inside operating room within the converted poultry barn and an outside operating area adjacent thereto with hydraulic operating tables, exercise yards, paddocks and the like facilities. The existing buildings and land were readily adaptable for these purposes.

Their target date for the commencement of this venture was set for 1959.

When the defendant and his son were advised of the impending expropriation by the plaintiff in March of 1959 this horse boarding project was ruined. Tentative steps had been taken towards the fulfillment thereof. A pond to ensure an adequate water supply had been dug on that portion of the property which was not expropriated, the poultry barn had been cleared in contemplation of reconstruction and some cultivating and planting had been done to prepare for an exercise yard and a paddock. Quite naturally when rumours of the impending expropriation became a certainty, all such preparatory activities were abruptly ceased.

Subsequently, the defendant's son's classmate began a similar horse breeding, stabling and caring business which has been attended by some success but whether the defendant and his son would have been equally successful is problematical.

Simultaneously with the son's conduct of his equine veterinary practice on the expropriation property it was also

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planned that he should conduct a small animal hospital in the nearby village of Agincourt. The lot upon which the building to house the small animal hospital to be constructed was purchased by the defendant in the fall 1958. This animal hospital was opened in September of 1960. The son testified that he made unsuccessful efforts to find an alternative site for a large animal hospital.

By letters patent dated June 24, 1958, issued pursuant to the laws of the Province of Ontario, a company was incorporated under the name of Grenn Limited following application therefor by the defendant presumably upon the advice of his solicitor. The authorized capital consisted of \$200,000 divided into 18,000 non-voting preference shares of the par value of \$10 each and 20,000 common shares of the par value of \$1 each.

By an agreement between the defendant and the company dated June 26, 1958 the defendant, as vendor, purported to sell to the company all his goods, equipment, implements and buildings in consideration of 8,251 fully paid non-voting preference shares of the company. In the schedule appended to the agreement, the buildings were valued at \$75,000. Subsection 2 of section 31 of the *Ontario Corporations Act* 1953 S. of O. Ch. 19 provides that shares with par value shall not be issued and allotted as fully paid except for a consideration in cash equal to the par value thereof or for a consideration in property being the fair equivalent of such cash consideration so determined by the directors in good faith by express resolution.

The defendant also purchased 25,000 common shares for cash. Apparently he held all issued shares other than qualifying shares and regarded and treated the company simply as his alter ego. It was the defendant's intention that his business should be conducted through this corporate medium thereby obtaining whatever corporate benefits that might result.

On April 11, 1961 the buildings were transferred back to the defendant by the expedient of redeeming the 7,500 preference shares held by him. The consideration for the transfer back therefore remained at \$75,000.

The equipment originally transferred to the company by the defendant in consideration of preference shares valued

at \$7,510 was not transferred back from the company to the defendant.

Upon the expropriation becoming effective March 11, 1963, the plaintiff permitted the defendant to remain in possession until June 19, 1963 when the defendant delivered the keys to the house to the plaintiff. It is agreed between the parties that this is the date upon which possession was surrendered, although the defendant moved from the house into other accommodation in October 1962 during which interval the house was unoccupied. The plaintiff permitted the defendant to store some of his personal effects and farming equipment in the story and a half concrete block building which is the only building which has not been demolished.

Further, on May 6, 1963 the sum of \$3,000 was advanced by the plaintiff to the defendant to defray his moving expenses on the agreement that \$3,000 should be credited against the compensation found to be payable to the defendant.

There was filed in evidence:

- (1) a certified copy of the Township of Scarborough official plan passed by the Township Council on April 11, 1957 and approved by the Minister of Planning and Development on December 18, 1957 which was not amended as at March 11, 1963 (Exhibit 13);
- (2) a certified copy of the Township of Scarborough urban development by-law No. 3861 passed on April 5, 1948 and approved by the Minister on April 16, 1948 which has not been amended as at March 11, 1963 (Exhibit 14) and
- (3) a certified copy of the Township of Scarborough zoning by-law No. 10217 passed on November 20, 1961 and which to become effective must be approved by the Ontario Municipal Board and has not been so approved. (Exhibit 11).

The defendant's property is not served by water-mains or sewers and it is evident from the above mentioned documents that urban development of the area in which the defendant's property lies is not contemplated until after

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1980 and that the defendant's property is in an area designated for agricultural use which term is defined in sufficiently broad terms to include the use contemplated by the defendant. The Township Planning Board is authorized to consent to separation of lands for non-farm homes, in accordance with the *Ontario Planning Act* but such separations are not to be encouraged in agricultural areas and not in parcels of less than 10 acres and each home is to be upon a lot of 100 foot frontage on a public road and at least 300 feet in depth.

Against such background, as I have intimated before, the sole dispute is between the plaintiff and the defendant as to the amount of compensation to which the defendant is entitled.

Opinion evidence of the value of the expropriated property was given for the defendant, by the defendant himself, Mr. James E. Farr and Mr. R. W. Hope and for the plaintiff by Mr. Frank Helyar, Mr. G. I. M. Young and Mr. Joseph Strung. Mr. Farr's testimony was directed to expressing his opinion to the value of the land as vacant land before and after expropriation while Mr. Hope gave his opinion of the reconstruction costs of the buildings expropriated and the depreciated value thereof. Messrs. Young and Strung gave their opinions as to the value of the land before and after expropriation. Mr. Helyar gave his opinion as to the reconstruction cost of the buildings. Messrs. Young and Strung accepted Mr. Helyar's opinion of the reconstruction cost and applied their respective opinions to the depreciation thereto. The defendant himself expressed no opinion as to the value of the land as such. The results were surprisingly divergent. I attribute the divergence as to the value of the land among the experts to differing opinions as to the best use to which the property could have been put. It is well established that the value of expropriated property should be estimated on the basis of the most advantageous use that could be made of it, whether present or future, but it must be remembered that, while consideration must be given to the future advantages and potentialities of the property, it is only the present value as at the date of expropriation of such advantages and possibilities that falls to be determined.

Mr. Farr based his valuation on the future use of the property as a rural residential development while Messrs. Young and Strung considered such use as conjectural and remote and accordingly concluded the best use as being agricultural holding, i.e. devoting the land to some agricultural use such as the defendant had done and had in contemplation against future urban development. In their views, with which I agree, the current market price would reflect that potentiality.

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To determine market value all three experts resorted to sales and listings of sales of other land in the same general area and there was no concrete evidence available to them about such transactions except what could be learned from examining deeds in the Registry Office and viewing the properties. It was accepted by all three experts that none of the sales upon which they relied were truly or exactly comparable.

Mr. Farr concluded that the expropriated property should be valued at \$2,000 per acre before expropriation and \$1,550 thereafter. The reduced value after expropriation he attributed to the presence of the railway with its heavy traffic which would injuriously affect the defendant's remaining land for rural residential development as would the irregular shape thereof.

Mr. Young valued the expropriated property at \$1,500 per acre before expropriation and Mr. Strung placed his valuation at \$1,300 per acre. Both Mr. Young and Mr. Strung were of the opinion that the coming of the railroad would not reduce the value of the land and accordingly their after valuations remained respectively at \$1,500 and \$1,300 per acre.

After careful consideration of all sales relied upon by the experts and the many imponderables attaching thereto, I cannot conclude therefrom that there was justification of Mr. Farr's "before" valuation of \$2,000 per acre. There was only one sale in excess of \$2,000 per acre and that was at \$2,030 per acre for land that was susceptible of earlier development than the defendant's property.

In the circumstances, therefore, and having regard to the onus which is on the defendant, I cannot make a finding that the defendant's land, before expropriation, was worth

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any more than the higher of the two values put forward by the plaintiff, i.e. \$1,500 per acre.

With respect to damage to the property remaining to the defendant after expropriation, there would be no detriment if the land were used for agricultural purposes there being no severance or restrictions of access, although there would most certainly be some detrimental effect for residential purposes. However, in view of the uncertainty and remoteness of any higher use in the future I accept the opinion of Messrs. Young and Strung that the "after" valuation of the land should remain the same as the "before" valuation and that such valuation would include the prospect of any potential higher use. For similar reasons I would not assess any benefit which could be conferred upon the land by the presence of the railroad.

Therefore, I would find the compensation to which the defendant is entitled in respect of his land to be in the amount of \$15,805.50.

There remains to be considered next the value of the improvements to the land made by the defendant to be followed by a consideration of the depreciated value thereof as at March 11, 1963.

The defendant himself testified that the approximate cost of the structures and improvements was \$111,080 including therein the cost of landscaping, roads and farm clean-up but exclusive of his own labour. This estimate is based upon his recollection and is not supported by any accounts which, if they existed, were destroyed when the vacant house on the expropriated land was rifled. In my view it is only natural that the defendant would be inclined to err upon the side beneficial to himself and accordingly I find this estimate to be excessive.

Mr. Hope began working as a carpenter and eventually became successively an estimator, manager and third owner of a successful general contracting company specializing in alterations and repairs, fire repairs and new construction with an annual volume of \$1,250,000. He is also the manager of an appraisal company specializing in the appraisal of fire losses, the cost of reconstruction and in estimating depreciation. Mr. Hope had the advantage of inspecting the buildings during April 1963. Also he was given the actual construction plans of the house and the

plan of the radiant heating layout. In making his estimate of the replacement costs he used a unit figure inclusive of the cost of material, labour, overhead and profit that is the identical unit price which he uses in making competitive bids. His resultant estimate of replacement costs of the buildings and improvements was \$92,077.00 the particulars of which are outlined in a report prepared by him and filed in evidence as Exhibit "Q".

Mr. Helyar, a quantity surveyor, estimated the reconstruction costs on behalf of the plaintiff. Mr. Helyar did not have the advantage of inspecting the buildings and improvements nor did he have available to him the construction plans of the house or of the radiant heating layout. He was obliged to make his estimate from numerous photographs of the buildings, both exterior and interior, a description thereof supplied to him by Mr. Strung and a floor plan of the house drawn by Mr. Strung. Mr. Helyar took the measurements, figured the materials required and based on unit prices current in March 11, 1963, but exclusive of contractor's overhead and profit for which he assigned specific amounts, from which computations he arrived at an estimated reconstruction cost of \$66,934. During the trial the construction plans of the house and radiant heating layout were made available to Mr. Helyar who accordingly raised his estimate upward to \$69,614, a difference of \$2,680 over his former estimate of the reconstruction cost of the house. The overall difference between the respective estimate of Mr. Hope and Mr. Helyar is \$23,463.

Mr. Helyar in his estimate did not include landscaping, sodding, culverts and the watchman's shed which were included in Mr. Hope's estimate at \$5,468 which would reduce the difference between them to about \$18,000. Mr. Helyar and Mr. Hope were extremely close in their estimate of the reconstruction costs of all buildings except the main house, that difference being between Mr. Hope's figure of \$54,192 and Mr. Helyar's of \$36,043 which is approximate to their overall difference of \$18,000.

The principal difference between them is with respect to the item of carpentry in the main house being \$8,623. As mentioned before, in fixing his unit price, Mr. Helyar did not include the contractor's overhead and profit, but included these as separate items. Further in arriving at his labour

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costs, Mr. Helyar did so on the basis of non union labour being employed.

In view of Mr. Hope's obvious advantages in being able to inspect the buildings and premises and because of his experience in making competitive bids his estimate of the reconstruction cost appears to me to be more realistic and accurate. I, therefore, accept the reconstruction cost put forward by him in the amount of \$92,077.

My next task is to find the depreciated value of the improvements.

Mr. Young and Mr. Strung, for the plaintiff, both accepted Mr. Helyar's estimate of reconstruction costs and applied thereto percentage rates of depreciation to arrive at the depreciated value. Mr. Young applied a rate of twenty-five percent to all buildings except the cottage and greenhouse, and open pole turkey shed which were unfinished and to which two buildings he applied no depreciation. Mr. Strung applied twenty-five percent to the house, ten percent to the cottage and greenhouse, thirty-three percent to the story and a half concrete block building and the poultry barn and fifty percent to the turkey sheds. They both arrived at these percentage rates basically upon the life expectancy of the buildings and deducting the actual age as well as considering their state of repair.

Mr. Hope, for the defendant, also estimated the depreciated value of the buildings. In doing so he employed two methods, the first method being an overall depreciation rate based upon the life expectancy of the buildings. Mr. Hope assigned a much longer life expectancy than either Mr. Young or Mr. Strung and came up with percentage rates ranging from a minimum of five percent to a maximum of sixteen percent, indicated by a summary prepared by him and filed in evidence as Exhibit "R". He also computed the depreciated value by a second method which involved an estimate of the expected life of the component parts of the buildings assigning a depreciation rate applied to the actual age and condition.

By the first method Mr. Hope arrived at a depreciated value of \$81,389 and by the second method at a depreciated value of \$76,434. However he expressed the view that he preferred his estimate by the first method and that his

second exercise was to check on the accuracy of his first method.

In my view, however, Mr. Hope's second method results in the most accurate and realistic result. In this conclusion I am reinforced by the fact that the defendant himself on June 26, 1958 transferred the buildings to Grenn Limited, some five years previous to March 11, 1963, for a consideration of \$75,000 which the directors of Grenn Limited must be presumed to have believed, in good faith, to have been the fair value thereof at that time.

Therefore I find the depreciated value of the buildings and improvements to have been \$76,434 as at March 11, 1963.

The depreciated value of the improvements which I have found to be \$76,434 when added to the value of the land which I have found to be \$15,805.50, amounts to \$92,239.50.

The defendant moved from his house to an apartment in the City of Toronto thereby incurring moving expenses. In addition he was obliged to move and store personal effects and farm equipment. He estimates these expenses at \$381.73.

In addition the defendant filed a statement of miscellaneous losses as Exhibit "J" in the total amount of \$3,150. These losses include fertilizer, piece lumber, a television aerial and such items as he could not dispose of or conveniently remove. Since title thereto would pass to the plaintiff, I therefore feel that this item is properly allowable.

Some of the equipment moved and stored belonged to Grenn Limited. For reimbursement for this expense the defendant should look to Grenn Limited rather than to the plaintiff. However since I have no means of segregating the equipment I think that the defendant would be adequately compensated by an award of \$3,500 to cover both of the foregoing items.

In Nichols on Eminent Domain, 2nd edition at page 665 the author says:

In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes present and prospective, for which it is adapted, and to which in reason it might be applied, must be considered, and its value for

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the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

The rule with respect to ascertaining the proper compensation of an owner where his property is expropriated is stated by Rand, J., in *Diggon-Hibben Ltd. v. The King*<sup>1</sup>, in the following words:

. . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

In *Drew v. The Queen*<sup>2</sup>, Locke, J., applying and explaining this principle said:

An element very often of great importance to be considered in determining what a prudent man would pay for the property rather than be ejected from it is the expense and inconvenience of moving elsewhere, the loss of benefits enjoyed by the owner due to the location of the property taken . . .

Judson, J., in the *Drew case (supra)* at pages 632-633 said:

In fixing an amount of an award there are often factors, other than market value of the property expropriated, which must be taken into account but which are not easily calculated. In such cases the tribunal of fact may decide that compensation can best be appraised in the form of a percentage of the market value. This is but part of the process of determining value to the owner. Once that value has been assessed in accordance with the rule in the Woods case it represents full compensation and the owner is not entitled to an amount for compulsory taking.

In applying the principles so enunciated to the facts in the present case I am convinced that the subject property had a special value to the defendant. The location of the property in close juxtaposition to three major race tracks and the adaptability of the existing buildings, which required an expenditure of funds and which the defendant had available, for the purpose of the very special type of horse boarding, was both feasible and enjoyed a reasonable prospect of success. Further this enterprise would utilize the professional qualifications of the defendant's son and I am certain that the defendant, as a parent, would be most anxious to do so. I am further convinced that this enterprise was realistically and seriously considered for implementation by the defendant and his son. Tentative steps were taken towards realization thereof and I feel that the cessation was due to the impending expropriation.

<sup>1</sup> [1949] S.C.R. 712 at 715.

<sup>2</sup> [1961] S.C.R. 614 at 625-6.

Therefore, I find that the property had a special value to the defendant over and above the market value for which he is entitled to compensation and which I would fix at \$7,260.50 with the result that the total amount of compensation which I award the defendant is \$103,000. From the amount of \$103,000 there will be deducted the amount of \$3,000 which was advanced by the plaintiff to the defendant on May 6, 1963.

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There remains the question of interest. The defendant remained in possession of his former property without payment of any rent until June 19, 1963. Up to this date, in accordance with the settled practice of this Court, he is not entitled to any interest but since that date he is entitled to interest at the rate of five percent per annum on \$100,000 to the date of this judgment.

There will, therefore, be judgment declaring that the property described in the Information is vested in the plaintiff as from March 11, 1963; that the amount of compensation payable is in the amount of \$100,000 subject to the usual conditions as to all necessary releases and discharges of claims, and with interest thereon at the rate of five percent per annum from June 19, 1963 to the date of this judgment payable to the Director, the Veterans' Land Act in accordance with subsection (3) of section 24A of the *Veterans' Land Act* the surplus to be paid by the Director to the defendant in accordance with section 11 of that Act, and the defendant Grenn is entitled to his costs to be taxed in the usual way. There will be no costs either for or against the Director who did not appear at the trial.

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BETWEEN :

CANADIAN GYPSUM COMPANY, }  
LIMITED .....

APPELLANT;

AND

THE MINISTER OF NATIONAL }  
REVENUE .....

RESPONDENT.

*Revenue—Income—Income tax—Exemption from tax—Meaning of “mine” and “quarry”—Characteristics of a mine—Construction of exempting provisions in taxing statute—Income Tax Act, R.S.C. 1952, c. 148, ss. 83(5) and (6)*

This is an appeal from the assessment of the appellant by the respondent for the year 1959, whereby the appellant's claim for tax exemption with respect to its mining profits pursuant to s. 83 of the *Income Tax Act* was denied.

Before trial the parties signed an “Agreement as to Issues of Fact in Dispute” wherein it was agreed that the issues of fact in dispute were: (1) Is the operation of a “stone quarry” within the meaning of s. 83(6) of the *Income Tax Act*, and (2) If not, is the operation a “mine” within the meaning of s. 83(5) of the *Income Tax Act*? However, before argument, counsel for the respondent conceded that the operation under review, being that conducted by the appellant on its property at Miller's Creek, Nova Scotia, was not a “stone quarry” within the meaning of s. 83(6)(a) of the *Income Tax Act*.

*Held:* That “mines” and “minerals” are not definite terms: “they are susceptible of limitation or expansion according to the intention with which they are used”.

2. That the Miller's Creek operation of the appellant clearly evinces the characteristics of a mine and this conclusion follows from the vast and constantly expanding proportions of the development area in depth, width or circumference, the costly and powerful equipment at work, a labour force of about 175 men and the assignment of one or two professional engineers and of two geologists in a permanent testing laboratory.
3. That the nominal exclusion of a “stone quarry” in the definition of the noun “mine”, coupled with the admission that the Miller's Creek operation is not a stone quarry, must, irresistibly lead to the deduction that, legally speaking at the very least, it is a mine.
4. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Toronto.

*George D. Finlayson, Q.C., William L. Latimer and Mrs. P. D. C. McTavish* for appellant.

*D. A. Keith, Q.C.* and *S. Silver* for respondent.

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

DUMOULIN J. now (April 15, 1965) delivered the following judgment:

Canadian Gypsum Ltd., of the City of Toronto, Province of Ontario, a company incorporated under the laws of Canada, has uninterruptedly operated mines in Canada for about 40 years. Its objects are, in part, to use and develop lands containing Gypsum, ores or other deposits.

In 1955, the appellant acquired in the province of Nova Scotia certain properties containing gypsum ore. A section of these, known as the Miller's Creek property, consists of 647 acres in Hants County near Windsor, N.S., on which exploratory work was performed, it is stated, both before and after the lands were obtained.

A so-called gypsum "mine" was developed at Miller's Creek; the first shipment of ore to the parent company, United States Gypsum, at the latter's plants along the Atlantic coast, took place in May of 1957, with production in reasonable commercial quantities said to have begun in April, 1959.

The Miller's Creek gypsum deposits are operated as an open-pit employing 175 men more or less under the direction of two engineers. Two professional geologists are regularly at work in a permanent laboratory built on the site as reported by Michael E. King, and Dr. Frank Beales, the former, a mining engineer, works manager of Canadian Gypsum and Fundy Gypsum, the latter a lecturer in geology at the University of Toronto and also a consulting engineer.

A very substantial stock of mobile equipment is affected to the workings of these gypsum beds and is detailed in a list, exhibit A-4, produced by Mr. King, to a cost price sum of \$2,880,688, although this witness agreed that such machinery could serve in the construction industry and was not exclusively designed for mining purposes. On exhibit A-5 appear the following bulk expenditures incurred in relation to the Miller's Creek undertakings:

1. Cost of development work approximately . . . \$ 280,000
2. Cost of stripping overburden to March, 1962 . . \$1,271,636
3. Cost of capital equipment (as of 12-31-61) . . \$2,960,500

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Before relating at greater length the operational features of this property, it is apposite to deal with the conflicting claims submitted in the Notice of Appeal and the respondent's Reply.

In paragraphs 9 and 10 of its pleadings, the company alleges compliance with "... all the requirements of Regulation 1900 of the Income Tax ... for the purpose of sub-section 5 of Section 83 of the Act ..." (para. 9); and that "on November 21st, 1961, pursuant to Part XIX of the Income Tax Regulations, (it) filed the prescribed T351 and claimed tax exemption for its mining profits pursuant to Section 83 of the *Income Tax Act*" (para. 10); a request the respondent refused to grant and so informed the appellant by letter, dated April 25, 1963, advising the company "that such property did not qualify under Section 83 of the *Income Tax Act* as a mine". The Minister, therefore, included in appellant's income the Company's net earnings from the "mine" which, for the period April 1, 1959, to December 31, 1959, amounted to \$220,655.50.

The reasons urged in support of this appeal are outlined in paragraphs 1 and 2, Part B, of the appellant's plea:

1. The income derived from the Miller's Creek mine is income derived from the operation of a mine within the meaning of sub-sections (5) and (6) of Section 83 of the *Income Tax Act*;
2. The open pit operation is a mine within the meaning of Section 83(6)(a) and is not a stone quarry or any other operation specifically excluded from the definition of the term "mine" by Section 83(6)(a).

To this contention, the respondent opposes the undergoing flat denial at paragraph 13 of the Reply to the Notice of Appeal; and an alternative submission at paragraph 14.

13. The Respondent says that the income derived from the removal and sale of gypsum rock from the said Miller's Creek Property was income derived from the operation of a stone quarry and, hence, by virtue of paragraph (a) of sub-section (6) of Section 83, it is not income derived from the operation of a mine within the meaning of sub-section (5) of Section 83 of the *Income Tax Act* and it is therefore not excluded in the computation of the income of the Appellant.

The alternative in paragraph 14 says that "the gypsum quarry on the ... Miller's Creek property is not a mine within the meaning of Section 83 (5) of the *Income Tax Act* ..." with, necessarily, analogous conclusions to those of paragraph 13.

On March 5 last, the litigants drew up and signed a proceeding labelled "Agreement As To Issues of Fact in Dispute". It reads thus:

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The parties are in agreement that the issues of fact in dispute are as follows:

1. Is the operation a "stone quarry" within the meaning of Section 83, Sub-section (6) of the *Income Tax Act*?
2. If the operation is not a "stone quarry" within the meaning of Section 83, Sub-section (6) of the *Income Tax Act*, is the operation a "mine" within the meaning of Section 83, Sub-section (5) of the *Income Tax Act*?

At the conclusion of the hearing and before addressing the Court, counsel for the Minister, Mr. D. A. Keith, Q.C., who declined to call witnesses, made this admission which I took down *verbatim*: "I am prepared to concede that the operation at Miller's Creek is not a stone quarry within the meaning of section 83, subsection (6) (a) of the *Income Tax Act*."

A first step towards a solution of the sole remaining question should be the recital of the pertinent statutory enactments, already indicated:

83. (5) 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.

(6) In subsection (5)

- (a) "mine" does not include an oil well, gas well, brine well, sand pit, gravel pit, clay pit, shale pit or stone quarry (other than a deposit of oil shale or bituminous sand); and
- (b) "production" means production in reasonable commercial quantities.

At this stage, I would note an agreement that the evidence and arguments in this issue, together with the intervening judgment, should be common, *mutatis mutandis*, to appeals A-2181 and A-2182 between the same parties, and to appeal A-2113 between Fundy Gypsum Ltd., and the instant respondent.

Any attempt at fashioning the word "mine" into some exclusive application in our times of uninterrupted and startling scientific innovations might well prove, at my hands at least, a pointless venture. In support of this view, I can quote the authoritative precedent of *Lord Provost and Magistrates of Glasgow v. Farie*<sup>1</sup> wherein Lord Watson and

<sup>1</sup> 13 App. Cas. 657 at 675, 676, 677, 683 and 684.

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Lord Herschell, commenting on the words "mines" and "minerals" (gypsum is a mineral) wrote, the former:

"Mines" and "minerals" are not definite terms: they are susceptible of limitation or expansion according to the intention with which they are used.

With reference to the judicial interpretation of an old statute of the realm, bearing some relation to mines and minerals, the Act 43 Eliz., c. 2, of 1601, the eminent jurist said:

...the Courts gave a restricted meaning to the word "mine" and decided that in the sense of the Act of Elizabeth it must be taken to be a subterranean excavation. It was accordingly held that persons who worked lead, freestone, limestone, or even clay by means of a shaft and underground levels were not liable to be rated in respect of their occupancy; whilst others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land; I do not suggest that the Courts erred in limiting so far as they could the exemption which for some reason or other had been established; *but I may venture to express a doubt whether any such exemption or distinctions with regard to the mode of working would have been recognized if the Act of 1601 had not become law until the year 1847.* (italics added throughout these notes)

And the learned Lord continues:

I am unable to assent to the appellants' argument that in sect. 18 of the Waterworks Clauses Act (a statute of 1847 then submitted for interpretation) "mines" must be understood in the same sense which it has been held to bear in the statute of Elizabeth. Such may have been its original meaning, but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning, and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, *whether subterranean or not*, from which metallic ores and fossil substances are dug out.

Next, further down page 677, we find that:

The fact is of sufficient notoriety to be noticed here, that, although in the extreme south-west of the island slate is obtained by subterraneous workings, the reverse is the rule in North Wales and in Scotland, where it is quarried. The word "quarry" is, no doubt, inapplicable to underground excavations; *but the word "mining" may without impropriety be used to denote some quarries.* Dr. Johnson defines a quarry to be a stone mine ...

Page 678, last paragraph, affords the conclusion:

I am accordingly of opinion that, in these enactments, the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got.

Lord Herschell, at pages 683 and 684 of the report, sets forth a corroborative opinion in these terms:

What, then, is the interpretation to be put upon the word "mines"? I think the primary idea suggested to the popular mind by the use of the word is an underground working in which minerals are being or have been wrought. It is certainly often used in contrast to "quarry" as indicating an underground working as opposed to one open to the surface. But to limit it in the enactment we are construing to an underground cavity, in which minerals are being or have been wrought, would be obviously inadmissible... The word "mines" is, I think, in a secondary sense, very frequently applied to a place where minerals commonly worked underground are being wrought, *though in the particular case the working is from the surface.*

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In the case of *N.S.W. Associated Blue-Metal Quarries Limited and Federal Commissioner of Taxation*<sup>1</sup>, Mr. Justice Kitto of the High Court of Australia seems to have accurately summed up the problem in concise language. I would draw, before quoting those lines, particular attention to the importance the learned trial judge attached to "context and subject matter" which, according to the wording or particular nature of the case, does affect even the judicial meaning. Let it be remembered that "context" in the issue at bar is s. 83, s-ss. 5 and 6(a) of our *Income Tax Act 1952 R.S.C.*, c. 148 and the stringent construction of a taxing statute; whilst the "subject matter" consists in the physical, industrial and scientific factors attaching to the Miller's Creek operations. This reminder had, the excerpt from Justice Kitto's speech goes thus:

The meaning of the word "mine" and "mining" like the word "minerals" *is by no means fixed and is readily controlled by context and subject matter.* Few words have occasioned the courts more difficulty than "minerals" but in some degree that is because in legal instruments it is seldom, if ever, used in its accurate or scientific sense and yet the word possesses no secondary meaning at once accepted and definite. *No doubt the word "mine" has also proved a source of difficulty*, but the difficulties have been fewer and less persistent. *The word seems always to have been somewhat indefinite in its application.* Judicially, however, its *primary meaning unaffected by context* is taken to refer to underground workings and not open-cast workings or quarrying.

According to a revolutionized mining technique, the noun "mine" in *Black's Law Dictionary 1951 Fourth ed.*, p. 1146 is defined as:

"Mine". An excavation in the earth from which ores, coal or other mineral substances are removed by digging or other mining methods, and in its broader sense it denotes the vein, lode, or deposit of minerals. *It may include open cut, strip or hydraulic methods of mining.*

The *Encyclopaedia Britannica* referred to by counsel for the appellant at the word "Quarrying", of no practical

<sup>1</sup> 94 C.L.R. 509 at 522.

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assistance in this suit, otherwise affords useful indications on the topics of "Mining" and "Open Cut-Mining" 1954 ed., vol. 15 hereunder reproduced:

Mining, Metalliferous: the winning of metals and their ores from the ground . . . The broad classification of these methods, which is used by the American Institute of Mining and Metallurgical Engineers, *divides metalliferous mining into two main fields; open cut mining and under-ground mining.*

Open-Cut Mining: the working of metalliferous deposits which either outcrop at the surface of the ground or are covered by a shallow overburden or capping which must be removed before the ore can be mined . . . *Large deposits of copper and iron ores are worked by open-cut mining, usually by the bench method. The depth of capping varies from a few feet up to 300 feet.*

Although gypsum does not belong to the metalloid class, the purport of the quotation above is that open cut methods are industrially considered mining operations irrespective of whichever substance is being mined. To this there would be one exception only, that of a stone quarry.

Let us now revert to the oral and literal evidence. Engineer Michael E. King, previously mentioned, described the manifold aspects of the company's enterprise at Miller's Creek. The exploited area is, first of all, submitted to intensive diamond drilling in numerous "centers" of 800 or 400 feet, next reduced to 200 and even 50 feet holes, to test the ore contents. Then comes the checking of the overburden whose depth ranges from 140 feet to a negligible layer. Controlled blasting is resorted to in order to extract the daily quantity of mineral, averaging 12,000 tons.

The top grade ore, once extracted, goes straight to a primary crusher to reduce the material to 10-inch pieces, and from the latter machine a conveyor belt hurries it to a scraper and a secondary crusher grinding it to strips of minus six inches in size; thence it is shipped to the U.S. plants.

Crushing and sorting by screening constitutes the mode of separating the usable product from adhering impurities.

The top grade should be at the very least 85% free of slag, whilst the secondary type of gypsum would prove from 82% to 85% pure.

Each year, 2,250,000 tons of overburden are scraped away and dumped to waste; the total annual stripping reaches 3,000,000 tons, yielding 1,500,000 tons of true gypsum or calcium sulfate ( $2H_2O$ ). A number of chemical tests are

carried out at the Miller's Creek laboratory, since the marketable ore must, as said, be 85% gypsum with no more than one half pound of salt (sodium) per ton. It is expedited in blocks to the American finishing plants.

From a technical standpoint, states Mr. King, "an operation such as that we are talking about here, is an open pit mine. Quarries, on the other hand, are generally connected with 'aggregates', gravel or building stone for instance, that do not require alteration or change before utilization. Minerals necessitating preliminary treatment to become usable are won from mines".

Replying to a question of the opposing counsel, the witness explains that crushed limestone for the fabrication of steel does not undergo preliminary treatment before it is fused into the steel making process nor when affected to construction purposes.

Dr. Frank Beales, a Toronto consulting engineer and professional geologist, lecturer in geology at the University of Toronto, a Ph.D. from the latter institution of higher learning, and holder of a Master of Arts degree from Cambridge, England, visited the Miller's Creek and adjacent Wentworth properties in the late summer of 1964. Dr. Beales has reached a definite conclusion, thus testified to: "I would qualify without hesitation the Miller's Creek workings as those of a mine." This definite assertion is predicated, in the witness' experience, upon the existence of several characteristic traits of most mines. These ear-marks would consist in the extent of the diamond drilling explorations; the complex engineering control; one or two resident engineers and two permanent geologists; the development work necessary; a minute quality supervision indispensable to the continual extension of the property; selective mining; the beneficiation of the ore from "pit to shipment" and, lastly, the large size of the "mine" albeit, as yet, in its inceptual stages only.

We are told that "no one item other than underground mining can qualify a development as being a mine; but this is by no means a unique or exclusive feature". As far back as the last decades of the 19th century, open cast operations have become a safer and less expensive method of mining.

"Nonetheless", continues the witness, "and for the reason just stated, absence of underground mining, I do not object

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to the layman's appellation of such deposits as a quarry, thereby differentiating open pit mining from underground mining."

Answering a question mine, Dr. Beales is of the opinion that even though in certain instances gypsum deposits might be regarded as quarries, it could well happen, as it actually does, on account of particular conditions, that gypsum workings undisputably constitute true mines. "I know of no stone quarry keeping any manner of staff comparable to that which is maintained at Miller's Creek. It is most unusual to find in stone quarries an engineer permanently employed on the site, whilst two specialized geologists are on the regular personnel at Miller's Creek", concludes the witness.

This conviction, shared by the last expert heard, Dr. Max Frohberg, a mining engineer and geologist, mining consultant to the Toronto Stock Exchange and Ontario Securities Commission, who testified that "an experienced foreman would suffice to direct the operations of a stone quarry and that keeping an engineer and two geologists for such purposes would be ruinous", coupled with the main trend of expert evidence, induced respondent's counsel to concede the exploitation at Miller's Creek was not a stone quarry within the meaning of the excluding clause, namely s-s. 6(a) of s.83.

Dr. Frohberg, who impressed me as a highly competent scientist, totally unbiased (similar credit is due to the other witnesses) inspected the company's property on March 3, 4 and 5 of the current year. Beyond any reasonable doubt the workings at Miller's Creek, an open pit mining undertaking, are those of a mine. This expert mentions as the differentiating criterion between a quarry and a mine, something especially noticeable here, "the technical know-how continuously required to conduct operations at Miller's Creek". Present in Court during the trial, he acknowledges his unreserved agreement with the whole of the evidence.

Some time past, Dr. Frohberg visited the manganese mines in Mexico, worked by open pit methods, and could point at no appreciable difference between those and the appellant's gypsum mine in Nova Scotia.

Mr. Donald C. McConkey, a chartered accountant serving in the dual capacity of Secretary to Canadian Gypsum and

Secretary-Treasurer of Fundy Gypsum Company, Ltd., (appellant in suit number A-2113) testified that separate books of accounts were kept for the operations at Miller's Creek during the entire period of 36 months as prescribed by s. 83 (5) and Regulation 1900, Part XIX of the Act.

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This company official filed exhibit A-7, a bundle of 36 sheets of records, one for each of the 36 months of the statutory tax exemption solicited, closing on March 31 of the material years, i.e., 1959, 1960, 1961, regarding Canadian Gypsum Ltd., and for the duration 1st October, 1961, to 31st December, same year, in the case of Fundy Gypsum Co. Ltd., which, on October 1, 1961, "acquired from the Appellant (Canadian Gypsum Ltd) all its rights, title and interest in respect of the Miller's Creek property and mine". (cf. Notice of Appeal, para. 8)

Mr. McConkey swore that all these bookkeeping vouchers "were examined here, in Toronto, by an auditor of the local branch of the Income Tax Department" and found in satisfactory compliance with the prescriptions of the statute.

As for s. 17 (2) of the Act, concerning the fixation of a fair market price between persons not dealing at arm's length, this official declares it was settled with the Department on the basis "of production costs, plus an arbitrary allowance of 25c per ton of marketable material".

The respondent abstained from calling witnesses and relied on a searching but ineffectual cross-examination of the scientists whose opinions were reviewed above. One line of tentative contradiction was tested which, we shall see, culminated in little better than a play on words. Donald McConkey, for one, was asked to explain the mention, in exhibit A-7, the bundle of accounting sheets, of the expressions "mine or quarry" and those of 4A quarry, white quarry, dark quarry, and the capital letters MC.

The answer was that the initials MC related to Miller's Creek and the other designations referred to properties in the Wentworth area having nothing to do with Miller's Creek, the same type or form of office stationery being used for all of them (cf. p. 25, transcript of Donald C. McConkey's evidence).

A mines manager in the employ of United States Gypsum Company, a professional engineer and member of the Nova

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Scotia Mining Society, Mr. Frank C. Appleyard, in the course of his evidence, was shown by the defending counsel a copy of the Mines Act of this Province, chapter 179 of its 1954 Revised Statutes, wherein gypsum is nominally excluded from the mineral category. Necessarily, Mr. Appleyard could only admit the fact as he similarly subscribed to a retort by Mr. Finlayson, Q.C., on being exhibited a facsimile of chapter 114 of the self-same 1954 Revised Statutes entitled "Gypsum Mining Income Tax Act" of which s. 1, s-ss. (a), (d) and (e) are drawn up as follows:

1. In this Act

- (a) "gypsum" includes any gypsum bearing substance removed from a mine;
- (d) "mine" includes a quarry or any work or undertaking in which gypsum is extracted or produced;
- (e) "mining operations" means the extracting or production of gypsum from or in any mine or its transportation to, or any part of the distance to the point of egress from the mine including any processing thereof prior to or in the course of such transportation but not including any processing thereof after removal from the mine.

Previously, the "works manager" of both Canadian Gypsum and Fundy Gypsum, engineer Michael E. King, acquiescing to Mr. Keith's request, had looked at exhibit R-1, the January, 1960, issue of U.S. Gypsum Company's magazine, "Gypsum News" and read these lines from page 25:

The newest quarry area—and second part of the Windsor operation—is the Miller's Creek area, about 10 miles from the main office. . . . After one of these locations is established for quarrying, the stripping department begins its work of removing the overburden, just like most other quarries. . . . This is certainly true of the brand-new Miller's Creek quarry which went into operation in early 1957.

If my memory does not do me any disservice, Mr. King explained that magazine style lays no claim to strict technical language when one expression is as readily understood as another by prospective clients, adding this assertion, written in my notes, "I think, technically, this is a mine".

Again, this was checkmated by exhibit A-6, a report by R. K. Collings of the Mineral Processing Division, published by the Department of Mines and Technical Surveys, Ottawa, labelled "Mines Branch Information Circular 1C114-The Canadian Gypsum Industry".

This survey of the Gypsum industry in Canada leads the reader to hold that the terms "mine" and "quarry" are both

suitable and interchangeable in relation with the winning of this mineral, though, at page 16, the author specifies that "Gypsum is obtained from surface or near surface deposits by quarrying. Gypsum deposits that occur at depth are developed by underground mining". A paragraph on page 17 says that:

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Underground gypsum deposits are mined by standard room and pillar methods with 20 to 25 ft rooms and 15 to 20 ft. pillars. The width or depth of gypsum mined is dependent on the thickness and purity of the seam. At Hagersville, in southern Ontario, a 4 ft. seam is mined; at Caledonia, near Hagersville, the seam is 9 ft.; and at Amaranth, in Manitoba, both a 10 ft. and a 20 ft. seam of gypsum are mined.

If depth of ore deposits should be indicative of a mine, an overburden of 140 ft. at certain spots, satisfies this requirement, irrespective of how the product is extracted. Underground mining, according to Dr. Beales, is gradually superseded in mining fields by the safer and less expensive process of open pit or open-cast operations.

Another passage of this departmental publication, at pages 23 and 24, is headed "The Canadian Gypsum Industry—Early History" and relates that:

Historical records reveal that the Canadian gypsum mining industry had its beginning during the latter part of the eighteenth century. Most of the mining activity was confined to Nova Scotia, where gypsum was quarried as early as 1770 for use as a fertilizer and for export to the United States.

I cannot but renew my assent to the "dicta" of Lord Watson and Justice Kitto, that "mines" and "minerals" are not definite terms: "they are susceptible of limitation or expansion, according to the intention with which they are used" (Lord Watson); and "The meaning of the words 'mine' and 'mining' like the word 'minerals' is by no means fixed and is readily controlled by context and subject matter". (Kitto, J.)

The vast and constantly expanding proportions of the development area in depth, width or circumference, the costly and powerful equipment at work, a labour force of about 175 men, the assignment of one or two professional engineers and of two geologists in a permanent testing laboratory, convince me that Miller's Creek clearly evinces the characteristics of a mine.

Exhibit A-11, a lot of 22 photos of the site (11a to 11v) fully substantiate such a conclusion as to the material facts of the problem.

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The respondent's admission that Miller's Creek was not a "stone quarry" has greatly simplified the legal aspect of the case. Section 83 (5), cited *supra*, is an exempting provision "at large", restricted only by the excluding clause of 83 (6), specifically disqualifying from the exemption benefit a "stone quarry".

In a fiscal statute, the age-long maxim "*inclusio unius est exclusio alterius*" finds its fullest justification. I could well agree with Mr. Finlayson's argument, on appellant's behalf, that "the nominal exclusion of a 'stone quarry' in the definition of the noun 'mine', coupled with the admission that Miller's Creek is not a stone quarry, must, irresistibly, lead to the deduction that, legally speaking at the very least, it is a mine".

In conclusion and with reference to the construction of taxing statutes, I might refer, as a permissible reminder, to some lines from Wheatcroft's valuable treatise on "The Law of Income Tax, Surtax and Profits Tax" 1962 ed., pp. 1036, 1037.

The general principles can be stated shortly. The onus is on the Crown to show that a taxing statute clearly imposes a charge on the person sought to be taxed; but once this onus has been discharged a taxing statute must be construed strictly by reference to its actual words without regard to what might be expected to be found in it.

The author then quotes a passage from Lord Cairn's pronouncement in *Partington v. Attorney General*<sup>1</sup>:

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

For all the reasons above, the Court doth decide and order that this appeal should be allowed and the record of the case referred to the Minister of National Revenue, respondent, for re-assessment as herein prescribed of appellant's 1959 income tax, during the period April 1, 1959 to December 31, 1959. The appellant will recover its costs after taxation.

BETWEEN:

HARRY SHEFTEL ..... APPELLANT;

AND

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

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AND BETWEEN:

BENJAMIN SHEFTEL ..... APPELLANT;

AND

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

AND BETWEEN:

LEOPOLD SHEFTEL ..... APPELLANT;

AND

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

*Revenue—Income—Income tax—Purchase and subsequent sale of real property at a profit—Taxability of profit from sale of real property—Exclusive purpose of taxpayer at time of purchase of real property—Business or adventure in the nature of trade—Onus of disproving assumptions made by Minister when assessing—Subsequent disposition at a profit the purpose or one of possible purposes of acquisition of land—Income Tax Act, R.S.C. 1952, c. 148.*

These appeals are from the decision of the Tax Appeal Board dismissing appeals from the assessment of the appellants for the 1959 taxation year.

The appellants are brothers who have resided and carried on business in the City of Calgary, Alberta for most, if not all, of their adult lives. They almost invariably engaged in their various business activities as partners. Many of their business enterprises included the purchase of real estate, its development and rental or subsequent sale. Among these enterprises was the development and operation of a chain of neighbourhood grocery and general stores in Calgary and the operation of a feed lot near the Calgary stockyards.

In April 1959 the appellants purchased a 10 acre parcel of land south of but in close proximity to the limits of the City of Calgary, their alleged intention being to develop the tract as a feed lot, the existing one being too small. Two months after the purchase the land, together with other lands south of the city, was expropriated and made part of the City of Calgary. When the appellants applied for a permit

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to develop the 10 acre parcel as a feed lot the authorities of the City of Calgary refused to grant such permission.

In 1959 the appellants sold the 10 acre parcel to Kelwood Corporation Limited for development as a residential subdivision. It is the assessment by the respondent of income tax on the profit realized on the sale to Kelwood Corporation Limited that the appellants have appealed from.

The evidence established that the appellants made no inquiries of any kind regarding the use to which the lands in question could be put before purchasing them, nor did they avail themselves of the appeal procedure outlined to them when their request to the City of Calgary for permission to develop the land as a feed lot was rejected.

*Held:* That if it were the appellants' exclusive purpose at the time of the acquisition of the land to construct and operate a feed lot thereon, the profit from the sale after that project had been necessarily abandoned, would not be a profit from a business or an adventure in the nature of trade. If that was not their exclusive purpose at that time there can, in the circumstances, be no doubt that the acquisition of this land had for its purpose or one of its possible purposes subsequent disposition at a profit and the resulting profit is, therefore, taxable.

2. That it is inconceivable that the appellants, being business men of astuteness and acumen, should have undertaken the purchase of the property in question with no other object in mind except its use as a feed lot without making any preliminary inquiries whatsoever as to whether they would be permitted to use the land for that purpose.
3. That the onus of disproving the Minister's assumption, when assessing, that the acquisition of the land had for its purpose or one of its possible purposes subsequent disposition at a profit, was on the appellants and they have failed to discharge that onus.
4. That the appeals are dismissed.

APPEALS from a decision of the Tax Appeal Board.

The appeals were heard by the Honourable Mr. Justice Cattanach at Calgary.

*S. J. Helman, Q.C.* and *R. Kambeitz* for appellants.

*W. A. Howard, Q.C., T. E. Jackson* and *G. R. Forsyth* for respondent.

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

CATTANACH J. now (April 20, 1965) delivered the following judgment:

These are appeals from decisions of the Tax Appeal Board<sup>1</sup> dated June 14, 1963 whereby the Board dismissed the appeals of the three appellants therein from the assessments of the Minister for the 1959 taxation year.

<sup>1</sup> (1963) 32 Tax A.B.C. 259, 266.

The appellants are brothers who are partners in their many activities each of whom manages his own special line of business. The appellant, Harry Sheftel, was engaged in the cattle purchasing and marketing business, whereas the other brothers, Leopold and Benjamin, were primarily responsible for the operation of a chain of neighbourhood grocery and general stores. When competition from the large grocery supermarkets become severe this business was gradually curtailed and eventually abandoned. However, the brothers, being enterprising, venturesome and experienced business men, turned their undoubted talents to other fields. They acquired land in the City of Calgary upon which they built and operated neighbourhood shopping centres, the land and buildings upon which the stores were previously operated were turned to account either by renting or selling existing buildings or the construction of buildings on vacant lands for rental purposes. All of these activities covered a span of years and were participated in by all three brothers, although one or the other of the brothers may have been dominant in a particular transaction depending upon their respective specialities.

The transaction which gives rise to the instant appeals was instigated by the appellant, Harry Sheftel. In connection with their cattle operation the appellants had acquired a 3½ acre parcel of land from the City of Calgary in 1949 in close proximity to the existing and extensive stock yards and used it as a feed lot. After using the property as a feed lot from 1949 to 1954 (which use is still being continued), the appellants on the recommendation of Harry Sheftel, decided that the original feed lot was too small for their expanded business, that a packing plant should be erected on that site and a larger feed lot should be purchased.

In purported furtherance of this purpose the appellants purchased a 10 acre tract of land on April 1, 1957 described as follows:

The most Southerly Six Hundred and Sixty (660) feet of the most Northerly Nine Hundred and Ninety (990) feet of the West Half of Legal Subdivision Five (5) of Section Twenty Eight (28), Township Twenty Three (23), Range One (1), West of the Fifth Meridian in the Province of Alberta containing Ten (10) Acres, more or less.

The land, at the time of purchase, was within the municipality of Rockyview but very close to the then existing southerly boundaries of the City of Calgary. The registered

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owner of the land was Neil D. Campbell who pastured horses on the adjacent 10 acres. He had sold the land in question to Ruth A. Henderson under an agreement for sale dated July 12, 1956. The appellants acquired the interest of Ruth A. Henderson by an assignment dated April 1, 1957 at a total cost to them of \$25,200.

At the time of purchase the appellants did not retain an independent solicitor to act on their behalf in the requisite conveyancing, but were content to accept and rely on the services of Ruth A. Henderson's solicitors. The agreement provided for a purchase price of \$21,000 payable \$6,000 on execution, and \$5,000 payable on July 5 in each of the years 1957, 1958 and 1959. When the interest under the agreement was assigned to the appellants on April 1, 1957 the balance outstanding was \$15,000.

It was further provided in the original agreement that in the event of development being commenced by the purchaser at any time prior to July 5, 1959 the entire outstanding balance of the purchase price would become due and payable thereon. There was no adjustment for taxes and the vendor was entitled to remain in possession and be responsible for taxes until development of the property being begun by the purchasers at which time an adjustment for taxes would be made and the balance of the purchase price would become payable if development was begun prior to July 5, 1959, but in the event no development was commenced prior to July 5, 1959 the provisions for payment as above mentioned would prevail.

The assignment to the appellants on April 1, 1957 made the conditions in the Agreement for Sale applicable to them.

The appellants made no enquiries at the time of purchase as to any zoning regulations applicable, the taxes payable, nor the services available. Harry Sheftel did testify, however, that this land was within ready access by truck over passable roads to the original feed lot upon the site of which it was proposed to build a packing plant and that from the general appearance of the area it was devoted solely to agricultural uses and accordingly he foresaw no impediment to the construction of a feed lot. However evidence was adduced by the Minister that on April 1, 1957 there were a number of medium priced houses along 66th Avenue and south on 14th Street not too far distant from the subject

property. A subdivision known as Meadowlarks was well under way a half mile distant from the property and there were two substantial homes on 100 acre tracts of land some quarter of a mile distant.

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The appellants did not indicate to Ruth A. Henderson or Neil D. Campbell the use to which the land was proposed to be put because, as he testified, he assumed that neither of them were concerned.

The appellants Harry and Leopold Sheftel testified (Benjamin did not testify) that they had no knowledge of proposals or rumours of annexation of the area by the City of Calgary despite the fact that public hearings were held during August 1956 and March 1957 respecting annexation of which prior notice had been given by insertions in local newspapers under the legal notices columns.

The land was, in fact, brought into the City of Calgary by order of the Board of Public Utility Commissioners for the Province of Alberta dated June 4, 1957 with retroactive effect to December 30, 1956.

The appellants decided shortly after the purchase of the land to provide a house for a man to care for the cattle as well as a garage. In order to do so it was necessary to obtain the consent of Neil D. Campbell, the vendor and still registered owner. An agreement was, therefore, completed between Campbell and the appellants dated April 24, 1957 whereby consent to construct a house and garage was obtained provided they indemnified him for any resultant increase in taxes and the agreement also provided that the appellants should obtain the permission of the relevant municipal authorities before commencing construction of the dwelling house and garage. It follows that the appellants on April 24, 1957 contemplated the possibility that permission of the municipal authorities was required to construct a house and garage.

Initial enquiries were made with respect to the building of a packing plant on the original feed lot site. Blue prints were prepared for the packing plant. Correspondence was conducted with the Federal Department of Agriculture in Ottawa in 1954 and with the Calgary Health Department in 1955, all prior to the purchase of the land here in question on April 1, 1957.

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In April 1958 the appellants must have learned that the land which they proposed to use as a feed lot had been incorporated within Calgary city limits because on that date the Montreal Trust Company, which almost invariably acted on behalf of the appellants in transactions of this nature, wrote the City of Calgary to advise that the construction and operation of a feed lot on the land in question was in contemplation and requested permission to so construct a feed lot.

On April 25, 1958 the City replied enclosing a copy of the decision of the Technical Planning Board stating that the request to operate a feed lot on the premises was considered and refused because the property had been classified on the interim zoning guide as "Agricultural future residential" which did not permit the development of feed lots and that feed lots were only permitted in heavy industrial areas under special conditions.

The appeal procedure from such refusal was explained but no appeal was launched because, as Harry Sheftel testified, he considered an appeal to be futile having been so informed by a civic official who also indicated to Harry Sheftel that he would vigorously oppose such an appeal.

Despite this rebuff the project of constructing a packing plant was not abandoned because there was tendered in evidence a letter dated March 27, 1961 from the Stockyard Branch of the Bank of Montreal offering financial assistance with respect thereto subject to adequate security being given. There was also correspondence in August 1960 with a manufacturer of meat packing machinery and equipment in Chicago, Illinois—followed by a personal visit of the appellant, Harry Sheftel, to the manufacturer in Chicago for a personal conference and a visit to plants there. The appellants expended the sum of \$12,000 in furtherance of this project.

On April 14, 1959 the appellants sold the interest in the 10 acre parcel they had acquired on April 1, 1957 to Kelwood Corporation Limited for the purpose of subdivision and building. Kelwood was particularly interested in this area and had been busily engaged in purchasing land and options in the area. This Company was also anxious that the area should become annexed to the City of Calgary to facilitate the provision of necessary services for the

construction of housing subdivisions. The land was sold for \$47,500 thereby giving rise to a profit of \$22,300 divided equally among the three appellants amounting to \$7,433.33 each. These amounts were added by the Minister to the reported income of the respective appellants for the 1959 taxation year.

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Since the identical issue arises in all three appeals it was agreed that the evidence adduced in one appeal should be applicable to the other two.

There is no dispute as to the amounts of the assessments but the question for determination is the familiar one as to whether the profit on the sale of a parcel of real estate was income for the purposes of the *Income Tax Act*, R.S.C. 1952, c. 148.

By the Notice of Appeal from the Tax Appeal Board the appellants set out their case as follows:

- (a) The intention of the appellant and his brothers was the acquisition of property for the purpose of development as a feed lot and as a result the creation of income from carrying on the business of operating a feed lot.
- (b) The fact that the appellant and his brothers were unable to use the land for the purpose for which it had been acquired arose from circumstances over which they had no control.
- (c) Neither the appellant nor his brothers made any effort to sell the parcel of land and they did not list the property for sale with any licensed Real Estate Agent.
- (d) The increment in value of the parcel of ten acres of land was not the result of any act by the appellant or his brothers but was caused solely by the sudden development of the City of Calgary southward, resulting in an increase in value over which the appellant and his brothers had no control.

The Minister's reply, so far as it is relevant, reads as follows:

8. In making the re-assessment, notice of which was given on the 21st day of March, 1961, the Respondent acted upon the following assumptions:

- (a) that the Appellant, in concert with Benjamin Sheftel and Leopold Sheftel, acquired the land referred to in paragraph 5 of the Notice of Appeal (hereinafter referred to as the "said lands") with a view to trading in, dealing with, or otherwise turning it to account at a profit;
- (b) that the Kelwood Corporation Limited purchased the said lands from the persons referred to in sub-paragraph (a) hereof on the 14th day of April, 1959, for the sum of \$47,500.00;
- (c) that the profit realized by the aforementioned persons from the purchase and subsequent resale of the said lands was \$22,300.00;

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- (d) that the Appellant's share of the profit from the purchase and subsequent resale of the said lands was \$7,433.34;
- (e) that the Appellant's share of the profit arising from the sale of the said lands during the Appellant's 1959 taxation year constituted part of his income for that year since it was profit from a business or adventure in the nature of trade.

The narrow issue is, therefore, whether the appellants purchased this property on April 1, 1957 "with the view to trading in, dealing with, or otherwise turning it to account at a profit". If they did, the resultant profit is taxable. If, however, as the appellants allege, the purchase of the property was made "for the purpose of development as a feed lot" and they "were unable to use the land from circumstances over which they had no control" then the profit from the land would not be taxable.

The onus of showing that the assumptions so made by the Minister were unfounded falls on the appellants.

If it were the appellants' exclusive purpose at the time of the acquisition of the land to construct and operate a feed lot thereon, the profit from the sale after that project had been necessarily abandoned, would not be a profit from a business or an adventure in the nature of trade. If that was not their exclusive purpose at that time there can, in the circumstances, be no doubt that the acquisition of this land had for its purpose or one of its possible purposes, subsequent disposition at a profit and the resulting profit is, therefore, taxable.

The onus of disproving the Minister's assumption, when assessing, that the latter was the case, was on the appellants and in my view they have failed to discharge that onus.

The question of fact as to what was the appellants' purpose in acquiring this property is one that must be decided after considering all the evidence. The appellants' statement at the trial that their intention was to construct and operate a feed lot on this particular property is only a part of the evidence. While such evidence may have been given in all sincerity it still may not reflect the true purpose at the time of acquisition. Present statements as to intention at the time of acquisition must be considered along with the objective facts.

To me it is inconceivable that the appellants, being business men of astuteness and acumen, should have undertaken the purchase of the property in question with no other

object in mind except its use as a feed lot without making any preliminary enquiries whatsoever as to whether they would be permitted to use the land for that purpose. They made no enquiries prior to purchase from any municipal authority as to zoning regulations, taxes to be paid when they eventually acquired title or the availability or likelihood of the availability of services.

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The appellants, over a span of years, had participated in the purchase and sale of land, both within and without the City of Calgary, and had conducted on such lands various enterprises. From this it follows logically that they must have been aware of the necessity of obtaining permission to devote land to certain uses and of complying with existing use and building restrictions which may have been imposed thereon.

Both Harry and Leopold Sheftel testified that from their examination of the location of the land they anticipated no difficulty in obtaining permission to operate a feed lot on it at the time of purchase. To me such a statement is so naïve as to confound its credibility. There were a number of residential houses of variable quality in the area. The very nature of a feed lot, of which the appellants were familiar, would of necessity inspire opposition to one's presence by these residents. Furthermore, the appellants had been resident in the City of Calgary for their entire adult and business life. They had observed and participated in the City's phenomenal growth and expansion. Therefore, they could not have been oblivious to the likelihood of the southerly development of the City which occurred shortly after the purchase of the land. In point of fact the land was brought into the limits of the City of Calgary by order dated June 4, 1957, just two months after its purchase by the appellants on April 1, 1957, the order having retroactive effect to December 30, 1956.

The appellants professed total ignorance of the annexation proceedings which had been going on since August 1956 and of any residential development in the area.

Because of their limited educational advantages the appellants also professed an unfamiliarity with proceedings for annexation and their attendant preliminary steps and matters of like nature. However, they almost invariably engaged the services of the Montreal Trust Company for

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assistance in their many business transactions, but in the present instance they did not seek the advice of the Trust Company officers but accepted the services of the vendor's solicitor without obtaining independent advice, nor did they instigate the most elementary precautionary enquiries to ascertain if the land could have been used as a feed lot.

As evidence of their intention to use this particular land as a feed lot, the appellants point to the steps they took towards the ultimate construction of a meat packing plant on the 3½ acre plot of land on which the original feed lot was conducted and it was submitted that the plans were so interwoven that one could not be completed without the other. However, in my opinion such does not necessarily follow. The appellants had also purchased a 20 acre plot in the Blackfoot Trail, which was used to grow feed and was purchased at a much lesser cost per acre than the land here in question. Both such parcels of land were equi-distant from the original feed lot site and enjoyed many similar advantages in common for use as a feed lot. Therefore there would have been no insurmountable obstacle to transferring the proposed feed lot operation to the 20 acre parcel in the Blackfoot Trail if the packing plant project were to be completed. Incidentally the construction of the packing plant had not as yet been undertaken at the time of trial. The first step taken by the appellants to begin the feed lot project, which could possibly be construed as preparatory thereto, was the writing of a letter dated April 3, 1958 by the Montreal Trust Company, on instructions of the appellants, to request permission to construct and operate the feed lot in the lands in question, that is one year after the purchase of the land. The reply was a definite refusal but resort was not had to the appeal procedure outlined in the reply.

It is quite true the appellants did not advertise the land for sale, nor did they list it with a real estate agency. They did not have to. The Kelwood Corporation Limited had been busily engaged in acquiring options on land in the area, advocating annexation of the area by the City and generally promoting the residential development of the area, all of which facts, could have been ascertained by any interested person by the instigation of casual enquiries and resort to the records of the Land Titles Office.

There was no evidence, therefore, that the appellants had any assurance when they purchased this land, that they would be permitted to operate a feed lot on it. They were hopeful of putting the land to this use. That hope was not realized and they then sold it at a profit.

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After having given careful consideration to all the evidence, I am not satisfied that there is a balance of probability that the appellants acquired this land for the purpose of operating a feed lot to the exclusion of any disposition of it at a profit. Accordingly it cannot be said that the assumptions of the Minister, in assessing the appellants as he did, were not warranted.

The appeals are, therefore, dismissed with costs

BETWEEN:

NATIONAL CAPITAL COMMISSION . . . . . PLAINTIFF;

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Mar. 8-11  
April 28

AND

HAROLD MUNRO . . . . . DEFENDANT.

*Expropriation—National Capital Commission—Constitutionality of expropriating powers of National Capital Commission—Meaning of “planning” and “Green Belt”—Master (Greber) Plan for the National Capital Region—Double aspect principle as test of validity of federal legislation—Subject matter under review beyond local or provincial concern—Validity of federal legislation affecting property and civil rights and matters of a local or private nature within a province—Existence of emergency as condition of federal legislative authority under peace, order and good government clause of s. 91 of B. N. A. Act—Expropriation powers of National Capital Commission—Powers of National Capital Commission—National Capital Act, S. of C. 1958, c. 37, ss. 10 and 13—British North America Act, 1867-1960, ss. 91 and 92—Aeronautics Act, R.S.C. 1952, c. 2—The Planning Act, R.S.O. 1960, c. 296.*

This is an adjunction on a special case stated concerning the expropriation by the plaintiff of certain lands of the defendant in the Township of Gloucester, in the County of Carleton, under the *National Capital Act*. The expropriated lands are wholly within the National Capital Region as defined by s. 2(j) of the *National Capital Act* and are within the Green Belt Area on the Master (Greber) Plan of the National Capital Region adopted by the National Capital Commission.

On the application for the special case it was ordered that

“the following question arising in this action:

‘Whether, on the special case stated by the parties, the expropriation of the lands of the defendant by the National Capital Commission therein referred to is a nullity because the legislative authority of the Parliament of Canada under the British North

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America Act, 1867 to 1960, does not extend to authorizing the expropriation.'

be set down and tried by the Court before the trial of the other questions raised in this action."

In its reasons for judgment the Court considered and reviewed in detail the general approach to, objectives of, and methods of implementing planning by governmental authority with particular reference to the *National Capital Act* and preceding legislation of the Parliament of Canada on the one hand and *The Planning Act*, and earlier legislation of the Province of Ontario on the other.

*Held:* That the objectives and purposes of any master plan of the National Capital Commission under the *National Capital Act* must be in conformity with s. 10(1) of the *National Capital Act*, and the objects and purposes of any general plan under the *Ontario Planning Act* must be in accordance with s. 1(h) of *The Planning Act*.

2. That the establishment of a Green Belt in the National Capital Region is the implementation of part of a general plan for the Region, namely, the Master (Greber) Plan, and that such part of the general plan is indivisible from the whole in that it is of the essence of the planning problem of the National Capital of Canada.
3. That the matter in respect to which the *National Capital Act* was passed by Parliament is one of planning in its two-fold aspect, namely, the preparation of plans and the implementation of such plans, and that the language employed by Parliament in s. 10 of the *National Capital Act* aptly describes this matter in its two-fold aspect.
4. That in considering whether the matter of the *National Capital Act* falls within s. 91 or s. 92 of the *British North America Act*, the most important principle to be applied is the double aspect principle, i.e. some matters which in one aspect and for one purpose fall within s. 92, may, in another aspect and for another purpose, fall within s. 91 of the *British North America Act*.
5. That the objects and purposes of implementing a plan for the development, conservation and improvement of the National Capital Region "in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance" is "such that it goes beyond local or provincial concern or interests and must in its inherent nature be the concern of . . . (Canada) . . . as a whole". It is a class of subject which has the dimensions to affect the body politic of Canada as a nation.
6. That the words "national significance" as used in s. 10(1) of the *National Capital Act* are meaningful and are apt in describing the goal sought to be attained for the nature and character of the seat of the Government of Canada.
7. That it is possible that the implementing of any plan by the National Capital Commission under s. 10(2) of the *National Capital Act* may affect property and civil rights and also matters of a local or private nature within the Provinces of Ontario and Quebec; and it may also affect zoning and land use regulations passed by the various municipal corporations therein pursuant to valid provincial authority delegated to them, in the National Capital Region, but the true character of the *National Capital Act* is not legislation "in relation to" such classes of subjects.

8. That the legislation under review was not the occasion of and needs no justification of emergency, inasmuch as it is well established that the legislative power of the Parliament of Canada as conferred by the peace, order and good government clause of s. 91 of the *British North America Act* is not restricted to occasions when there exist unusual conditions constituting an emergency.
9. That the double aspect principle applies to the facts of this case and that the matter should be classified as coming within the classes of subject assigned to the Parliament of Canada under s. 91 of the *British North America Act*, that is, under the power contained in the words constituting Parliament's sole grant of legislative power, viz.,
- to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.
10. That the National Capital Commission has power to implement its general plans, provided always that such plans are for "the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance".
11. That the National Capital Commission has power under s. 13 of the *National Capital Act* to expropriate land for the purpose of removal and replotting of odd-shaped remnants of land; for the purpose of taking abutting land so that planning restrictions may be imposed to protect a public improvement from inharmonious environment; and for the purpose of taking surplus lands so that a profit may be obtained upon re-sale at the values enhanced by the completion of the project, provided that any such acquisition of land is made in good faith for the purposes set out in s. 10(1) of the *National Capital Act*.
12. That on the abandonment of the purposes for which the land was acquired, if such abandonment is not part of a colourable scheme, the National Capital Commission may, subject to the provisions of s. 14 of the *National Capital Act*, sell such lands for private use and no right or interest remains in the original owners.
13. That there is no obligation on the part of the National Capital Commission to continue any particular use of lands after the acquisition thereof by it pursuant to s. 13 of the *National Capital Act*, and therefore no cause of action against the National Capital Commission can arise at any time in favour of the original owners of any lands by reason of the abandonment by the Commission in good faith, of any use which constituted the original purpose for the acquisition of such lands.
14. That the question in the special case stated is answered in the negative.

ACTION to have the Court determine whether the expropriation of land by the National Capital Commission is a nullity.

The action was tried by the Honourable Mr. Justice Gibson at Ottawa.

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*D. S. Maxwell, Q.C., G. W. Ainslie and D. G. H. Bowman*  
 for plaintiff.

*B. J. MacKinnon, Q.C. and Roydon A. Hughes, Q.C.* for  
 defendant.

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

GIBSON J. now (April 28, 1965) delivered the following judgment:

This is an adjudication on a special case stated concerning the expropriation of certain lands of the defendant in the Township of Gloucester, in the County of Carleton, which were taken by the plaintiff on the 29th day of July, A.D. 1959, with the approval of the Governor in Council under section 13 of the *National Capital Act*, S. of C. 1958, c. 37, for the purposes of the said Act.

On the 21st of February, A.D., 1965, on the application for the special case, it was ordered by this Court that: the following questions arising in this action:

“Whether, on the special case stated by the parties, the expropriation of the lands of the defendant by the National Capital Commission therein referred to is a nullity because the legislative authority of the Parliament of Canada under the British North America Act, 1867 to 1960, does not extend to authorizing the expropriation.”

be set down and tried by the Court before the trial of the other questions raised in this action,

A plan and a description of the lands of the defendant which were expropriated was deposited in the Registry Office for the County of Carleton on July 29, A.D. 1959.

The plaintiff in this action, the National Capital Commission, prior to the deposit of the said plan and description, obtained the approval of the Governor in Council for its action, as is evidenced by Order in Council P.C. 1959-815, dated June 25, A.D. 1959.

The parcel of land (hereinafter referred to as the “subject property”) which was expropriated from the defendant is situated wholly within the National Capital Region as defined in section 2(j) of the *National Capital Act* (and more particularly described by metes and bounds in the schedule to the said Act.)

The National Capital Region as described in the *National Capital Act* consists of 1,800 square miles comprising lands

in both the Province of Ontario and the Province of Quebec, and it includes the whole of the City of Ottawa, the Townships of Gloucester, Nepean, Goulbourn, Huntley, March, and Thorbolton, parts of the Townships of Fitzroy, North Gower, and Osgoode, in the County of Carleton; parts of the Townships of Pakenham, Ramsay and Beckwith, in the County of Lanark; parts of the Townships of Russell and Cumberland in the County of Russell, in the Province of Ontario; the whole of the City of Hull, in the County of Gatineau, the whole of the Township of Templeton and parts of the Townships of Buckingham and Portland in the County of Papineau; the whole of the Townships of Hull and Eardley and parts of the Townships of Wakefield and Masham in the County of Gatineau (formerly the County of Hull), the whole of the Township of Onslow and part of the Township of Oldfield in the County of Pontiac, in the Province of Quebec.

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The subject property is in the area designated as a Green Belt area on the so-called Master (Greber) Plan of the National Capital Region. The said Master (Greber) Plan (a copy of which was filed as an exhibit at this hearing) is a general plan of the National Capital Region adopted by the National Capital Commission.

The plaintiff, the National Capital Commission, is a corporation duly constituted by section 3 of the *National Capital Act* which reads as follows:

3. (1) There shall be a corporation, to be called the National Capital Commission, consisting of twenty members, each of whom shall be appointed by the Governor in Council to hold office during pleasure for a term not exceeding four years.

(2) The Governor in Council shall designate one of the members to be Chairman and one of the members to be Vice-Chairman.

(3) The members, other than the Chairman and Vice-Chairman, shall be appointed as follows:

- (a) at least one member from each of the ten provinces;
- (b) at least two members from the city of Ottawa;
- (c) at least one member from the city of Hull;
- (d) at least one member from a local municipality in Ontario other than the city of Ottawa; and
- (e) at least one member from a local municipality in Quebec other than the city of Hull.

(4) A member is eligible to be appointed from a province or municipality if, at the time of his appointment, he normally resides therein.

(5) A person who has served two consecutive terms as a member, other than Chairman, is not, during the twelve months following the com-

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pletion of his second term, eligible to be reappointed to the Commission in the capacity in which he so served.

(6) A vacancy in the membership of the Commission does not impair the right of the remainder to act.

(7) The *Public Service Superannuation Act* does not apply to a member unless the Governor in Council otherwise directs.

(8) A member who is present at a meeting at which is discussed any matter in which he has, directly or indirectly, a pecuniary interest, shall declare his interest and shall refrain from casting a vote in respect of such matter.

The defendant is a farmer residing in the Township of Gloucester in the County of Carleton and Province of Ontario, and he alleges that before the expropriation by the plaintiff he was the owner in fee simple of Lot 20 in the 3rd Concession, Ontario Front, in the Township of Gloucester, in the County of Carleton and Province of Ontario.

The plaintiff, the National Capital Commission, claims that \$200,000 is sufficient and just compensation for the lands taken, and the defendant claims \$450,000.

The wording of the expropriating power contained in section 13 of the *National Capital Act*, which the National Capital Commission purported to exercise in taking the subject property, reads as follows:

13 (1) The Commission may, with the approval of the Governor in Council, take or acquire lands for the purpose of this Act without the consent of the owner, and, except as otherwise provided in this section, all the provisions of the *Expropriation Act*, with such modifications as circumstances require, are applicable to and in respect of the exercise of the powers conferred by this section and the lands so taken or acquired.

The declared purpose of this Act for which the National Capital Commission may take and acquire lands, under section 13(1) of the Act, is set out in section 10(1), which reads as follows:

10. (1) The objects and purposes of the Commission are to prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.

The defendant does not attack the validity of the *National Capital Act* in its entirety. Instead, the defendant submits that the expropriation of his lands by the National Capital Commission is a nullity because the legislative authority of the Parliament of Canada under the *British North America Act*, 1867 to 1960, does not extend to authorizing this expropriation. The submission is that the object

and purpose of this expropriation is to establish part of a so-called Green Belt; that the establishment of a Green Belt is a matter of zoning or land use control; that zoning or land use control is a matter falling within either head 13 or head 16 of section 92 of the *British North America Act*, namely, "property and civil rights in the province" or "generally all matters of a local or private nature in the province"; that legislation in relation to zoning or land use control is within the exclusive legislative jurisdiction of the Provincial Legislature; and in reference to the subject property, that the Province of Ontario, by its planning legislation, has delegated the exclusive power to legislate in respect thereto, to one of its municipal institutions, namely, the Township of Gloucester, which is a municipal institution within the meaning of head 8 of section 92 of the *British North America Act*.

The defendant, also, does not question the legislative authority of the Parliament of Canada to permit the National Capital Commission to establish a Green Belt or to otherwise zone for land use any land which the National Capital Commission (or indeed any other agent or legal body duly constituted by the Parliament of Canada) has acquired (a) by voluntary purchase, or (b) by expropriation in connection with any matter falling within any of the classes of subjects enumerated in section 91 of the *British North America Act*.

The issue for decision on this special case, with respect to the subject property, therefore, resolves itself into a specific enquiry. It may be put this way. If the National Capital Commission had power to expropriate the subject property for the purpose of establishing part of a Green Belt in its National Capital Region, such power must be established by finding as follows: (1) that the establishment of a Green Belt in the National Capital Region is within the legislative jurisdiction of the Parliament of Canada under the opening words of section 91 of the *British North America Act* (namely, the power "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces"—which words constitute Parliament's sole grant of legislative

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power); (2) that the enactment of section 10 of the *National Capital Act* is a valid exercise of such legislative power; and (3) that the establishment of such Green Belt is within the objects and purposes set out in section 10 of the *National Capital Act*.

The relevant portions of the *British North America Act, 1867*, read as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.
- 1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—

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- (a) Lines and Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
- (b) Lines of Steam Ships between the Province and any British or Foreign Country;
- (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
  12. The Solemnization of Marriage in the Province.
  13. Property and Civil Rights in the Province.
  14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
  15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
  16. Generally all Matters of a merely local or private Nature in the Province.

Section 10(2) of the *National Capital Act* contains the powers conferred on the National Capital Commission for carrying out or implementing the declared objects and purposes of that Act as defined by section 10(1) of the Act. Section 10(2) reads as follows:

- (2) The Commission may for the purposes of this Act,
- (a) acquire, hold, administer or develop property;
  - (b) sell, grant, convey, lease or otherwise dispose of or make available to any person any property, subject to such conditions and limitations as it considers necessary or desirable;
  - (c) construct, maintain and operate parks, squares, highways, parkways, bridges, buildings and any other works;
  - (d) maintain and improve any property of the Commission, or any other property under the control and management of a department at the request of the authority or Minister in charge thereof;
  - (e) co-operate or engage in joint projects with, or make grants, to, local municipalities or other authorities for the improvement, development or maintenance of property;
  - (f) construct, maintain and operate, or grant concessions for the operation of, places of entertainment, amusement, recreation, refreshment, or other places of public interest or accommodation upon any property of the Commission;
  - (g) administer, preserve and maintain any historic place or historic museum;
  - (h) conduct investigations and researches in connection with the planning of the National Capital Region; and

- (i) generally, do and authorize such things as are incidental or conducive to the attainment of the objects and purposes of the Commission and the exercise of its powers.

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The enquiry may be divided into two parts. Firstly, what is the "matter" in relation to which the *National Capital Act* was passed by the Parliament of Canada? Secondly, is the "matter" in the federal or the provincial field?

In other words, it is necessary to ascertain the matter in relation to which this Act was passed by the Parliament of Canada before the matter can be classified as "coming within" or "not coming within" the classes of subjects assigned to the Parliament of Canada.

To ascertain the matter of the *National Capital Act*, it is helpful firstly to consider the evidence for the purpose of defining certain concepts and terms. What we are concerned with here is a matter that is generally referred to as a "Green Belt". It is, therefore, essential to ascertain what is meant by this expression.

In regard to this it is correct to say that there is no accepted definition of "Green Belt" because there is no complete agreement of concept among planners on the aims and purposes of a Green Belt.

Nevertheless, although the Green Belt concept cannot be precisely described, as I understand it, the expression "Green Belt" is employed in relation to three types of situations. They are as follows:

1. A buffer type of green belt, which may consist, for example, of a screen established between areas of land dedicated to incompatible uses. This might be created by the planting of trees, the building of an opaque wall, and so forth.
2. A device to avoid unbroken urban development. This may consist of roads, golf clubs, cemeteries and farms in an area surrounding a central urban core. (The Driveway in the Ottawa area is such a device on a small scale.) This type of Green Belt prevents large and continuous, and usually monotonous, building. Such a Green Belt is essentially a low density use of the land. It is an area of land that forms a break between the central core and the area beyond it.
3. The so-called "urban fence" idea. This is an attempt to limit the size of a city or town.

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(The Green Belt proposed by the Master (Greber) Plan of the National Capital Commission under the *National Capital Act* for the National Capital Region is an example of this third type of Green Belt. Under it the proposal is to contain the center urban core inside the so-called Green Belt area, which area it is estimated will eventually contain a population of approximately 500,000 people. The increase in population to attain this figure, it is envisaged, will be, in the main, in the countryside lying between the inner boundary of the Green Belt and the built up areas of the City of Ottawa, and other existing municipalities. Beyond the Green Belt area it is envisaged there will be built-up satellite towns like Smiths Falls and so forth.

The Master (Greber) Plan says that this Green Belt area should be subjected "to control to the end that the periphery of the urban area be protected against all undesirable or linear subdivisions or developments" (Greber Report, p. 191).

The Master (Greber) Plan further envisages that within this Green Belt there may be sites which in the future may be used as sites for new federal buildings or institutions, which by their nature require large acreages, or by private persons who also require large acreages; and there would also be provided park areas to serve the future metropolitan population which will live inside the Green Belt and in the satellite communities beyond the Green Belt.)

The object and purpose of this type of Green Belt is to prevent rural slums, which occur when housing is permitted to grow sporadically without proper servicing.

This concept of what such a Green Belt should contain is a flexible and growing one. Its main purpose as indicated is to cause an urban fence to be established around the central urban core and to prevent haphazard growth in the suburbs.

The physical design concept of this proposal is one that has been adopted by practically every large European city and by many, and in increasing numbers, United States major cities. In brief, it is the concept of a main centre as the dominant point, surrounded by satellites of lesser centres, with residential communities throughout the entire area accessible to the centres and to governmental and industrial concentrations at daily peak hours mainly by

means of regional streets and highways and a regional transportation system.

So much for the discussion as to the three types of situation in relation to which the term "Green Belt" is employed.

The actual physical boundaries of the Green Belt planned in the Master (Greber) Plan of the National Capital Commission encompass 37,388 acres. Almost half of this acreage consists of highway and railway rights-of-way, and large areas of land having mostly shallow soil over rock shelves which would present problems of both finding water and disposing of wastes. This leaves only approximately 20,000 acres of usable land affected by the proposed Green Belt. Of this latter amount of acreage, already 6,170 acres of Federally owned land are devoted to a variety of uses, and it appears from the evidence that it is proposed to use a further 4,000 acres for the Experimental Farm and another 2,000 acres for the Department of National Defence.

In further analyzing the term "Green Belt" and the concepts which are involved in establishing such an area in relation to the constitutional question raised in this action, it is helpful to consider a number of matters, such as some details of the so-called Master (Greber) Plan adopted by the National Capital Commission, *The Planning Act*, R.S.O. 1960, c. 296, as amended, the *National Capital Act*, and the evidence as set out in the Agreed Statement of Facts. This involves a discussion of planning and of zoning or land use principles and concepts.

At this juncture it should be mentioned that the Agreed Statement of Facts, filed (which constitutes the evidence on the issue raised herein), contains at page 1 the following limitation as to the use that may be made of what material is contained therein. It reads:

. . . provided further that the parties hereto reserve the right to object to the admissibility of all or any of the said facts or documents on the grounds that they are not relevant or material to any of the issues to be determined in answering the question stated in the said Order.

Counsel for the plaintiff submitted that the paragraphs numbered as follows and the material to which such paragraphs refer were inadmissible on the above grounds, that is to say, paragraphs 6, 7-19, 26 and 27, 37-41, 42 and 43, 45-51, 52, 53 and 54, and 56-60. These paragraphs are, in the

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main, various parts of minutes of the Ottawa Area Planning Board, documents relating to the National Planning Committee of the Federal District Commission Minutes, parts of meetings of zoning and Green Belt sub-committees, and documents relating to the proposed Green Belt.

I am of opinion that all of these documents are admissible and that in relation to any of them it is a matter only of what weight should be given to any of them in the determination of the issue herein.

These documents in some places refer to planning concepts and what was done or not done by the various representatives mentioned. And, while they are not necessarily probative of any of the statements or propositions of law therein set out, they assist in the determination of the issue raised by the question in this stated case, because the answer to it concerns planning, and the effects of planning decisions, and necessitates the categorization of the legislative jurisdiction in respect to such classes of subjects.

It is helpful in reaching a decision in this matter on the evidence to mention at this stage some general planning ideas and the planning policies adopted by certain governmental authorities.

It should first be mentioned that planning, in the sense of a general plan for the physical development of a community, may conceivably be undertaken by any governmental authority, either federal, provincial or municipal, in either the Province of Ontario or the Province of Quebec.

The first thing that it is necessary to do in undertaking planning in order to make a general plan is to do a survey. Such survey must be directed to the objects or goals of such plan.

The next thing to consider in making a plan is the form and content of it.

Again, the objects or goals of such plan govern its form and content.

Because the results of planning involve a choice which will have an impact not only in space but in time, it is necessary to decide what type of plan it is sought to make, that is, whether the objects and purposes of the plan will result in what is sometimes referred to as "positive planning" or whether it will result in what is sometimes referred to as "negative planning".

The distinction between positive and negative planning lies in the method of implementing a plan.

Negative planning consists of settling the positive proposals and then waiting until the proposals are carried out by private enterprise or by public authorities. In this type of planning, therefore, the person who carries out the plan is different from the planning agency.

Positive planning is a program which is undertaken and carried out by the planning agency.

This distinction is of significance, as will appear later, when the objects and purposes of planning under the *National Capital Act* are compared with the objects and purposes under *The Planning Act*.

It is essential to note also that planning itself is to be distinguished from the implementation of a plan. They are quite separate and distinct matters.

Provincially, for example, the usual way a general plan is implemented is to confer on the municipality the power to control land use by enabling it to enact what are sometimes referred to as zoning or land use by-laws. This is not the only way but it is the predominant way in which general plans are implemented by such legislative bodies.

Zoning or land use by-laws curtail and abridge the rights of affected owners in relation to the uses of their lands.

In the Province of Ontario, no right to compensation has ever been conferred upon owners of property by provincial or municipal legislative bodies for the property rights which are taken away from such owners by reason of the enactment of land use or zoning by-laws. The idea that compensation should be paid to such owners appears to be abhorrent to provincial or municipal planners in Ontario according to the evidence of the views expressed at the meetings attended at various times over the last few years by various representatives of the Government of the Province of Ontario, of the municipalities of Ottawa, Township of Nepean and Township of Gloucester, and of the National Capital Commission, in connection with the problem of overall planning for the National Capital Region.

Another important feature about zoning or land use by-laws or controls in the Province of Ontario is that after

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the same are enacted the title to the affected land is left in the same private ownership.

An alternative to the above method of implementing a general plan (and this is germane to the issue raised in this case) is acquisition of the affected land by the governmental body which implements its plan. Acquisition may be accomplished by purchase, expropriation or by gift.

(This latter method of implementing a general plan is the way the Government of Canada through the plaintiff, the National Capital Commission, in the instant case is implementing part of its general plan. In the case of the subject property acquisition is being accomplished by expropriation.)

A necessary incident of implementing a plan by expropriation (or purchase or gift) is that the title then vests in the authority implementing the plan. In such cases, practically universally, the substantive law requires that compensation be paid to the owners from whom property is expropriated. (For example, and it is relevant to this case, when the Government of Canada expropriates property for any of its purposes, the substantive law enacted by Parliament requires that compensation be paid.)

In connection with compensation, it is also relevant to note, as will be detailed at greater length later in these reasons, that in certain particular instances the Government of Canada has the power to, and does, enact the equivalent of zoning or land use by-laws which otherwise leave the titles to the properties affected in the particular private ownerships, but in such particular cases the laws concerning such matters enacted by the Parliament of Canada require that compensation be paid to owners of land whose rights are diminished by such enactments.

This is a clear departure from the concept held by provincial and municipal legislative bodies and planners in the Province of Ontario concerning the matter of compensation in such cases.

This is of vital concern in this particular case, as will also be noted later in these reasons, because failure of the representatives of the Townships of Gloucester and Nepean in particular to persuade the persons representing the Government of Ontario and the City of Ottawa (when they met

at various times to consider the request of the National Capital Commission that they adopt the latter's Master or General (Greber) Plan as their respective official plans under the Ontario *Planning Act*, and to pass zoning or land use by-laws only in accordance with the same) that compensation should be paid to the owners of land whose rights were liable to be diminished by the passing of zoning or land use by-laws, was one of the main reasons that the National Capital Commission General (Greber) Plan was not so adopted and implemented in the area where the subject property is.

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This matter of whether or not compensation should be paid to owners of property affected by the enactment of zoning or land use controls or by-laws is important when particularly onerous land use or control by-laws are considered, and it beclouds the solution to the problem of determining the matter of the legislation under review in every case.

This is so because when the resulting diminution of private property rights is excessive, it is always difficult to argue that the goal in the field of such land use controls or zoning by-laws enacted under provincial or municipal legislation and the goal of expropriation for land use control by another legislative body such as the Parliament of Canada through the National Capital Commission, are distinguishable. In other words, the distinction between the goals attained by the exercise of these two different powers on the basis of any difference in motive becomes difficult to determine.

In connection with this matter of compensation, also, it is of some help in understanding the problem in this case to mention that there is a crucial difference between the land use controls systems of the Province of Ontario and the United States on the one hand, and the British system of land use controls on the other hand.

The British system provides for compensation in cases where properties, affected by implementation of a general plan or any part of it or by a planning decision, had development value before their present system of control was introduced in 1947. If any such properties have acquired development value since 1947, no compensation is payable except where the decision cancels "existing use"

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rights. If, however, the property has become "incapable of reasonably beneficial use" as a result of implementation of a general plan or part thereof (which is done under the present British planning law by making a planning decision), then the owner can require the planning authority to purchase the property.

The result is that now the compensation position in the Province of Ontario, in Britain and in the United States, except in the circumstances set out above, are somewhat similar, that is, no compensation for implementing a general plan or part of it or for planning decisions.

But it is important to note that, whereas in Britain the introduction of the control system was accompanied by making provision for the payment of compensation by the establishment of a fund of £300,000,000 for such purpose, in the United States and in the Province of Ontario their systems have never been accompanied by any provision for compensation.

In the United States, the reason for this was and is as follows: The originators of the zoning system in the United States had to decide upon which of two quite distinct governmental powers these new controls should be based, that is, on eminent domain (compulsory acquisition or expropriation) or on the police power. (Police power in the United States includes the right to enact land use or zoning controls or by-laws such as are enacted by municipalities in the Province of Ontario. In other words, zoning or land use controls are an exercise of the police power. But police power authority is much wider. It is the general residual power of government to pass laws in the interests of the general public health, safety and welfare.) If property rights were condemned under the power of eminent domain (compulsory acquisition or expropriation) then compensation would have to be paid. If on the other hand these controls could be brought under the police power, then no compensation would be payable and the controls would be analogous to fire or structure regulations. The real problem arises when the enactment of controls under each of these powers is for essentially the same goal. Then the enactment of such controls based on the police power may become unconstitutional because of the Fifth Amendment, *viz.*: "No person . . shall be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for the public use without just compensation." Under this guarantee of due process of law, a United States Court must decide whether a particular zoning ordinance is a "Reasonable" exercise of that power.

It is the degree of intensity of such controls in the United States which becomes important in determining the line between regulation and eminent domain (expropriation or compulsory acquisition). Mr. Justice Holmes stated this in the United States Supreme Court in *Pennsylvania Coal Company v. Mahon*<sup>1</sup>.

Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act.

The absence of any "once and for all" settlement on the lines of the British system, obviously curtails the scope of land use controls in the Province of Ontario as well as in the United States; and as stated this was one of the main reasons why the Townships of Gloucester and Nepean did not accept the Master (Greber) Plan of the National Capital Commission or any other official plan and declined otherwise to enact any planning controls, except, in the case of the Township of Gloucester the enactment of Building By-law No. 34 of 1946, as amended by By-law No. 18 of 1947 (being a combined building and zoning by-law). As a result, as stated, the problem of determining the respective matters in relation to which the *National Capital Act* and *The Planning Act* (and Province of Ontario Municipal land use or zoning by-laws) were enacted is beclouded.

Another thing that should be mentioned is that in planning for a large area, reference is sometimes made to a master plan. (This is what the plan of the National Capital Commission is called.) (Under the Ontario *Planning Act*, a general plan for a community is called an "official plan".) The term "master plan" can be misleading because such plans are elastic and flexible projects. They are projects of

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<sup>1</sup> 260 U.S. 393, 413 (1922).

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community planning subject to change in accordance with changing circumstances and are in effect merely blue prints. They are not static museum-like directives.

Finally, in connection with the specific general plans that must be considered in these proceedings, it is important to note that the objects and purposes of any master plan of the National Capital Commission under the *National Capital Act* must be in conformity with section 10(1) of the *National Capital Act*, and that the objects and purposes of any general plan under the *Ontario Planning Act* must be in accordance with section 1(h) of *The Planning Act*.

So much for a general discussion of general planning ideas and planning policies adopted by certain governmental authorities (including the authorities interested in these proceedings, namely, the Government of Canada, the Government of Ontario, and the municipalities (in the National Capital Region) established by the Legislature of the Province of Ontario).

With this background, the answer to the first part of this enquiry can now be sought.

The answer to the first part of this enquiry, namely, what is the matter in respect to which the *National Capital Act* was passed by the Parliament of Canada, may be obtained by considering and deciding whether the objectives of the community physical design proposals of the general plans under *The Planning Act* of the Province of Ontario ("Official Plan") and those of the National Capital Commission (e.g., the Master (Greber) Plan) are distinct and different.

For this purpose nine (9) subjects will now be considered, namely: (1) the physical design proposals of every "official plan" under *The Planning Act* (Ontario) and those under the *National Capital Act*; (2) the fact that no municipality in the National Capital Region adopted the Master (Greber) Plan as its "official plan" under *The Planning Act* (Ontario); (3) the form and content of the Master (Greber) Plan of the National Capital Commission; (4) a comparison of the objects and purposes of the physical design proposals of the National Capital Commission in reference to the seat of the Government of Canada with those of the Federal Government of the United States in reference to its seat of Government, *viz.*, Washington, D.C.; (5) a

comparison of the legal effects resulting from the adoption of the Master (Greber) Plan with those resulting from the adoption of an "official plan" under *The Planning Act* (Ontario); (6) the legislative history of the *National Capital Act*; (7) the legislative history of *The Planning Act* (Ontario); (8) a consideration of the problems of the suburbs (the approaches to an urban centre); and (9) the parts of the Master (Greber) Plan of the National Capital Commission that have been implemented.

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1. The physical design proposals.

The physical design proposals of every "Official Plan" enacted by any municipal corporation pursuant to *The Planning Act* of the Province of Ontario by reason of section 1(h) of the said Act must consist of a "programme or policy . . . designed to secure the health, safety, convenience or welfare of the inhabitants of the area . . ." These criteria were chosen by the Legislature of the Province of Ontario as the declared objectives of every such "Official Plan".

(It should be mentioned, as an aside, that the objectives of the community physical design proposals of the relevant legislation in the Province of Quebec are in essence of a similar character to those in *The Planning Act* of the Province of Ontario, and although the National Capital Region is partly in the Province of Quebec, since the subject property is entirely in the Province of Ontario, it is not necessary to discuss the Province of Quebec legislation in this case. The relevant Province of Quebec legislation is contained in section 426 of the *Cities and Towns Act*, R.S.Q. 1962, c. 49, and Art. 392a of the *Municipal Code*. Also within the Province of Quebec Department of Municipal Affairs there is a Provincial Town Branch which is charged with duties of a local nature and its duty is to assist municipalities in an advisory capacity to carry out municipal planning.)

The physical design proposals of any general plan such as the Master (Greber) Plan adopted by the National Capital Commission, by virtue of section 19(1) of the *National Capital Act*, must be for "the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government

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of Canada may be in accordance with its national significance." These criteria were chosen by the Parliament of Canada through the medium of the *National Capital Act* as the declared objectives of any general plan under that Act.

2. The fact that no municipality in the National Capital Region adopted the Master (Greber) Plan as its "official plan" under *The Planning Act* (Ontario).

The evidence discloses a reluctance on the part of the relevant (in this case) Ontario municipalities in the National Capital Region to adopt as their respective "Official Plan" under *The Planning Act* (Ontario) any part of the National Capital Commission's Master (Greber) Plan despite years of negotiations by the National Capital Commission (and its predecessor corporation the Federal District Commission) with the Townships of Gloucester and Nepean and the City of Ottawa, and the Ottawa Area Planning Board; and the evidence establishes that none of these municipalities did so adopt any part of such general plan.

It may be that the objectives and purposes of the National Capital Commission in this matter, as exemplified in the Master (Greber) Plan were not directed to the programme and policy envisaged by these local municipalities as satisfying their respective needs.

In this connection it is interesting to consider whether the objectives of the Government of Canada in this latter regard were similar to those that must have motivated the respective authorities who caused Athens, Rome and Paris, for example, to become cities of national significance. Lord Latham spoke of similar objectives when he spoke on the introduction into the British Parliament of the general plan for the Metropolitan County of London, as follows:

This is a plan for London. A plan for one of the greatest cities the world has ever known; for the capital of an Empire; for the meeting place of a commonwealth of Nations. Those who study the Plan may be critical, they cannot be indifferent.

Our London has much that is lovely and gracious. I do not know that any city can rival its parks and gardens, its squares and terraces. But year by year as the nineteenth and twentieth centuries grew more and more absorbed in first gaining and then holding material prosperity, these graces were over-laid, and a tide of mean, ugly, unplanned building rose in every London borough and flooded outward over the fields of Middlesex, Surrey, Essex, Kent.

Athens was the glory of Greece, Rome the great capital of a great Empire, a magnet to all travellers. Paris holds the hearts of civilised people all over the world. Russia is passionately proud of Moscow and Leningrad; but the name we have for London is the Great Wen.

It need not have been so. Had our seventeenth century forefathers had the faith to follow Wren not just the history of London, but perhaps the history of the world might have been different. For the effect of their surroundings on a people is incalculable. It is a part of their education.

Faith, however, was wanting. It must not be wanting again no more in our civic, than in our national life. We can have the London we want; the London that people will come from the four corners of the world to see; if only we determine that we will have it; and that no weakness or indifference shall prevent it.

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### 3. The form and content of the Master (Greber) Plan of the National Capital Commission.

A general perusal of the plan indicates that it contains the ideas and information needed so the scheme can be seen in its proper context, that is to say, it includes (a) a history: the various stages of the development of the National Capital Region since 1899; (b) geography: a description of the geographic setting of the National Capital Region and a discussion of the geographic factors that are of significance to it; (c) population and economic base: a statement of the facts and conditions from 1899 up to the present time, and of future trends, forecasts and assumptions concerning the population and economy of the National Capital Region; and (d) major physical development issues: a summary statement of immediate and ultimate problems and proposals for the development and preservation of the National Capital Region.

This is emphatically demonstrated by referring to the following excerpts from this Master (Greber) Plan and by making the following comments.

To begin, to find the real origin of this Master (Greber) Plan it is necessary to go back in time much beyond the year 1937 when Mr. Greber's services were first employed by the Government of Canada.

Since 1903 the development of the National Capital Region as the seat of Government worthy of the nation has been the program and policy of successive governments, commencing with the government led by Sir Wilfrid Laurier.

In turn, Sir Wilfrid Laurier, Sir Robert Borden and the Right Honourable W. L. Mackenzie King each expressed

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the determination to provide Canada with a seat of Government worthy of the growth and status of this nation and as an interpretation and exemplification of the national pride and aspirations of all the people of Canada.

When the Government commissioned and authorized the preparation of this Master (Greber) Plan, the Right Honourable Mackenzie King expressed such motives of the people of Canada in this way:

Canada's Capital has grown up in a magnificent setting of intimate, imposing and enchanting scenery. Ottawa's growth, however, has reached a point of urban development which is rapidly depleting and endangering its natural assets. To be worthy of Canada's future greatness, its Capital must be planned with far-reaching foresight.

\* \* \*

The vast amount of research, technical knowledge and imagination, of which this work by Mr. Greber and his assistants is so eloquent an expression, cannot fail, if given due appreciation and support, to result in the attainment of a Capital City of which Canadians of our own and future generations will be increasingly proud.

The history of the previous planning studies of the National Capital of Canada (which is the real origin of the present Master (Greber) Plan) begins with the study made in 1903 by the late Frederick G. Todd of Montreal.

At p. 129 of Greber it is stated:

In the year 1903, the late Frederick G. Todd of Montreal, a noted Canadian landscape architect, was engaged by the Ottawa Improvement Commission to outline a comprehensive scheme of park and parkway development for the City of Ottawa and its environs. Though the scope of his report did not go beyond beautification, Mr. Todd expressed strongly for the first time the necessity of collecting all data necessary to make a comprehensive plan. His outlook on the subject was broad and tended to evolve a general scheme rather than attempt to go into details.

Remembering that the Report was written in 1903, the following quotation is indicative of this attitude:

Ottawa is at present a manufacturing city of considerable importance, and is destined to become great in this respect, owing to its immense water power. The industries, however, should be so regulated that they will interfere as little as possible with the beauty of the city, for a Capital City belongs to a certain extent to the whole country, and should not be placed in such a position that any one man, or company of men, can have it in their power to seriously mar its beauty, and thus throw discredit on the nation. As a Capital City, the park and open spaces should be numerous, and ample boulevards and parkways should skirt the different waterways as well as connect the principal parks and the different public buildings . . .

To preserve the great natural beauty of the city as a heritage for the Dominion of the future, and at the same time to allow of the development to the greatest possible extent of the magnificent

industrial opportunities of Ottawa, presents a problem of such magnitude that to attempt to discuss it in this respect would be practically impossible. It seems to me, however, that this question must be faced sooner or later, and these two important considerations which often conflict so seriously, made to work together for the future beauty and prosperity of the city, otherwise the industrial development of the city will be sacrificed to its aesthetic development, or what is probably of greater present danger, that much of the natural beauty of the city will be sacrificed to its industrial growth.

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The Todd recommendations which have been adopted or as the Greber Report points out can still be made the subjects for consideration may be listed under the following headings:

- Large natural parks or reserves.
- Suburban parks.
- Boulevards and parkways.
- City parks.

As to large natural parks or reserves, "two forest reserves were recommended by the author; one of the two thousand acres along the Gatineau River between Ironside and Old Chelsea; the other on both sides of Meach Lake.

The first proposal is no longer feasible due to extensive cottage and agricultural developments. However, it is recommended that this area be included in the controlled rural belts and be subject to special regulations, thus preserving the remnants of the forests to which Mr. Todd refers."

The next report of the Federal Planning Commission, in time, was that of the Holt Commission in 1915.

At page 133 of the Master (Greber) Report is this reference to it:

This Commission, under the Chairmanship of Sir Herbert S. Holt, and generally referred to as the "Holt Commission", was appointed under Order in Council dated September 8, 1913, and was a joint undertaking on the part of the Federal Government and the Cities of Ottawa and Hull.

The comprehensive recommendations contained within the report are dealt with in detail but special attention is drawn to the following features, i.e.:

1. That improvements in the area of the Capital at Ottawa and Hull should not be attempted without first establishing a Federal District and securing for the Federal authority some control of local government.
2. That the pivot, on which hinged the success or failure in carrying out any comprehensive plan, lay in the proper solution of steam railway transportation.

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3. That the extension and development of Government Buildings should be carried out on a comprehensive plan.

4. That there should be proper control of residential and manufacturing districts by enforcing building restrictions.

5. That there be developed a broad and forceful policy of park lands.

The next report in time that was made was the Cauchon Report in 1922.

This Report was unofficial in the sense that Mr. Noulan Cauchon, Planning Consultant of the City of Ottawa, was not retained by the Government of Canada to execute it, but it does comprise the co-ordination of extensive studies of the Capital area pursued by this author over a period of some fifteen years.

The Master (Greber) Report makes this reference to it, at page 139:

The Cauchon Report was formulated and released in April, 1922. It suggested the creation of a Federal District on a basis which would overcome previous objections to such a project, by providing for the control of physical features and public utilities within Ottawa, Hull and their environs, and leaving all other provincial and municipal prerogatives undisturbed.

The first studies made by Mr. Jacques Greber were done in the period 1937 to 1939.

Reference is made to them on page 142 of the Master (Greber) Plan:

The Federal Government retained my services in 1937, 1938 and 1939 as consultant in relation to the development of Government-owned lands in the centre of the City.

The plans, which primarily embraced the whole of Parliament Hill and Nepean Point, dealt with the landscape design of the grounds and approaches to the Government Buildings, as well as the architectural treatment of such buildings. They also comprised suggestions or recommendations covering the utilization of certain sites.

As it was important to examine the relationships of such undertakings to adjoining areas, a preliminary plan of Ottawa was submitted, accompanied by a report setting forth the advantages of a master plan from the point of view of the co-ordination of proposals as well as of economics, in order to orient the execution of future developments.

Lacking a complete analysis of existing conditions and future requirements, this preliminary plan was merely a superficial outline. Nevertheless, it comprised many new suggestions and co-ordinated or endorsed, according to cases, certain proposals envisaged and in some cases studied in previous plans. Thus the development of a main transurban artery was recommended on the Canadian National right-of-way traversing the City from east to west. The plan likewise envisaged the linking up of Scott Street and Wellington Street providing a new westerly outlet toward Westboro and Britannia. The partial or total use of other rights-of-way

as arteries of penetration was also recommended, among which were the Canadian Pacific rights-of-way linking Billing's Bridge and the Prince of Wales Bridge, and those of the present belt line from Hurdman Bridge to Sussex Street. These highway proposals, as also other operations of lesser importance, have been retained within the present report.

The studies then made of landscaping and architectural treatment of the central area are also basic to the detailed plans now submitted. (See photographs of the model prepared in 1938—Illustrations 117 and 118)

Certain detail operations were partially executed. These were, principally, the development of the site on which the Government had previously decided to locate the National War Memorial, 1914-1918, known as Confederation Place, and the widening of Elgin Street. The Confederation Place project was executed only to the extent which concerned the War Memorial Terrace and its planted surroundings. The erection of the memorial and the development of its immediate site, having to be completed for the Royal Visit in May 1939, were undertaken only in so far as the westerly extremity of Confederation Place was concerned. Work on the approach from the east, essential to improve traffic conditions at that congested point, was postponed and its resumption was offset by the outbreak of the war of 1939-45.

For similar reasons proposals then envisaged for the improvement of Elgin Street were likewise postponed, its widening being limited to that part situated between Laurier Avenue and the Memorial, while its re-grading to improve its profile was temporarily omitted to ensure the termination of the work then undertaken prior to the Royal Visit.

The authority to undertake what is now the present Master (Greber) Plan, Exhibit 1, was given by the Committee of the Privy Council approved by His Excellency the Administrator on the 31st of October, 1945, and the terms of reference are prescribed in it. The reference to this in the Master (Greber) Report is at page 5:

That under the authority of Order in Council P.C. 5635 of August 16, 1945, an area comprising some 900 square miles, more or less, adjoining the City has been defined as the National Capital district and it has been decided to re-engage Mr. Greber to make a study of that area with a view of preparing plans for a suitable long-term development of such area as a National War Memorial;

That Mr. Greber will be required to:

(List of Services)

1. Direct the preparations of graphic survey, basic plan and various cartograms, diagrams, photographic illustrations, etc., including guidance for research and graphic representation of all elements of the survey, by advice and documentary examples, bibliography, etc.
2. Direct the preparation of the proposed master plan, by advice and furnishing personal preliminary drawings and sketches, in Ottawa or from Paris, as previously done.
3. Direct the preparation of proposed by-laws, zoning ordinances and planning programmes.
4. Direct the preparation of eventual scale model.

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5. Study and advise on the eventual local operations while final report is being prepared.

6. Direct the preparation of the final report and basic plans.

(The references to the preliminary report of the National Capital are not included in the Master (Greber) Plan, but they are contained in the Statement of Facts agreed to by the parties and the relevant pages are 63, 64, 66, 68, 72, 73 and 76.

In it there is reference to the green belt which is the concept we are considering in this particular case in reference to the subject property. The point to note is that in this preliminary report and also in the final report, Exhibit 1, the concept of the green belt is given in its correct meaning. It explains (as was pointed out earlier in these reasons) that a green belt is not a fixed and immutable concept. So it is not surprising to find reference to different things that may be contained in any particular type of green belt. This is the accepted view when one is referring to green belt concepts.)

At page 2 of the Master (Greber) Report there is a reference to the fact that the Master Plan of the seat of the Government of Canada and the implementation of any work in it was to be a national scheme, and such national scheme was to be accomplished (with the co-operation of Canadian architects, engineers and technicians) under the guidance of a National Capital Committee.

The scope of the project is set out at page 14 of the Master (Greber) Report:

In establishing a National Capital Region in accordance with the recommendations of the Joint Committee of the Senate and of the House of Commons, and pursuant to the provisions of the Order in Council of August 16, 1945, the Federal Government defined an area comprising some 900 square miles surrounding the City of Ottawa, as the National Capital Region, with a view to the preparation of plans for the long-range development of this territory.

Consequently, the first concern of the National Capital Planning Service was to initiate studies to determine the present and future needs of this large region, and to secure the basic information upon which to chart its planning. This analytical study forms the first part of this Report under the heading of "General Survey".

It would have been comparatively easy, following a superficial survey of present conditions and trends, to have drafted a theoretical plan which from the natural and magnificent setting of the region, could have been quite attractive, but such a procedure would have lacked practical value, and the expenditure involved would have been unwarranted.

The National Capital plan has a dual purpose: it aims primarily at the planning and mapping of the development of the group of municipalities which form the Capital Region, with a view to ensuring the comfort and well-being of their inhabitants and facilitating all their activities; but also, it must aim at the planning of a capital, an undertaking which involves manifold problems relative to its life and special functions: Parliament, Government, diplomatic life, and national and international conventions, in an atmosphere of dignity, orderliness and welcome.

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The duty rests on the Capital to set the example for other Canadian cities, in their adoption of planning procedures suited to the needs of modern living.

In this connection the scope of the general survey, (which as stated earlier in these reasons is the first step in the preparation of any plan) is set out demonstratively by the index. At page 303 of the Master (Greber) Report appears such index, as follows:

GENERAL SURVEY

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1 Physical Conditions:	
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Geology (by R. E. Deane, geologist) . . . . .	22
Vegetation (by E. S. Archibald, D.Sc., Director, Experimental Farms Service) . . . . .	25
Hydrography . . . . .	28
2 History:	
History of the Capital (by Gustave Lanctôt, president, Royal Society of Canada) . . . . .	33
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	14. Review of Previous Town Planning Studies:	
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	The Cauchon Report, 1922 .....	139
	First Studies by Jacques Greber, 1937-39 .....	142
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The next matter which it is relevant to consider in this Master Plan is the part entitled "Justification of Proposals." This is set out at page 155 of the Master Report, as follows:

The plan and its accompanying report are but directing documents. They form the general skeleton of development for the region and do not treat any operations in detail. The ultimate formulation and execution of each project will be the subjects of further local studies. However, in exceptional and urgent cases, we have been called upon to provide immediate solutions, the detail plans of which were either incorporated in the Master Plan or elaborated in keeping therewith in co-operation with the authorities responsible for their realization.

This part of the Master Plan is broken down into several sub-headings.

The first is entitled General Commentary on the Project, which appears at pages 157 to 160:

#### GENERAL COMMENTARY ON THE PROJECT

In compliance with the scope of the task entrusted to us, and in light of basic data derived from investigations and surveys made, we have conducted our studies with the sole object of reaching conclusions in keeping with present and estimated requirements based on existing tendencies.

Our task consisted of two inseparable but differing programmes, comprised of complementary elements.

(a) In the first instance, it was required to develop the physical framework of expansion for the National Capital, organizing its life for a period of at least two generations, without comprising the more remote future.

A Capital is the reflection, the symbol, of the whole nation. The Capital of Canada, as in all federated states, such as in the case of Washington, or Berne, has special importance; it is the city which, to every Canadian and to all foreigners, must be representative of all of the ten confederated provinces, without, however, prejudicing the attributes and prerogatives of their respective capitals.

Chosen for this noble role by a far-seeing and wisely inspired Queen, the little Ontario town of Ottawa, the outgrowth of the pioneer village of Bytown, rapidly became a large city, and, with distances gradually losing their significance, blended itself with the neighbouring villages and localities around the beautiful Ottawa River, formerly a frontier but now a link between the two provinces of Ontario and Quebec, which are symbolic of Canadian greatness.

Extending beyond this initial symbolic development, Ottawa has since become truly representative of the whole of Canada.

The large neighbouring metropolitan cities of Montreal and Toronto, those of the prairies and of the oceanic shores, retain their prestige, and leave to the Capital its constitutional, national and international mission. There is neither competition nor rivalry, because their respective functions are clearly defined.

The planning of the Capital is therefore a national undertaking, of which each Canadian can be proud and through which national desires and aspirations can be expressed through material accomplishments. The first accomplishment, initiated by the Federal Government, will go down in history: it is the decision that the planning of the National Capital be dedicated to the memory of Canadians who gave their lives to the nation in the second world war.

This heroic symbol will be materialized in the heart of the territory of the Capital, not by an allegoric sculptural composition, sometimes subject to controversies, but by an objective reality: the living panorama of the Capital. Other tangible tokens of national unanimity and of effective participation of the Federal Capital in the greatness and progress of each of the ten provinces will be similarly integrated in the material expression of its plan.

\* \* \*

(b) The second imperative demand, lay in the recognition of the territory of the Capital area as an already urbanized region, the place of living and of work of its citizens. We have reviewed the extraordinary growth of its demographic occupations, involving a present population of more than a quarter of a million inhabitants.

Two principal cities, Ottawa in Ontario and Hull in Quebec—mixed population, differing legislative and educational systems,—two provincial entities within which we must recognize their respective administrations, customs, language and aspirations; far from being a difficulty in our work, these conditions merely intensified our interest.

\* \* \*

What then, briefly expressed, are the characteristics of our plan?

The planning of the region of 900 square miles, which is the area of attraction incident to the Capital, involves, primarily, the establishment of a highway system through the improvement of existing roads and the creation of additional roads, to facilitate traffic movements throughout the region. Specific classification of roads is predicated upon their particular functions, and the nature and speed of the vehicular traffic to which they are or will be subjected: utilitarian transportation, interurban communications or pleasure driving.

In the centre, the urban region is delimited by a perimeter, intended to prohibit tentacular and linear extensions of construction abutting upon highways. To that effect an area, zoned as a *greenbelt*, frames this perimeter and is subjected to regulations to protect the area comprised within the greenbelt against undesirable development. Outside of the extreme limit of this greenbelt, the territory will retain its rural character, with the exception of limited and controlled minor and appropriate developments.

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(At pages 84 and 85 of the Agreed Statement of Facts is a reproduction of a plan of the open spaces in the Green Belt area.)

The importance of this is that the subject property, of course, is in the proposed green belt area, but as has been heretofore mentioned in these reasons it is clear that the green belt is an integral part of the whole Master Plan and it is tied in intimately with the railway and railway facilities relocation. But there is this difference in these two matters. The green belt proposal in this plan deliberately seeks to cause a particular type of development. The establishment of railway and railway facilities without reference to any intent have caused a control of the form of development of the area because such establishment happened to coincide with the railway economic reasons for placing their installations in the location in which they were put.)

At page 191 of the Master (Greber) Plan, there is set out the specific type of green belt envisaged. It is the third type referred to in these reasons and its objects and purposes are described in these words:

DELIMITATION OF FUTURE URBAN GROWTH — NUCLEAR  
 DISTRIBUTION OF COMMUNITIES AND  
 NEIGHBOURHOODS — ZONING  
 REGULATIONS

The Master Plan shows the maximum delimitation of the future urban extension within an area amply sufficient for a total population of 500,000 inhabitants, a figure which is merely indicative, the anticipated densities being based on data covering existing conditions, but eventually subject to modification in relation to the likely increase of multiple dwellings and apartments replacing single family dwellings.

It is thus possible, to envisage the eventual population reaching without inconvenience, 600,000 within the limits of the agglomeration as defined in the plan.

What is important is that, outside the limits so defined, there be maintained a rural belt, subjected to control to the end that the periphery of the urban area be protected against all undesirable or linear subdivisions or developments.

This rural belt, the outer limits of which are also indicated, should be solely dedicated to agriculture, or to the establishment of large properties. Public urban services cannot be assured within this rural belt and if residential groups must be constructed they should be reserved solely for agricultural workers.

If, in the future, the needs of the urban extension became such that the provisions now adopted from studies made of the urban evolution have to be exceeded, tentacular extensions, similar to those which have formerly developed around the initial urban core and which with adjustments

we have had to incorporate within the general layout of the ultimate urban zone, would be thus made impossible through the controls referred to.

Exterior to the rural greenbelt and at a sufficient distance therefrom to ensure the permanency of a rural frame to the future Capital, other nuclei of populations could be established in the rural zone in the form of complete self-contained communities comprising from 20,000 to 25,000 inhabitants, similar to the towns of Buckingham, P.Q., or Smiths Falls in Ontario. The rural regions surrounding the Capital on both sides of the Ottawa River offer excellent road and railway facilities for exploitation and favourable development of this type of "new cities" as satellites to the Capital.

A further reference in this Report to the open spaces is made at page 227, as follows:

#### OPEN SPACES

The survey of built-up areas and of existing open spaces, warrants the envisagement of the creation at little cost of an organic system of parks and an uninterrupted network of verdure within the entire region.

Such a project, while ambitious in appearance, nevertheless does not necessitate costly expropriations, grading or planting on a large scale, but rather a simple reservation of appropriate lands chosen from spaces, which from their natures, do not lend themselves to economic housing development and servicing.

The lands thus retained should be sufficient to fulfil a twofold objective, (1) establish a system of greenbelts framing dwelling areas and directly linked to the main rural belt surrounding the urban zone, and (2) ensuring a sufficient reserve for the eventual establishment of public services necessitating environments of verdure and quietness: such as hospitals, houses of refuge, schools, churches, colleges, recreational, sports or cultural centres, cemeteries, etc.

The suggested schedule of execution for this Master (Greber) Plan is set out on page 265 and following, after these preliminary words of explanation are given:

The Master Plan and justificative programme herewith submitted are not final and rigid blue-prints of immediate operations, but a comprehensive and flexible chart of co-ordinated development, subject to amendments and adaptations resulting from detail studies and from unforeseen circumstances as they may evolve.

\* \* \*

#### IMMEDIATE AND SHORT RANGE OPERATIONS

1. Construction of new bridge and approaches from Elgin to Waller Streets, between Confederation Place and Laurier Avenue.

2. Acquisition and zoning of land incidental to the adequate relocation of railway facilities; the equipment of new railway belt line, from its intersection with the C.P.R. Montreal south shore line, southerly to Chaudiere junction, with the C.P.R. Prescott line; development and equipment of new industrial zones on appropriate grounds, contiguous to railway facilities.

3. Reservation of lands for Governmental buildings and public services.

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4. Elimination of the Daly Building and of the buildings on the south side of Rideau Street east of and adjacent to the Union Station, as part of the completion of the approaches to Confederation Place; construction of a parking terrace on the site of the Daly Building, and of an additional covered parking area, directly connected with the Chateau Laurier.

5. Extension of Scott Street westerly to Highway No. 15.

6. Construction of parkway from Bayview Road to Island Park Drive.

7. Gradual elimination of the C.N.R. cross-town tracks and construction of the cross-town parkway on the vacated right-of-way.

8. Elimination of the Sussex Street C.P.R. line from Sussex Street to Hurdman's Bridge and construction of circular boulevard on the vacated right-of-way.

9. Gradual elimination of the freight yards at Union Station and their relocation on new freight terminal grounds east of Hurdman's Bridge.

10. Construction of new eastern approach from Montreal Road at a point west of Green Creek and linked with the MacArthur Road to Cummings Bridge, Eastview.

11. Development and extension of industrial zones in Hull and Hull South.

12. Construction in Hull of new boulevard from Reboul Street to Montclair Boulevard, and connection to Mountain Road and Saint-Joseph Boulevard.

13. Partial improvement of Aylmer Road between Hull and the Ottawa Country Club (double drive and central boulevard). Diversion from Aylmer Road, west of the Country Club, by construction of a new driveway on rights-of-way of Hull Electric Railway, and of a direct by-pass highway north of the Aylmer Road and the Town of Aylmer, to relieve Aylmer Road approaching and within the Town of Aylmer.

14. Construction of public buildings:—Printing Bureau; Department of Veterans Affairs Building; Headquarters for the Department of National Defence; Bureau of Statistics; National Film Board Buildings; Ottawa City Hall; Institute of Fine Arts; National Theatre; National Art Gallery; National Library; Public Works laboratories and workshops; Laboratories for Department of National Health and Welfare; National Stadium and Sports Centre.

15. Construction, in its first stage, of National Memorial Terrace on Gatineau Hills, dedicated to the Canadians fallen in the Second World War.

16. Construction of the Mountain parkway from the intersection of Brickyard Road and Mountain Road to Kingsmere.

17. In Hull, direct connections from Aylmer Road to (1) the Mountain Road, and (2) to the Mine Road, by the construction of two new boulevards on each side of Fairy Lake Park.

18. Widening of Laurier Avenue in Hull, north of Interprovincial Bridge to Jacques-Cartier Park.

#### LONG RANGE OPERATIONS

19. Construction of a new by-pass highway to Hull, from north-shore Highway No. 8 from Montreal, through Templeton, Gatineau and Pointe-Gatineau, north of C.P.R. Railway.

20. Construction of public buildings:—Civic Auditorium and Convention Hall centered on Lyon Street, and annexes on surrounding grounds—Additions to National Archives—Laboratories for Bureau of National Research and Department of Mines and Resources—Office buildings for decentralized Government Departments—Botanical Garden—Museum of Natural History—Zoological Garden.

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21. Construction of esplanade on the western end of Parliament Hill, and of a large underground garage.

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22. Reconstruction, in two stages, of the Chaudiere Bridges from Wellington Street at the westerly end of Parliament Hill, to Eddy Park in Hull. Gradual park treatment of the Chaudiere islands, peninsula and Ottawa River banks.

23. Completion of the Railroad Belt line, north of the C.P.R. Montreal line, northerly across Ottawa River, including a new Railroad and Highway Bridge, west of Green Creek, over Duck Island, to the C.P.R. North Shore Line and Highway No. 8.

24. Construction of the new Union Station on the belt line; elimination of present Union Station and of railroad tracks from site of present Union Station to Hurdman's Bridge and from Hurdman's Bridge to Chaudiere Junction.

25. Extension of riverside parkway (operation 6) from Island Park Drive to Britannia.

26. Construction of the new bridge over the Ottawa River to replace the present Interprovincial Bridge; and replanning of the central part of Hull—widening of St-Laurent Boulevard and construction of the new Hull Station; and development of access in Ottawa to the new bridge by Sussex and Mackenzie Avenue.

27. Final completion of the eastern end of Confederation Place by building a right turn loop and underpass to connect Sussex Street with the new lower entrance to the Chateau Laurier and underground garage accommodations.

28. Gradual realization of Confederation Park, from Elgin to Nicholas, such work being co-ordinated with the elimination of railway facilities, first freight, and ultimately passenger.

29. Construction of new rapid transit highways leading from various parts of the city to the new Station and to the industrial areas. Simultaneously, construction of new residential units in the neighbourhood of the working areas.

30. After elimination of the railway tracks leading to the present Union Station, construction, on vacated right-of-way, of the driveway from Hurdman's Bridge to Confederation Place.

31. Elimination of the C.P.R. Carleton Place line between Nepean Bay and its intersection with the C.N.R. North Bay line. Construction of two lane artery, in conjunction with Scott Street, on the vacated right-of-way, and its extension easterly across present railway yards to Wellington Street.

32. Elimination of the Prescott C.P.R. line between Prince of Wales Bridge and the new belt line south of Rideau River.

#### EVENTUAL OPERATIONS

Other operations shown on the plan or described in the present report, but not mentioned in the above list, concern a number of street, driveway or road widenings and openings, green belt reservations, gradual

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completion of the park and playground system, planning of new residential units and corresponding civic centres for communities or neighbourhoods, development of roads, trails and pedestrian walks within suburban natural parks.

Such operations form the balance of the proposals shown on the Master Plan. They are indicative and will be subject to flexible adaptations when they reach the stage of execution. They may be reduced, amplified or, if need arises, completely omitted, in the light of unforeseeable circumstances or new requirements, and to the measure of financial possibilities.

These operations still remain co-ordinated to those of the first two categories, and amendments, to which they may be subjected, will require to be conceived in harmony with the parts of the Master Plan previously executed.

A town planning work is a continuous creation, comprised of progressively slow and flexible adaptations, as are all evolutions of nature, from which we should seek inspiration.

**4. A comparison of the objects and purposes of the physical design proposals of the National Capital Commission in reference to the seat of the Government of Canada with those of the Federal Government of United States in reference to its seat of government, *viz.*, Washington, D.C.**

The objects and purposes of the policies and physical design proposals (of which the expropriation of the subject property for part of the Green Belt area is the implementation of a very small part) in the National Capital Commission's Master (Greber) Plan can be compared with the objects and purposes of the policies and physical design proposals for the seat of Government of the United States, *viz.*, Washington, D.C. While this is not part of the evidence it is of interest to note that this comparison is apposite, and it may be made by considering in this context the memorandum made by the late President John F. Kennedy in 1962, which appeared in the Washington Post, November 28, 1962:

Because of the importance of the Federal interest in the National Capital Region, I want the greatest possible coordination of planning and action among the Federal agencies in developing plans or making decisions which affect the Region.

Decisions of the Federal Government affect directly and indirectly the location of employment centers, highways, parks, airports, dams, rapid transit, utilities, and public and private housing. These decisions all have a crucial bearing on the future development of the metropolitan area outside as well as within the District of Columbia.

In order that the effect of the Federal Government's activities on the Region will be consistent and directed in a manner which will foster the implementation of modern planning concepts, the following development

policies are established as guidelines for the agencies of the executive branch, subject to periodic review.

1. Planning for the Region shall be based on the prospect that regional population will approximate 5 million by the year 2000.

2. The corridor cities concept recommended by the Year 2000 Plan, prepared by the National Capital Planning Commission and the National Capital Regional Planning Council in 1961, shall be supported by agencies of the executive branch as the basic development scheme for the National Capital Region.

3. The success of the corridor cities concept depends on the reservation of substantial areas of open countryside from urban development. It shall be the policy of the executive branch to seek to preserve for the benefit of the National Capital Region strategic open spaces, including existing park, woodland, and scenic resources.

4. It shall be the policy of the executive branch to limit the concentration of Federal employees within Metro-Center, as defined in the Year 2000 Plan, over the next four decades to an increase of approximately 75,000.

5. It shall be the policy of the executive branch that new facilities housing Federal agencies outside Metro-Center shall, to the maximum extent possible, be planned, located, and designed to promote the development of the suburban business districts which will be required to serve the new corridor cities.

6. Planning to meet future transportation requirements for the Region shall assume the need for a coordinated system including both efficient highways and mass transit facilities, and making full use of the advantages of each mode of transportation.

7. It shall be the policy of the executive branch to complete and enhance the Mall complex as a unique monumental setting.

8. It shall be the policy of the executive branch to house new public offices of an operational nature in non-monumental buildings which, through the use of the highest quality of design and strategic siting, will have a dignity and strength to establish their public identity. Within Metro-Center, this policy shall be carried out by locating new nonmonumental Federal buildings in relatively small but strategically situated groups in and adjacent to the Central Business District.

9. It shall be the policy of the executive branch to encourage the development of a system of small urban open spaces throughout the District of Columbia as adjuncts to the development of new Government, institutional, commercial and high-density residential facilities. In addition, a system of important streets and avenues shall be designated for special design coordination and treatment.

10. The executive branch will participate with local governments in the formulation of complementary policies essential to the coordinated development of the Region.

I am requesting each department and agency head concerned to give full consideration to these policies in all activities relating to the planning and development of the National Capital Region, and to work closely with the planning bodies which have responsibilities for the sound and orderly development of the entire area.

(Schematic drawings omitted).

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From such a comparison, it may be inferred that the objects and purposes are quite similar in both cases. This summary, it should be observed, like the Master (Greber) Plan, is composed of three closely related parts: policies, physical-design proposals, and simple schematic drawings; and it may demonstrate that the objects and purposes for the National Capital Region of Washington are the very antithesis of any enactment that is directed to parochial or private objects and purposes; and from this it may be reasonable to infer, because essentially it has some objects and purposes, that the same comments may be applied to the General (Greber) Plan for the National Capital Region of Canada.

5. A comparison of the legal effects resulting from the adoption of the Master (Greber) Plan with those resulting from the adoption of an "Official Plan" under *The Planning Act* (Ontario) by a municipality in the Province of Ontario.

The adoption of the Master (Greber) Plan by the National Capital Commission has no legal effect on lands in the National Capital Region. (It is only by the implementation of it, or part of it, as for example in this case by expropriation of the subject property, or as another example, by purchase of property, in the exercise of powers conferred by section 10 or section 13 of the *National Capital Act*, that some legal consequences flow.)

But, in contrast to this, such is not the case when a municipality enacts an "official plan" under *The Planning Act*. For example, section 20 of that Act provides that no redevelopment (which means the planning or replanning, designing, re-designing of a subdivision, clearance, development, construction, rehabilitation, etc.) shall be approved by the Municipal Board unless it conforms with the Official Plan. It is also provided in section 15(1) that where an official plan is in effect in a municipality no public work shall be undertaken that does not conform therewith.

There are other examples, and these are merely illustrative of the legal consequences that flow when such an Official Plan has been adopted by an Ontario municipality.

(In this connection, it should be recalled that, as mentioned above, that except for streets and certain parks,

neither the Townships of Gloucester and Nepean nor the City of Ottawa has adopted an official plan under *The Planning Act*, although each of these municipalities was invited to adopt the Master (Greber) Plan of the National Capital Commission as their respective official plan under *The Planning Act*.

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In the Province of Quebec, also, there has been no adoption of the equivalent of any so-called "official plan" or the Master (Greber) Plan of the National Capital Commission in so far as the lands in the Province of Quebec within the National Capital Region under the *National Capital Act* are concerned.)

#### 6. The legislative history of the *National Capital Act*.

The legislative history of the *National Capital Act* (under which was established the National Capital Commission, which adopted this so-called Master (Greber) Plan for the National Capital Region) commences with the year 1899.

In 1899, by 62-63, Victoria, c. 10, there was created a corporation under the name "The Ottawa Improvement Commission".

It was provided by that Act at section 4 as follows:

4. The Commission shall be a body corporate under the name of "The Ottawa Improvement Commission" and it shall have power to make such by-laws, employ such persons, and pay and defray such expenses as are necessary to enable them to carry into effect the purposes for which they are constituted, or any of the powers conferred on them by this Act; but no by-laws so made shall come into force or effect until approved by the Governor in Council, nor shall any alteration, modification or repeal of any such by-law have any force or effect until approved by the Governor in Council.

The number of Commissioners and their tenure of office was prescribed by section 3 of the Act.

The powers of the Commission were set out in section 7 of the Act, as follows:

7. The Commission may—

- (a) purchase, acquire and hold real property in the city of Ottawa, or in the vicinity thereof, for the purpose of public parks or squares, streets, avenues, drives or thoroughfares;
- (b) do, perform and execute all necessary or proper acts or things for the purpose of preparing, building, improving, repairing and maintaining all or any of such works for public use;
- (c) co-operate with the Corporation, or with the Board of Park Management of the City of Ottawa, in the improvement and beautifying of the said city, or the vicinity thereof, by the

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acquisition, maintenance and improvement of public parks, squares, streets, avenues, drives or thoroughfares, and the erection of public buildings in the said city or in the vicinity thereof;

And for all or any of the aforesaid purposes the Commission may expend the whole or any portion of the sums that are placed at their credit under this Act: provided that in case of local improvements being made by the Corporation in front of or along the line of property owned by the Dominion Government, the Commission may out of such moneys contribute thereto such share of the cost, or may perform such portion of such local improvements, as is agreed upon between the Commission and the Corporation.

In section 8 of the Act it was declared that "all works and undertakings of the Commission under clauses (a) and (b) of section 7 are to be for the general advantage of Canada".

Section 9 prescribed the power to acquire property as follows:

9. No real property shall be purchased or acquired by the Commission, except with the previous consent of the Governor in Council; and should the Commission be unable to agree with the owner of the property, which they are so authorized to purchase, as to the price to be paid therefor, then the Commission shall have the right to acquire the same without the consent of the owner, and the provisions of *The Railway Act* relative to the taking of lands by railway companies shall, mutatis mutandis, be applicable to the acquisition of such real property by the Commission.

The first amendment to this Act of 1899 was made in 1902 by 2 Edward VII, c. 25, That amendment merely increased the number of Commissioners to eight from four, which four new commissioners it was provided were to be appointed by the Governor in Council and would hold office during pleasure.

The second amendment to this 1899 Act was made in 1903 by 3 Edward VII, c. 45.

For the first time, it was provided that the Commission had power to borrow money from time to time on debentures of the Commission to enable the Commission "to purchase land or to carry into effect any scheme of improvement and undertakings requiring a larger outlay than is available out of the annual income of the Commission or for both purposes."

The third amendment to the 1899 Act was made in 1905 by 4-5 Edward VII.

By section 2 of this 1905 Act the powers of the Commission as prescribed in section 7 of the 1899 Act were enlarged

by deleting paragraph (b) of section 7 and inserting a new paragraph (b) which reads as follows:

(b) do, perform and execute all necessary or proper acts or things for the purposes of preparing, building, improving, repairing, maintaining and protecting all or any of the works of or under the control of the Commission and for preserving order thereon.

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Section 11 of the 1899 Act was also amended by adding a subsection (2) to it, that is, as follows:

2. The Commissioners shall on or before the first day of December in each year make to the Governor in Council through the Minister of Finance and the Receiver General an annual report for the information of Parliament, setting forth a description of the nature and extent of the works and undertakings of the Commission for the year ended on the thirtieth day of June in that year, and such other matters as appear to them to be of public interest in relation to the said Commission. The report for the year ended on the thirtieth day of June, 1905, shall cover also the period from the date of the appointment of the Commissioners under the said Act to the thirtieth day of June, 1905. Copies of such annual reports shall be laid before Parliament by the Minister of Finance and Receiver General within the first fourteen days of the next following session thereof.

The fourth amendment to the 1899 Act was made in 1910 by 9-10 Edward VII, c. 45.

By this Act the money authorized to be paid to the Commission for the purpose of the Act was increased to \$100,000 and by section 3 thereof the Commission was authorized, subject to the provisions of sections 9 to 14 of the 1899 Act to "expend the sums placed to its credit under the provisions of this Act for all or any of the purposes for which the said Commission is authorized by section 7 of the said...(1899 Act) to expend sums placed at its credit."

By section 4 of this Act the Minister of Finance and the Receiver General were authorized to pay out of the Consolidated Revenue Fund to the corporation of the City of Ottawa, as a contribution to the maintenance of the fire protection service given by the City of Ottawa, the sum of \$15,000 annually for a period of ten years from the first day of July 1909.

The fifth amendment to the 1899 Act was made in 1919 by 9-10 George V, c. 62. This Act provided for substantial amendments in certain areas.

For example, the powers were increased. This was provided in section 8 which read as follows:

8. The Commission may,—

(a) purchase, acquire and hold real property in the city of Ottawa, or in the vicinity thereof, for the purpose of public parks or

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- squares, streets, avenues, drives or thoroughfares;
- (b) do, perform and execute all necessary or proper acts or things for the purpose of preparing, building, improving, repairing, maintaining and protecting all or any of the works of or under the control of the Commission and for preserving order thereon;
- (c) co-operate with the City in the improvement and beautifying of the said city, or the vicinity thereof, by the acquisition, maintenance and improvement of public parks, squares, streets, avenues, drives or thoroughfares in the said city or in the vicinity thereof;

And for all or any of the aforesaid purposes the Commission may expend the whole or any portion of the sums that are placed at its credit under this Act.

### Section 9 of this 1919 Act also provided that

9. All works or undertakings of the Commission, under section eight of this Act, are hereby declared to be for the general advantage of Canada.

Section 10 provided for the method by which the Commission might acquire real property. It read as follows:

10. No real property shall be purchased or acquired by the Commission, except with the previous consent of the Governor in Council; and if the Commission is unable to agree with the owner of the property, which it is so authorized to purchase, as to the price to be paid therefor, the Commission shall have the right to acquire the same without the consent of the owner, and the provisions of the *Railway Act* relating to the taking of lands by railway companies shall, *mutatis mutandis*, be applicable to the acquisition of such real property by the Commission.

The sixth amendment to the 1899 Act was made in 1921 by 11-12 George V, c. 43. This Act amended the powers of the Commission prescribed in section 8 of the 1919 Act by adding at the end of paragraph (a) thereof, the following:

and, subject to the approval of the Governor in Council, sell or lease any real property of the Commission, not being a portion of any public park or square, street, avenue, drive or thoroughfare, which is not required for purposes of the Commission.

This is the first time that the Commission was given power to sell to a third party any property that the Commission did not require, that is, excess property that had become surplus for any reason.

Then in 1927 there was a substantial change in this legislation. The 1899 Act and all the amendments above referred to were repealed, and the provisions of the 1927 Act were substituted for the provisions of the 1899 Act and all the Acts amending the 1899 Act.

The 1927 Act was referred to as "*The Federal District Commission Act, 1927*". It was enacted in 17 George V, c. 55.

The new Commission, by statute, was given a new name and was called "The Federal District Commission"; and it consisted of ten members and section 3 prescribed who these Commissioners were to be:

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3. There shall be a Commission, to be called "the Federal District Commission", consisting of ten members, of whom nine shall be appointed by the Governor in Council and shall hold office during pleasure and at least one of whom shall be a resident of the City of Hull. One shall be appointed by the Corporation of the City of Ottawa, hereinafter referred to as "the City" and shall hold office for a period of one year from the date of his appointment, or for such period not exceeding three years as shall be determined by by-law duly passed by the City: Provided, however, that if the mayor or an alderman of the City is appointed by the City to be a commissioner he shall cease to hold office as commissioner when he ceased to hold office as mayor or alderman, and the City shall thereupon appoint a commissioner for the unexpired term.

By section 4 of that Act, the Commission was made a body corporate and its powers were prescribed:

4. (1) The Commission shall be a body corporate, and shall have power to make such by-laws, employ such persons, and pay and defray such expenses as are necessary to enable it to carry into effect the purposes for which it is constituted or any of the powers conferred on it by this Act; but no by-laws so made shall come into force or effect until approved by the Governor in Council, and no alteration, modification or repeal of any such by-law shall have any force or effect until approved by the Governor in Council.

(2) Any by-law of the Commission may impose penalties not exceeding fifty dollars, recoverable upon summary conviction, for the infraction of its provisions, and may provide for the imprisonment of offenders in default of payment of such penalties for any term not exceeding two months.

This new body corporate, The Federal District Commission, assumed the rights and liabilities of the previous Commission by virtue of section 20 which read as follows:

20. Subject to the provisions of this Act the Commission shall possess and be vested with all the assets, rights, credits, effects and property, real, personal and mixed, of whatsoever kind and wheresoever situated, belonging to the Ottawa Improvement Commission, and shall pay, discharge, carry out and perform all the debts, liabilities, obligations and duties thereof.

By section 7 of this 1927 Act the powers of the Commission were considerably enlarged and they were not limited to activities concerning the city of Ottawa but the powers included the right to deal with other municipalities. There was, however, no power given to sell or lease any property once acquired by the Commission.

Section 7 of the Act read as follows:

7. The Commission may,—

(a) purchase, acquire and hold real property within such area or

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district as may from time to time be designated by the Governor in Council for the purpose of public parks or squares, streets, avenues, drives, thoroughfares or bridges;

- (b) do, perform and execute all necessary or proper acts or things for the purposes of preparing, building, improving, repairing, maintaining and protecting all or any of the works of or under the control of the Commission, and for preserving order thereon;
- (c) co-operate with any local municipality in the improvement and beautifying of the same or the vicinity thereof by the acquisition, maintenance and improvement of public parks, squares, streets, avenues, drives, thoroughfares or bridges in such municipality or in the vicinity thereof;
- (d) grant concessions for the maintenance of places of refreshment, amusement or shelter, or for the encouragement of sports and games, upon any property under its administration or control, where in the judgment of the Commission it is advisable in the public interest to do so;

and for all or any of the aforesaid purposes, the Commission may expend the whole or any portion of the sums that are placed at its credit under this Act; Provided that any moneys which may be received by the Commission by way of special grant for the carrying out of any particular work or undertaking shall be expended solely upon such work or undertaking.

By section 8, the Minister of National Revenue was authorized to pay out of the Consolidated Revenue Fund of Canada to the Commission the sum of \$250,000 a year and the Commission by section 9 was given certain borrowing powers.

By section 12, all the works or undertakings of the Commission were declared to be works for the general advantage of Canada.

By section 13, no real property was to be purchased or acquired by the Commission, except with the previous consent of the Governor in Council. Power was given also by this section to expropriate property from third parties.

The 1927 Act was amended in 1928 by 18-19 George V, c. 26.

By section 1 of the 1928 Act the power to sell or lease was again given. This was done by adding a new section 7(e) to the 1927 statute which read as follows:

- (e) subject to the approval of the Governor in Council, sell or lease any real property of the Commission not being a portion of any public park or square, street, avenue, drive or thoroughfare, which is not required for the purposes of the Commission.

By section 2 of the 1928 Act, the annual grant was reduced to \$200,000 per year.

By section 9 of this Act, the National Capital Fund of \$3,000,000 was made available for the purposes of the Commission in so far as they related to the purchase of land or the carrying into effect of any scheme of improvements and undertakings requiring a larger outlay than was available under the actual annual income of the Commission.

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By section 3 of that Act, section 13 of the 1927 Act was amended and expropriation proceedings were now to be taken under the *Expropriation Act* and not under the provisions of the *Railway Act*. The Commission was empowered to take land for a limited time only or to take a limited estate or interest in any real estate.

The new subsections 13(1) and (2) as amended by this Act read as follows:

13. (1) No real property shall be purchased or acquired by the Commission, except with the previous consent of the Governor in Council; and if the Commission is unable to agree with the owner of the property which it is so authorized to purchase, as to the price to be paid therefor, the Commission shall have the right to acquire the same without the consent of the owner, and the provisions of the *Expropriation Act* shall, *mutatis mutandis*, be applicable to the acquisition of such real property by the Commission.

(2) Any plan and description deposited under the provisions of the *Expropriation Act* may be signed by the Chairman of the Commission or by one of the Commissioners thereof, on behalf of the Commission, and the land shown upon and described in such plan and description so deposited shall thereupon be and become vested in the Commission, unless the plan and description indicates that the land taken is required for a limited time only, or that a limited estate or interest therein is taken; and by the deposit in such latter case the right of possession for such limited time or such limited estate or interest shall be and become vested in the Commission.

This 1927 Act was next amended in 1943 by 7 George VI, c. 27. The only amendment made by this Act was to extend the period of the payment of the annual grants.

The 1927 Act was next amended in 1946 by 10 George VI, c. 51.

By section 3 of this Act the number of Commissioners was increased to nineteen and the method of appointment and who they were to be was changed. This new amendment read as follows:

3. (1) There shall be a Commission to be called the Federal District Commission, consisting of nineteen members.

(2) Seventeen members shall be appointed by the Governor in Council to hold office during pleasure for a period not exceeding five years.

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(3) One member shall be appointed by the Corporation of the City of Ottawa, to hold office during pleasure for such period not exceeding five years as the Corporation may by by-law determine.

(4) One member shall be appointed by the Corporation of the City of Hull to hold office during pleasure for such period not exceeding five years as the Corporation may by by-law determine.

(5) Of the members appointed by the Governor in Council one shall be ordinarily resident in each of the nine provinces of Canada.

(6) A retiring member is eligible for reappointment.

(It should be noted that all the provinces of Canada for the first time were given representation on this Commission.)

A new section 3A was also added which prescribed that "The Governor in Council may from time to time designate an area within and in the district surrounding the City of Ottawa to be known as the National Capital District."

By section 4 of this Act, the powers of the Commission were considerably enlarged. Section 4 read as follows:

4. The said Act is further amended by inserting immediately after section six thereof the following section:—

"6A. (1) The Commission shall co-ordinate construction and development work in the National Capital District in accordance with general plans approved from time to time under this Act.

(2) Proposals for the location, erection, alteration or extension of a building or other work by or on behalf of the Government of Canada or by any person on lands owned, leased or otherwise controlled by the Government of Canada in the National Capital District shall be referred to the Commission prior to the commencement of the work.

(3) No building or other works shall be erected, altered or extended by or on behalf of the Government of Canada in the National Capital District unless the site, location and plans thereof have first been approved by the Commission.

(4) No person shall erect, alter or extend a building or other work on land in the National Capital District owned, leased or otherwise controlled by the Government of Canada unless the site, location, and plans thereof have first been approved by the Commission.

\* \* \*

(7) This section does not apply to interior alterations in a work or building."

The right to acquire property for various purposes by section 5 of this Act was also very considerably enlarged. Section 5 read as follows, in part:

(a) purchase, acquire and hold real property within the National Capital District for the purpose of public parks or squares, streets, avenues, drives, thoroughfares, bridges or other structures;

\* \* \*

(c) co-operate with any local municipality in the improvement and beautifying of the same or the vicinity thereof by the develop-

ment, maintenance or improvement of public parks, squares, streets, avenues, drives, thoroughfares, bridges or other structures in such municipality or in the vicinity thereof;

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It should be noted from the above that by this Act it was not necessary to co-operate with any other municipality in the acquisition of any real property for the purposes of the Commission.

Then finally this brings us to the *National Capital Act* which was passed in 1958 by 7 Elizabeth II, c. 37.

This Act was an entirely new Act and it repealed the *Federal District Commission Act* of 1927 and all amendments thereto.

The main provisions of the *National Capital Act* are as follows:

It is provided in section 1 that the Act may be cited as the "National Capital Act".

In section 2(j), the National Capital Region is prescribed and defined and it was provided that the powers of the Commission can now only be exercised within the area of the National Capital Region. This is, therefore, a limitation on its powers which heretofore did not exist.

Section 2(j) of the Act reads as follows:

(j) "National Capital Region" means the seat of the Government of Canada and its surrounding area, more particularly described in the Schedule;

The constitution of the Commission is set out in section 3. By it, the number of Commissioners was increased to twenty, all of whom were to be appointed by the Governor General in Council. The City of Ottawa and the City of Hull no longer had the right to appoint a member.

Section 3 reads as follows, in part:

3. (1) There shall be a corporation, to be called the National Capital Commission, consisting of twenty members, each of whom shall be appointed by the Governor in Council to hold office during pleasure for a term not exceeding four years.

\* \* \*

(3) The members, other than the Chairman and Vice-Chairman, shall be appointed as follows:

- (a) at least one member from each of the ten provinces;
- (b) at least two members from the city of Ottawa;
- (c) at least one member from the city of Hull;
- (d) at least one member from a local municipality in Ontario other than the city of Ottawa; and

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(e) at least one member from a local municipality in Quebec other than the city of Hull.

There is a statutory definition of "local municipality" referred to in section 3(3)(e) above quoted. It is contained in section 2(g) of the Act and it reads as follows:

(g) "local municipality" means a municipality wholly or partly within the National Capital Region;

It is provided in section 4 that the Commission shall be the agent of Her Majesty, thereby removing any suggestion of ambiguity in its status. Section 4 reads as follows:

4. (1) The Commission is, for all purposes of this Act, an agent of Her Majesty, and its powers under this Act may be exercised only as an agent of Her Majesty.

(2) The Commission may, on behalf of Her Majesty, enter into contracts in the name of Her Majesty or in the name of the Commission.

(3) Property acquired by the Commission is the property of Her Majesty and title thereto may be vested in the name of Her Majesty or in the name of the Commission.

(4) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Commission on behalf of Her Majesty whether in its name or in the name of Her Majesty, may be brought or taken by or against the Commission in the name of the Commission in any court that would have jurisdiction if the Commission were not an agent of Her Majesty.

In section 5, it is prescribed that the head office of the Commission shall be at the city of Ottawa; and that the Commission shall meet at least three times a year in the city of Ottawa; and that it may meet at such other times in the National Capital Region as the Commission deems necessary.

In section 8, the method of appointing officers and employees of the Commission and consultants and advisers is provided for, and all appointments are subject to the approval of the Governor in Council in the manner therein provided.

Under section 9(3), it is provided that the Commission may appoint a National Capital Planning Committee and such other committees as it considers necessary or desirable for the administration of the Act.

(This is the first time there was a statutory recognition of a National Planning Committee. Heretofore the appointment of such a committee was done by by-law. (See p. 28 of the Statement of Facts)).

Section 10 of the Act, as indicated earlier in these reasons, sets out the objects, purposes and powers of the Commission.

In section 10(c) the words "other works" is a new phrase and gives additional rights.

In section 10(e), the Commission is authorized to "co-operate or engage in joint projects with, or make grants to, local municipalities or other authorities for the improvement, development or maintenance of property". (In 1927, in section 7, the power given was to co-operate in the acquisition.)

Section 11 charges the Commission with the co-ordination of the development of the public lands in the National Capital Region and prescribes the method by which they may accomplish this. Section 11 reads as follows:

11. (1) The Commission shall, in accordance with general plans prepared under this Act, co-ordinate the development of public lands in the National Capital Region.

(2) Proposals for the location, erection, alteration or extension of a building or other work by any person on public lands, or by or on behalf of a department, in the National Capital Region shall be referred to the Commission prior to the commencement of the work.

(3) No building or other work shall be erected, altered or extended by or on behalf of a department in the National Capital Region unless the site, location and plans thereof have first been approved by the Commission.

(4) No person shall erect, alter or extend a building or other work on public lands in the National Capital Region unless the site, location and plans thereof have first been approved by the Commission.

(5) In any case where the Commission does not give its approval under this section the Governor in Council may give such approval.

(6) Any approval given under this section may be subject to such terms and conditions as are considered desirable by the Commission or the Governor in Council, as the case may be, respecting the erection, alteration, extension or maintenance of the building or other work in relation to which the approval was given.

(7) This section does not apply to interior alterations in a work or building.

By section 12, the Commission is given power to relocate railways and related facilities. Section 12 reads as follows:

12. (1) The Commission may construct in the National Capital Region, in accordance with plans prepared under this Act, a railway and related facilities.

(2) The Commission may sell, convey or lease the railway and related facilities, or any portion thereof, to any railway company or enter into agreements with any railway company for the sole, joint or several use of such railway or facilities or portion thereof and for the maintenance by

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such company of such railway or facilities or portion thereof and the operation thereof.

(3) The provisions of the *Railway Act*, with such modifications as circumstances require, are applicable to and in respect of the exercise of the powers conferred by this section, but nothing in this section shall be deemed to constitute the Commission a railway company except for the purpose of carrying out the provisions of subsection (2).

The expropriating power of the Commission, as above set out in part in these reasons, is contained in section 13. It is to be noted that there is no power to take property for a limited time or to take a limited right or estate in any property as there was in the 1928 statute.

Section 13 reads in full as follows:

13. (1) The Commission may, with the approval of the Governor in Council, take or acquire lands for the purpose of this Act without the consent of the owner, and, except as otherwise provided in this section, all the provisions of the *Expropriation Act*, with such modification as circumstances require, are applicable to and in respect of the exercise of the powers conferred by this section and the lands so taken or acquired.

(2) For the purposes of section 9 of the *Expropriation Act* the plan and description may be signed by the Chairman or General Manager of the Commission.

(3) The compensation for lands taken or acquired under this section, or for damage to lands injuriously affected by the construction of any work by the Commission, shall be paid by the Commission as though the lands were acquired under the other provisions of this Act, and all claims against the Commission for such compensation or damage may be heard and determined in the Exchequer Court of Canada in accordance with sections 46 to 49 of the *Exchequer Court Act*; but nothing in this subsection shall be construed to affect the operation of section 34 of the *Expropriation Act*.

By section 14, a limitation was imposed on the disposal of any property acquired by the Commission. Section 14 reads as follows:

14. Except with the approval of the Governor in Council, the Commission shall not

- (a) dispose of any real property for a consideration in excess of a value of ten thousand dollars;
- (b) acquire any real property for a consideration in excess of a value of twenty-five thousand dollars; or
- (c) enter into an agreement or lease enduring for a period in excess of five years.

Section 15(1) of the Act empowers the Commission to make payments of taxes to municipalities. Section 15 reads as follows:

15. (1) The Commission may pay grants to a local municipality not exceeding the taxes that might be levied by the municipality in respect of

any real property of the Commission if the Commission were not an agent of Her Majesty.

(2) Subsection (1) does not apply to parks or to squares, highways or parkways or to bridges or similar structures.

(3) The Commission may pay grants to the appropriate authorities in respect of real property of the Commission situated in Gatineau Park not exceeding in any tax year the amounts estimated by the Commission to be sufficient to compensate such authorities for the loss of tax revenue during that tax year in respect of municipal and school taxes by reason of the acquisition of the property by the Commission.

Section 16 sets up a separate National Capital Fund and this is the first time this was done by statute for the Commission.

By section 23, all works of the Commission, were declared to be for the general advantage of Canada. Section 23 reads as follows:

23. All works of the Commission, whether constructed or executed before or after the coming into force of this Act, are hereby declared to be for the general advantage of Canada.

The word "work" referred in the said section 23 is defined in section 2(o) of the Act. It reads as follows:

(o) "work" means any work, structure or undertaking.

Section 26 provides for the substituting of the Commission under this Act for the Federal District Commission in any heretofore existing acts, orders, regulations, contracts, etc. Section 26 of the Act reads as follows:

26. Whenever in any Act, order, regulation, deed, contract, lease or other document, the Federal District Commission is mentioned or referred to, there shall, in each and every case, be substituted the National Capital Commission.

Section 27 also provides for certain transmittal powers to the Commission. Section 27 reads as follows:

27. The corporation referred to in section 3, and the corporation established by the *Federal District Commission Act* are hereby declared for all purposes to be one and the same corporation.

All powers, rights, liabilities, therefore, of the Federal District Commission under the 1927 Act and all amendments thereto are now transferred to the National Capital Commission under the *National Capital Act*.

From this history of legislation culminating in the *National Capital Act*, it may be observed that since 1899 it has always been the object and purpose of the Parliament of Canada to plan and implement plans from time to time to make the seat of the Government of Canada some place different and distinct from all other areas in the nation.

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7. The legislative history of *The Planning Act* (Ontario).

The present planning Act of the Province of Ontario is *The Planning Act*, R.S.O. 1960, c. 296, as amended by 1960-1, c. 76; 1961-62, c. 104; 1962-63, c. 105, and 1964, c. 90 (in force in part).

The first planning Act in the Province of Ontario was enacted in 1946, R.S.O. 1946, c. 41. This 1946 Act was subsequently amended by 1947, c. 75; by 1949, c. 71 (consolidated in R.S.O. 1950, c. 53); by 1952, c. 775; by 1953, c. 80; by 1954, c. 71; by 1955, c. 279, and by 1959, c. 71. Then there was enacted the present Act in 1960; and the amending Acts, as set out in the previous paragraph, were enacted.

In reviewing the provisions of these planning Acts, it may reasonably be inferred that in pith and substance the object of this provincial legislation from 1946 to date has been planning and regulating the use of land in a manner designed to secure the health, safety, convenience and welfare of the inhabitants of the particular planning area.

For example, the functions of local planning boards are directed solely to planning of a purely local or private nature; "official plans", as another example, must be designed solely with the above purpose as their goal.

In the 1959 *Planning Act*, S. of O. 1959, c. 71, there was transferred to *The Planning Act* from *The Municipal Act* the provisions giving municipalities the power to pass zoning or land use by-laws. (In the 1960 *Planning Act* this power is set out in section 30.)

The power to enact zoning of land use by-laws had been in *The Municipal Act* for as long a time as there existed a predecessor Act to the *National Capital Act*, which latter date is 1899. This power in fact predates 1899.

In *The Municipal Act*, R.S.O. 1897, c. 223, s. 631, for example, it was provided that any city having a population of 50,000 or more could pass a general by-law prescribing the minimum width of streets, lanes, alleys or any public places within the municipality wherein dwelling houses could be erected or occupied and the minimum area of vacant land to be attached and used with any dwelling house thereafter to be erected as the court yard or curtilage and the mode of erection of buildings occupied or intended

to be occupied as dwelling houses within the municipality or within any area or areas thereof to be defined by the said by-law or by any other by-law which may from time to time alter, amend or repeal such by-law.

But a municipality in the Province of Ontario was not given the right to adopt an official plan for its municipality or a joint official plan with one or more other municipalities of their joint area until the enactment of the 1946 *Planning Act*.

Therefore, until 1946, it was not the practice for a municipality to draw up and adopt a general plan and then to implement such plan by way of passing a zoning or land use or building by-law, except in so far as it was necessary to have in mind some general plan in order to draft any such zoning or land use or building by-law.

Since the passing of the first *Planning Act* in 1946, however, although it is not imperative for any municipality to adopt an official plan within the meaning of that Act, nevertheless, the whole scheme of this original *Planning Act*, and its successor Act today, and the goal of any official plan adopted pursuant to such legislation and the implementation of any plan is "to secure the health, safety, convenience or welfare of the inhabitants of the area".

Not only, therefore, must any zoning or land use or building by-law or any other planning decision now made by any Province of Ontario municipality or by one such municipality jointly with any other municipality or municipalities have such as its sole goal, but in fact, if any such by-law is passed which purports to have any different goal it is illegal because it is beyond the powers of any such municipality to enact under the delegated authority given to it by section 30 of the present *Planning Act*.

It may therefore be inferred from the history of the planning and land use legislation in the Province of Ontario that its objects and purposes have been solely directed to assisting municipalities to carry out in the best way possible their traditional roles, namely, for example, the provision of fire and police protection, water and sewer services, street cleaning and repairs, garbage collection, establishment of parks and recreation areas, the provision of local health and welfare services, schools, standards of construction of buildings, etc.

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### 8. A consideration of the problems of the suburbs (the approaches to an urban center).

There is a great and particular emphasis in the Master (Greber) Plan adopted under *The National Capital Act*, on the suburbs, but none in particular is called for under *The Planning Act* (Ontario) or any legislation enacted pursuant to any enabling power granted by it.

As disclosed fully in the evidence, the problem of suburbs is a general problem of planning in any large city. The problem is how to cope with suburbs.

One of the main objects and purposes of establishing a green belt in the National Capital Region (and establishing part of this green belt involved the acquisition of the defendant's property) is directed to solving the problem of the suburbs in the National Capital Region.

It is abundantly clear from the evidence that one of the most difficult problems in devising a satisfactory economic and social layout of the National Capital Region concerns the suburbs.

The approach to any great city is a most vital matter, Without proper approaches no city can become a truly great city.

If the National Capital of Canada is to be developed in accordance with the national significance of Canada, it therefore may be reasonably inferred that it is imperative that the problem of the approaches to it must be solved in a satisfactory way.

(In this connection it should be observed that the problem of the approaches to cities is a world-wide problem as is indicated in the evidence and it has not been solved in cities like Montreal and Detroit, but it has been solved, for example, in the western approach to Philadelphia, in the approach to Berlin and in the northern development of New York City, and in many parts of Greater London.)

The evidence discloses that, in the main, speculation and neglect are responsible for the decay that does occur in the approaches to many cities.

It may, therefore, be reasonably inferred that it is of the utmost importance that a situation that permits irrational and disgraceful treatment of congested suburban approaches be eliminated so that uneconomical and social disorder

will not encircle and dishonour the National Capital of Canada. And it may be reasonable to assume that this must be done if this national purpose is to be attained.

Solving the problem of the suburban approaches is one of the main purposes in establishing a green belt area.

Associated with and as part and parcel of solving this problem of the suburbs and the approaches to the central urban core of the National Capital Region of Canada by the establishing of a green belt area, the National Capital Commission has taken other steps which are complementary thereto, namely, steps to reestablish rail freight facilities, railway tracks, branch lines of the railways, and Union Station, so that this urban central core of Ottawa will be free of these facilities and the difficulties they create. This serves to point up the objects and purposes of implementing this part of the Master (Greber) Plan.

(The railway relocation program as the evidence indicates is the key of the plan of the National Capital. Originally the railway facilities were organized strictly in keeping with the demands of the railroad operations and their immediate economy to the detriment of the normal growth and life of the Ottawa and area community.)

#### 9. The parts of the Master (Greber) Plan of the National Capital Commission that have been implemented.

Parts of the whole Master (Greber) Plan have already been implemented. For example, between 1945 and 1955, the following joint projects have been carried out or initiated under the Master Plan:

- (a) Federal District Commission Joint Projects with Ottawa and Hull
  - (i) The Mackenzie King Bridge,
  - (ii) Fairy Lake Parkway.
- (b) City of Ottawa—Federal District Commission Joint Projects
  - (i) Sussex Drive and Bytown Bridges,
  - (ii) The Dunbar Bridge,
  - (iii) The Queensway limited access roadway,
  - (iv) Carling Avenue widening,
  - (v) "Advance of Need" municipal sewer and waterworks projects.

As to this also, the joint committee of the Senate and the House of Commons appointed to review and report upon the progress and programme of the Federal District Commission (predecessor to the National Capital Commission) in developing and implementing the plan of the National

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Capital, reported in 1956, and selected six works in the whole general plan for special consideration, *viz.*:

- (1) the elimination of the causes of pollution in the Ottawa River,
- (2) the completion of the ten-mile section of the essential elements of the Queensway within the City of Ottawa,
- (3) the completion of the removal of the railroad tracks from the Interprovincial Bridge, the abandonment of the C.P.R. main line along the Ottawa River west of the Ottawa West Station, the elimination of many dangerous level crossings in the west end of the Capital, the renovation of the Union Station and the removal of the local freight sheds and yards to a site immediately east of Hurdman's Bridge,
- (4) a new bridge across the Ottawa River servicing the downtown sections of Ottawa and Hull,
- (5) the establishment of the Green Belt, and
- (6) the Gatineau Park.

It may be reasonable to infer further that not only does the Master (Greber) Plan refer to matters which are calculated to make the seat of the Government of Canada a great area, but also that they are not directly, except incidentally, related to the health, safety and welfare of the inhabitants resident in the National Capital Region.

So much for the consideration of the federal and provincial objectives of the community physical design proposals of their respective general plans.

From a consideration of the foregoing, I am of the opinion that the establishment of a Green Belt in the National Capital Region is the implementation of part of a general plan for the Region, namely, the Master (Greber) Plan, and that such part of the general plan is indivisible from the whole in that it is of the essence of the planning problem of the National Capital of Canada. Such planning problem consists of many indivisible parts, such as the decentralization of population, the controlling of the suburbs or the approaches, providing for or causing the establishment of satellite towns, placing of public buildings, providing for parkway development, the Gatineau Park, the main arterial road system, and as stated, the relocation of the railway and railway facilities and many other matters.

The answer to the first part of this enquiry, I am of opinion, is, therefore, that the matter in respect to which the *National Capital Act* was passed by Parliament is one of planning in its two-fold aspects, namely, the preparation of plans, and the implementation of such plans; and that the language employed by Parliament in section 10 of the *National Capital Act* aptly describes this matter in its two fold aspect. It does so in this way:

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(a) *by authorizing the preparation of general plans in*

10. (1) The objects and purposes of the Commission are to prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.

(b) *by authorizing the implementation of general plans in*

10. (2) The Commission may for the purposes of this Act,

(a) acquire, hold, administer or develop property; . . .

The second part of this enquiry is concerned with ascertaining whether this matter is in the federal or provincial field, that is with deciding whether the matter should be classified as "coming within" or as "not coming within" the classes of subjects assigned to the Parliament of Canada under section 91 of the *B.N.A. Act*.

In reaching a decision on this point, it is not necessary to consider the matter of planning in relation to its first aspect, namely the preparing of general plans (section 10(1) of the Act) because as was mentioned above, no legal results flow from the preparation of such plans by the National Capital Commission and therefore no constitutional question for decision has arisen with regard thereto.

The question for decision therefore is concerned solely with the constitutional right of the Parliament of Canada to confer on the Federal Government the powers contained in section 10(2) of the Act to implement such plans.

I therefore come now to discuss and decide whether the matter of the *National Capital Act* falls within section 91 or 92 of the *B.N.A. Act*.

Probably the most important principle to be applied in reaching such a decision is the double aspect principle.

Briefly stated, this principle may be put this way:

Some matters which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91 of the *B.N.A. Act*.

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Viscount Haldane in the case of *John Deere Plow v. Wharton*<sup>1</sup> stated it in these words:

It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality.

In the cases of *Russell v. The Queen*<sup>2</sup> and *Hodge v. The Queen*<sup>3</sup> the character of this doctrine was first defined. In *A.G. Ontario v. Canada Temperance Federation*<sup>4</sup> Viscount Simon stated the test to be employed in solving the problem of whether the matter falls within section 91 or 92 in this language:

In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must in its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case . . . and the *Radio* case . . .) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

In *Johannesson v. West St. Paul*<sup>5</sup>, the Supreme Court of Canada applied Lord Simon's test and held that a zoning by-law which purported to prevent the erection of an airport, which was passed pursuant to the purported enabling powers contained in section 921 of the *Municipal Act*, R.S.M. 1940, c. 141, was of no legal effect because the said enabling legislation was in relation to aeronautics and, therefore, beyond the competency of the Legislature of Manitoba to enact.

This was planning legislation, and planning legislation speaking generally, in one aspect with within the competency of the Legislature of Manitoba to enact, but this particular planning legislation in this particular aspect was not.

And the enactment of this zoning by-law by the Municipality of West St. Paul was a purported implementation of planning in what, again speaking generally, in one aspect was a subject in relation to which competent municipal legislation can be passed, but not in the aspect appearing on the facts of the *Johannesson* case.

Following this case, section 4 of the *Aeronautics Act*, R.S.C. 1952, c. 2, was amended in 1952 (by R.S.C. 1952, c.

<sup>1</sup> [1915] A.C. 330 at 339. <sup>2</sup> (1882) 7 A.C. 829. <sup>3</sup> (1883) 9 A.C. 117.

<sup>4</sup> [1946] A.C. 193.

<sup>5</sup> [1952] 1 S.C.R. 292.

302,) to authorize the Minister to “make regulations with respect to

- (j) the height, use and location of buildings, structures and objects, including objects of natural growth, situated on lands adjacent to or in the vicinity of airports, for purposes relating to navigation or aircraft and use and operation of airport, and including for such purposes, regulations restricting, regulating or prohibiting the doing of anything or the suffering of anything to be done on any such lands, or the construction or use of any such building, structure or object.”

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Section 4 was also amended in other respects, providing for so-called “zoning regulations” under paragraph (j) set out above. Subsections (8) and (9) provided.

- (8) Every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, minus an amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport.
- (9) No proceedings to recover any compensation to which a person may be entitled under section (8) by reason of the operation of a zoning regulation shall be brought except within two years after a copy of the regulation was deposited pursuant to subsection (6) or (7).

Under this authority the Governor General in Council on the recommendation of the Minister of Transport approved *The Toronto Malton Airport Zoning Regulations* (1 S.O.R. Consolidation 1955, 37).

The Regulations provide in part:

3. These regulations apply to all lands adjacent to or in the vicinity of Toronto Airport, Malton, Ontario, including public road allowance, as more particularly described in the Schedule hereto.

4. (1) No person shall erect or construct, on any land to which these regulations apply, any building, structure or object or any addition to any existing building, structure or object, the highest point of which exceeds in elevation the elevation at that point of such of the surfaces hereinafter described as project: immediately over and above the surface of the land upon which such building, structure or object is located, namely,

- (a) a horizontal surface, the outer limits of which are at a horizontal radius of 13,000 feet more or less;
- (b) the approach surfaces abutting each end of the strip designated as 10-28, the strip designated as 14-32 and the strip designated as 05-23, and extending outward therefrom, the dimensions of which approach surfaces are 600 feet on each side of the centre line of the strip at the strip ends and 2,000 feet on each side of the projected centre line of the strip at the outer ends, the said outer ends being 200 feet above the elevations at the strip ends, and measured horizontally, 10,000 feet from the strip ends; and

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(c) the several transitional surfaces, each rising at an angle determined on the basis of a ratio of one foot vertically for every seven feet measured horizontally from the outer lateral limits of the strips and their abutting surfaces, as shown on a Plan No. T724 dated December 17, 1952, and revised February 20, 1953, of record in the Department of Transport.

(2) Where any building, structure or object on land to which these regulations apply exceeds the limits in elevation specified in subsection (1), the Minister may order the owner or occupier of the land to remove, demolish or modify such buildings, structure or object or do any act or thing necessary to ensure that such building, structure or object complies with the limits in elevation so specified and may, in any such order, specify the time within such removal, demolition, modification, act or thing shall be done.

5. No person shall operate or cause to be operated on any lands to which these regulations apply any machine, device, contrivance or thing after being notified by the Minister that, in the opinion of the Minister, the machine, device, contrivance or thing causes or is likely to cause, by the emission of light, smoke, noise or fumes, a hazard or obstruction to aircraft using the airport.

[The short title and interpretation sections and the schedule describing the lands have been omitted. Section 4(2) and section 5 were revoked by S.O.R./55-331 and S.O.R./55-402].

Under this authority also the Governor General in Council on the recommendation of the Minister of Transport approved the Ottawa Airport Zoning Regulations (Uplands Airport) on the 23rd January, 1964 (S.O.R. 64-41).

These Regulations apply to certain lands in the Township of Gloucester and the Township of Nepean and provide in part:

1. These Regulations may be cited as the *Ottawa Airport Zoning Regulations*.

2. In these Regulations,

- (a) "airport" means Ottawa Airport, Ottawa, in the Province of Ontario;
- (b) "airport reference point" means the point determined in the manner set out in Part I of the Schedule;
- (c) "approach surface" means an imaginary inclined plane the lower end of which is a horizontal line at right angles to the centre line of the strip and passing through a point at the strip end on the centre line of the strip;
- (d) "horizontal surface" means an imaginary horizontal plane located 150 feet above the assigned elevation of the airport reference point;
- (e) "Minister" means the Minister of Transport;
- (f) "strip" means a rectangular portion of the land area of the airport, being 2000 feet in width including the runway, especially prepared for the take-off and landing of aircraft in a particular direction; and
- (g) "transitional surface" means an imaginary inclined plane extending upward and outward from the outer lateral limits of the strip and its approach surface to an intersection with the horizontal surface or other transitional surfaces.

3. For the purpose of these Regulations the airport reference point is deemed to be 348 feet above sea level.

4. These Regulations apply to all the lands adjacent to or in the vicinity of Ottawa Airport, Ottawa, Ontario, including public road allowances, as more particularly described in Part II of the Schedule.

5. No person shall erect or construct, on any land to which these Regulations apply, any building, structure or object or any addition to any existing building, structure or object, the highest point of which exceeds in elevation the elevation at that point of such of the surfaces hereinafter described as projects immediately over and above the surface of the land upon which such building, structure or object is located, namely: (Description)

(In both these cases it should be observed, and as alluded to earlier in these reasons the Federal Government pays compensation pursuant to the provisions of the *Aeronautics Act* to any owner of property whose title is diminished within the meaning of this Act, by such zoning regulations. This, as mentioned earlier also, is something that is never done under any Ontario provincial or municipal planning regulation or zoning.)

From this it is clear that part of the matter in respect to which the *Aeronautics Act* was passed by the Parliament of Canada concerns planning, and approvals of these zoning regulations in the cases of these two airports are examples of implementation of such planning.

This clearly exemplifies the proposition that planning and the implementation of planning are subjects in respect to which the double aspect doctrine can apply.

In the instant case the implementation of planning by the plaintiff, the National Capital Commission, by expropriating the defendant's property for part of a green belt purports to have been done pursuant to a plan whose objects and purposes are for the "development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance."

This is positive planning as defined earlier in these reasons.

Whether or not an "official plan" within the meaning of section 1(h) of *The Planning Act* has been adopted by a municipality in the Province of Ontario (and the Township of Gloucester has not adopted an "official plan" except for certain streets and parks) any zoning or land use by-law passed by such municipality must have as its objects and

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purposes the securing of "the health, safety, convenience or welfare of the inhabitants of the area", and if any such by-law does not, it is not valid because it is beyond the intent and scope of the enabling legislation delegating power to such municipalities to pass such by-laws.

This is negative planning as defined earlier in these reasons.

The conclusion, therefore, is irresistible that the two above-mentioned aspects of the matter in relation to the implementation of planning or the making of a planning decision are quite distinct and different. The objects and purposes of implementing a plan for the development, conservation and improvement of the National Capital Region "in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance" is "such that it goes beyond local or provincial concern or interests and must in its inherent nature be the concern of . . . (Canada) . . . as a whole." (Compare the language of Viscount Simon at p. 206 in *A.G. Ontario v. Canada Temperance Federation*<sup>1</sup>. It is a class of subject which has the dimensions to affect the body politic of Canada as a nation.

The words "national significance" in s. 10(1) of *The National Capital Act* are employed in describing the goal sought to be obtained for the "nature and character of the seat of the Government of Canada".

These words were understood by three of Canada's great Prime Ministers, Sir Wilfrid Laurier, Sir Robert Borden and Mackenzie King from 1899, and by the persons who were employed by the Government of Canada to investigate, to report and to act. And it has been understood by every succeeding Prime Minister down to the present time.

Canada is a nation as was exemplified this year when the Parliament of Canada adopted a national flag for the first time.

The Royal Proclamation of this flag reads in part:

We do by this Our Royal Proclamation appoint and declare as the National Flag of Canada, from and after the fifteenth day of February, in the Year of Our Lord, one thousand nine hundred and sixty-five . . .

\* \* \*

All of which Our Loving Subjects and all others whom these Presents may concern are hereby required to take notice and to govern themselves accordingly.

\* \* \*

<sup>1</sup> [1946] A.C. 193.

This national flag symbolizes the national significance of Canada.

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The National Capital Region belongs to the nation in the sense that it can be said that the aspirations, hopes, attainments and way of life of the citizens of Canada are exemplified to themselves and to all the visitors to Canada in the nature and character of the seat of the Government of Canada. Concern for and interest in the seat of the Government of Canada are the affair of all the citizens of Canada and of all ten provinces. A worthy seat of Government can be achieved by the adoption and implementation of a general plan under the provisions of section 10 of the *National Capital Act*.

Every country must have a capital worthy of it, and the evidence indicates that throughout history this has always been recognized. As indicated earlier, the national significance of ancient Greece was exemplified in its capital Athens, of Italy, in its capital Rome, of France, in its capital Paris, of Great Britain, in its capital London, and of the United States, in its capital Washington.

In the result, therefore, I am of opinion that the words "national significance" are meaningful and are apt in describing the goal sought to be attained for the nature and character of the seat of the Government of Canada.

Counsel for the defendant submitted that this was a matter of "Property and Civil Rights in the Province" of Ontario. The question raised by this submission is whether the disputed Act deals with a single matter of national concern or several identical matters each of local or provincial concern in one of the provinces.

In *Gold Seal Limited v. Dominion Express Company and A.G. Alberta*<sup>1</sup> Duff, J., as he then was, used these words at p. 460 in dealing with a similar argument:

The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation "in relation to" civil rights. Most legislation of a representative character does incidentally or consequently affect civil rights. But if it is not legislation "in relation to" the subject matter of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause.

Viscount Simon in *A.G. Saskatchewan v. A.G. Canada*<sup>2</sup>

<sup>1</sup> [1921] S.C.R. 424.

<sup>2</sup> [1949] A.C. 110 at 123.

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quoted with approval the language of Rand, J., enunciating the same principle:

But, as Rand, J. points out, there is a distinction between legislation "in relation to" agriculture and legislation which may produce a favourable effect on the strength of stability of that industry. Consequential effects are not the same thing as legislative subject matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters . . .

In 1956, *Pinto Uranium Mines Limited v. Ontario Labour Relations Board*<sup>1</sup> McLennan, J., quoted these words of Lord Simon and applied this principle.

In 1964, in this Court, in *Porter v. The Queen*<sup>2</sup> Jackett, P., held, in relation to the object of the legislation in that case, namely, *The Government Annuities Act*, that although it may be legislation affecting the classes of subjects enumerated in s. 92, it was not legislation in relation to any of such classes of subjects; and stated:

Here Parliament expressly declared that the scheme was "in the public interest" and there are no circumstances that would constrain the Courts to hold that that declaration is colourable.

In this case it is possible that the implementing of any plan by the National Capital Commission under s. 10(2) of the *National Capital Act* may affect property and civil rights, and also matters of a local or private nature within the provinces of Ontario and Quebec; and it may also affect zoning and land use regulations passed by the various municipal corporations therein pursuant to valid provincial authority delegated to them, in the National Capital Region, but the true character of the *National Capital Act* is not legislation "in relation to" such classes of subjects.

The language of Jackett, P., quoted from the above case, relating to the declared objects of the subject legislation in that case, applies with equal force to the title words and to the words of s. 10(1) of the *National Capital Act*.

Counsel for the defendant also submitted that there must be a national emergency before the Parliament of Canada can enact a law in relation to a matter that does not fall within one of the enumerated heads of s. 91.

In *A. G. Ontario v. Canada Temperance Federation*<sup>3</sup> it was held that it was not necessary that there be unusual conditions constituting an emergency before the Parliament

<sup>1</sup> [1956] O.R. 862.

<sup>2</sup> [1965] 1 Ex. C.R. 200.

<sup>3</sup> [1946] A.C. 193.

of Canada can exercise its legislative jurisdiction under the legislative power conferred on it by the peace, order and good government clause by s. 91; and Viscount Simon at p. 206 expressly negatives any suggestion that the contrary was the decision in *Toronto Electric Commissioners v. Snider*<sup>1</sup> when he used these words:

It is to be noticed that the Board in Snider's case nowhere said that *Russell v. The Queen* (7 App. Cas. 829) was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation itself, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

There is nothing in *Natural Products Market Act et al*<sup>2</sup>, especially the words of Duff, C. J. at 419, in the *Labour Convention Case*<sup>3</sup> which the Privy Council stated it hoped would form the *locus classicus* of the law on this point, *Margarine Reference, Canadian Federation of Agriculture v. Attorney General of Quebec et al.*<sup>4</sup>, or *Reference Concerning Japanese Canadians*<sup>5</sup> which changed the jurisprudence in respect to this emergency theory enunciated by Viscount Simon and quoted above. There may be cases in which an emergency may be both the occasion and the justification for legislation by the Parliament of Canada. But this proposition is something entirely different from the submission that the opening words of s. 91 confer only an emergency power.

The legislation, in the subject case, was not the occasion of and needs no justification of emergency.

In the result, therefore, I am of opinion that the double aspect principle applies to the facts of this case and that the matter should be classified as coming within the classes of subjects assigned to the Parliament of Canada under s. 91 of the *B.N.A. Act*, that is under the power contained in the words constituting Parliament's sole grant of legislative power, viz., "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces".

The National Capital Commission, therefore, has power to implement its general plans provided always, of course,

<sup>1</sup> [1925] A.C. 396.      <sup>2</sup> [1936] S.C.R. 398.      <sup>3</sup> [1937] A.C. 326 at 353.

<sup>4</sup> [1951] A.C. 179.

<sup>5</sup> [1947] A.C. 88.

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such plans are for "the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance."

It also follows that such implementation may be done by purchase, by expropriation, or by gift to it. The right to expropriate is not the issue before the Court. The role of the Court is to determine the right of the Parliament of Canada in this matter to implement its general plan for the National Capital Region. But the Parliament of Canada is the sole authority to determine the needs to be served by s. 10(2) of the *National Capital Act*. This principle admits of no exception merely because the power of expropriation is involved. The power of expropriation in s. 13 is merely one means to accomplish such needs; the power to accept gifts in s. 20 is another means.

It is also not the role of the Court to say whether or not the *National Capital Act* could have been drafted better to achieve its national objectives. The Court in this case is concerned only with the validity of the power under which the National Capital Commission purported to expropriate the subject property of the defendant.

The Court would have a role to play, however, if the exercise of this power of expropriation was colourable.

It was suggested by counsel for the defendant that the power in s. 10(2)(b) of the *National Capital Act* may be a colourable attempt to authorize expropriation for purposes of re-sale under the guise of planning legislation.

In essence it is a submission that the National Capital Commission in respect to the green belt area proposes and is empowered to embark on a program which in some jurisdictions is referred to as excess condemnation (expropriation).

Such use of expropriation proceedings may take one of the following forms:

- (1) expropriation for the purpose of removal and replotting of odd-shaped remnants of land;
- (2) the taking of abutting land so that planning restrictions may be imposed to protect a public improvement from inharmonious environment;
- (3) the taking of surplus lands so that a profit may be

obtained upon re-sale at the values enhanced by the completion of the project.

In my opinion, all of these uses are within the legal competence of the National Capital Commission under its power contained in s. 13 of the *National Capital Act* provided any acquisition of lands is made in good faith for the purposes set out in s. 10(1). On the abandonment of such purposes, if such abandonment is not part of a colourable scheme, the National Capital Commission, subject to the provisions of s. 14, may sell such lands for private use and no right or interest remains in the original owners. There is also no obligation on the part of the National Capital Commission to continue any particular use of lands after the acquisition of the same by it pursuant to s. 13 of the Act, and therefore no cause of action against the National Capital Commission can arise at any time in favour of the original owners of any lands by reason of the abandonment by the latter, in good faith, of any use which constituted the original purpose for the acquisition of such lands.

The conclusion that I reach is, therefore, that the legislative authority of the Parliament of Canada, under the *British North America Act*, 1867 to 1960, does extend to authorizing the expropriation of the lands of the defendant referred to in the proceedings in this action.

The question in the special case stated is, therefore, answered in the negative.

The plaintiff is entitled to its costs from the defendant.

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IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF CANADA FOR THE GRANT OF WRITS OF ASSISTANCE MADE PURSUANT TO SECTION 143 OF THE CUSTOMS ACT,  
IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF CANADA FOR THE GRANT OF WRITS OF ASSISTANCE MADE PURSUANT TO SECTION 78 OF THE EXCISE ACT,  
IN THE MATTER OF AN APPLICATION BY THE MINISTER OF NATIONAL HEALTH AND WELFARE FOR THE ISSUE OF WRITS OF ASSISTANCE MADE PURSUANT TO SUBSECTION (3) OF SECTION 10 OF THE NARCOTIC CONTROL ACT,

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AND IN THE MATTER OF AN APPLICATION BY  
 THE MINISTER OF NATIONAL HEALTH AND  
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 ANCE MADE PURSUANT TO SUBSECTION (3) OF  
 SECTION 36 OF THE FOOD AND DRUGS ACT.

*Practice—Crown—“Writs of Assistance”—Applications for the grant of Writs of Assistance—Attorney General of Canada—The Customs Act, R.S.C. 1952, c. 58, s. 143—The Excise Act, R.S.C. 1952, c. 99, s. 78—Minister of National Health and Welfare—The Narcotic Control Act, S. of C. 1960-61, c. 35, s. 10—The Food and Drug Act, S. of C. 1960-61 as amended, c. 38, s. 36(3)—Judge of the Exchequer Court of Canada—“May grant”—“Shall grant”—“Officer”—“Peace officer”.*

Writs known as “Writs of Assistance” have issued out of the Exchequer Court of Canada as a matter of course almost since the creation of the Court. Being statutory writs they are, in effect, search warrants unrelated to any particular suspected offence and are issued to members of the R.C.M.P. and other officers in the service of the Government of Canada to have effect as long as the holder continues to hold the position by virtue of which the writ was issued to him.

In view of the extraordinarily wide powers so conferred by statute upon the holder of the writ and of its continuing operation, the Court considered that it was of some importance to examine with care the circumstances in which one of these writs should be issued and the form which it should take, so the official advisers of the Crown were asked to submit their views on these two points.

*Held:* That under the *Excise Act*, the *Narcotic Control Act* and the *Food and Drugs Act* the issuance of writs of assistance is mandatory upon a judge of the Exchequer Court of Canada on the specified application without any other material except material to show that the person to whom the writ is to issue is an appropriate officer.

2. That under the *Customs Act*, having regard to the fact that the writ of assistance confers authority upon the person named therein to exercise the wide powers of search throughout the whole of his career and without limit as to place, it is very difficult, if not impossible, to conceive of any basis upon which a judicial discretion might be exercised. What advantage does it serve to determine that, at the time of the issuance of the writ, the officer is an appropriate person in whom to vest such extraordinary powers, when, by the terms of the statute, he is to continue to have the powers for a period that may extend to twenty or thirty years? Similarly, it is not possible for the Court to exercise a discretion as to whether the particular circumstances in which the powers of search are to be used are appropriate for the exercise of such wide powers of search.
3. That there being no difference between the desirability of such writs being issued under the *Customs Act* and the desirability of their issuance under the other Acts there is a duty upon a judge of the Exchequer Court, upon receipt of an application from the Attorney General of Canada under section 143 of the *Customs Act* for the issuance of a writ of assistance, to issue the writ of assistance in accordance with the application conditioned only upon his satisfying himself that the person named in the application is an “officer”.

4. That the legislation having ordained that the authority conferred upon a person holding a writ of assistance shall be evidenced in the form of a writ issued out of the Exchequer Court of Canada and the Court having to bow to such statutory direction, nevertheless care must be taken to insure that the writs do not say anything other than that which Parliament has directed and does not contain anything that is calculated to mislead the reader into thinking that the writ is anything other than that which the terms of the legislation require.
5. That, subject to certain changes to be made in the documents, the applications are granted.

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APPLICATIONS by the Attorney General of Canada for the grant of Writs of Assistance pursuant to section 143 of the *Customs Act*.

The applications were heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

*D. S. Maxwell, Q.C.* and *D. H. Christie* for the application.

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

JACKETT P. now (May 6, 1965) delivered the following judgment:

These applications for the issuance of Writs of Assistance raise certain questions concerning the documents known as "Writs of Assistance" which issue out of the Exchequer Court of Canada. To my knowledge, such Writs of Assistance have issued out of this Court as a matter of course for many years. Statutes, having their origins in Imperial legislation of the seventeenth century, have required such Writs to be issued by this Court almost since the creation of the Court.

Unlike the common law Writ of Assistance which was a writ in aid of execution, statutory Writs of Assistance are, in effect, search warrants unrelated to any particular suspected offence and of continuing operation, which are issued to members of the Royal Canadian Mounted Police and other officers in the service of the Government of Canada to have effect as long as the holder continues to hold the position by virtue of which the writ was issued to him.

Having regard to the extraordinarily wide powers which are conferred by statute upon the holder of a Writ of Assistance and to the fact that, by statute, such a writ, once issued, continues in effect during the whole of the career of

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the officer to whom it is issued, it is of some importance to consider with care the circumstances in which one of these writs should be issued and the form which the writ should take.

While, as I have already indicated, search warrants in the guise of Writs of Assistance have their origin in Imperial legislation of some antiquity, the Parliament of Canada has enacted legislation for the issuance of Writs of Assistance out of the Exchequer Court of Canada during the present decade. Being contemporary Canadian legislation, it may be interpreted in accordance with the language employed by Parliament without seeking assistance from statutory history.

The legislation authorizing or requiring the issuance of Writs of Assistance may be summarized briefly as follows:

(1) THE CUSTOMS ACT, R.S.C. 1952, CHAPTER 58:

Section 143 provides that a judge of the Exchequer Court of Canada "may grant a writ of assistance to an officer" upon the application of the Attorney General of Canada and that "such writ shall remain in force for as long as the person named therein remains an officer, whether in the same capacity or not". Section 2 defines an "officer" to mean a person employed in the administration or enforcement of the *Customs Act* and to include any member of the Royal Canadian Mounted Police. Section 137 provides that under "the authority of a writ of assistance" any officer "may enter" at any time in the day or night "any building or other place" and "may search for and seize and secure any goods which he has reasonable grounds to believe are liable to forfeiture" under the *Customs Act* and it further provides that "in case of necessity" such officer may break open any doors and any chests or other packages for that purpose.

(2) THE EXCISE ACT, R.S.C. 1952, CHAPTER 99:

Section 78 provides that a judge of the Exchequer Court of Canada "shall grant a writ of assistance" upon application made to him by the Attorney General of Canada and that such writ shall remain in force so long as any person named therein remains an "officer" whether in the same capacity or not. Section 79 provides that a writ of assistance addressed to a collector

or any superior officer shall have full force and effect in the hands of any officer to whom he delegates his authority. Section 2 defines "officer" to include, in addition to excise officers, any member of the Royal Canadian Mounted Police. Section 76 provides that under "authority of a writ of assistance", any officer "may enter" in the night time, if accompanied by a peace officer, and in the day time without being so accompanied, "any building or other place" and that he may "search for, seize and secure any goods or things liable to forfeiture under this Act" and that he may "in case of necessity" break open "any entrance or other doors, walls, floors, windows or gates and any chests or other packages for that purpose". Section 76 further provides that an officer having a writ of assistance "may arrest and detain any person whom he detects in the commission of any offence" declared by the *Excise Act* to be an indictable offence.

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(3) THE NARCOTIC CONTROL ACT, CHAPTER 35 OF THE STATUTES OF 1960-61:

Section 10(3) provides that a judge of the Exchequer Court of Canada "shall, upon application by the Minister, issue a Writ of Assistance" authorizing and empowering the person named therein, aided and assisted by such person as he may require, "at any time" to enter "any dwelling house" and "search for narcotics". Section 10(1) provides that a peace officer may "at any time" under "the authority of a Writ of Assistance" enter and search "any dwelling house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed". Section 10(4) provides that, for the purposes of exercising his authority under section 10, a "peace officer" may, with such assistance as he deems necessary, "break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing".

(4) THE FOOD AND DRUGS ACT, STATUTES OF 1952-53 CHAPTER 38, AS AMENDED BY CHAPTER 37 OF THE STATUTES OF 1960-61:

Section 36(3) provides that a judge of the Exchequer

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Court of Canada “shall, upon application by the Minister, issue a Writ of Assistance” authorizing and empowering the person named therein, aided and assisted by such person as he may require, “at any time”, to enter “any dwelling house” and “search for controlled drugs”. Section 36(1) provides that a peace officer may “at any time” under “the authority of a Writ of Assistance” enter and search “any dwelling house in which he reasonably believes there is a controlled drug by means of or in respect of which an offence under this Part has been committed”. Section 36(4) provides that, for the purpose of exercising his authority under section 36, a “peace officer” may, with such assistance as he deems necessary, “break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing”.

It is to be noted that, while the *Customs Act* provides that a judge of the Exchequer Court “*may* grant” a Writ of Assistance upon the application of the Attorney General of Canada, the other legislation summarized above provides that a judge of the Exchequer Court of Canada “*shall* grant” a Writ of Assistance upon the application either of the Attorney General of Canada or the Minister of National Health and Welfare. The first question that arises, therefore, is whether the use of the word “shall” makes it mandatory, in the case of the three statutes, that a judge of the Exchequer Court issue the Writ of Assistance upon the receipt of the specified application without any other material whatsoever except material to show that the person to whom the writ is to be issued is an appropriate officer if the statute limits the issuance of the writ to a specified type of officer. If that be so, and I cannot escape the conclusion that it is so, the further question arises as to whether the use of the word “may” in the corresponding provision in the *Customs Act* means that the statute has conferred a discretion on the Court which must be exercised judicially and which contemplates, therefore, that the application be made upon material which will enable a court to decide, in the case of each application, whether or not the facts are such as to warrant the issuance of the Writ of Assistance. Having regard to the fact that the Writ of Assistance confers authority upon the person named therein to exercise the wide powers of search throughout the whole

of his career and without limit as to place, I find it very difficult, if not impossible, to conceive of any basis upon which a judicial discretion might be exercised. What advantage does it serve to determine that, at the time of the issuance of the writ, the officer is an appropriate person in whom to vest such extraordinary powers, when, by the terms of the statute, he is to continue to have the powers for a period that may extend to twenty or thirty years? Similarly, it is not possible for the Court to exercise a discretion as to whether the particular circumstances in which the powers of search are to be used are appropriate for the exercise of such wide powers of search. Having regard to the extraordinary difficulty, if not impossibility, of exercising any judicial discretion as to whether or not a Writ of Assistance should or should not be issued under the *Customs Act* upon any particular application, and having regard to the fact that the issuance of such writs under the other three statutes referred to above is mandatory upon the specified application, and having regard to my inability to distinguish any difference between the desirability of such writs being issued under the *Customs Act* and the desirability of their issuance under the other Acts, I have come to the conclusion that there is a duty upon a judge of the Exchequer Court, upon receipt of an application from the Attorney General of Canada under section 143 of the *Customs Act* for the issuance of a Writ of Assistance, to issue the Writ of Assistance in accordance with the application conditioned only upon his satisfying himself that the person named in the application is an "officer".

I come now to the question as to the terms which should be employed in framing the Writ of Assistance to be issued pursuant to the various statutes referred to above.

In the first instance, it is to be noted that, if I am right in my construction of the legislation, when a person holding a Writ of Assistance is exercising the powers conferred upon him thereby, he is exercising powers conferred upon him by statute pursuant to designation by the Attorney General of Canada or the Minister of National Health and Welfare, as the case may be, and is not executing an order or judgment of the Exchequer Court of Canada, or a judge thereof. Parliament, in its wisdom, has ordained that the authority conferred upon such officer shall be evidenced in the form of

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a writ issuing out of the Exchequer Court of Canada and the Court must bow to such statutory direction. Nevertheless, in my view, care must be taken to insure that the writs do not say anything other than that which Parliament has directed and does not contain anything that is calculated to mislead the reader into thinking that the writ is anything other than that which the terms of the legislation require.

Accordingly, I am prepared to grant the application for Writs of Assistance under the *Customs Act*, if the body of the writ is revised to read as follows:

You are hereby authorized, pursuant to section 143 of the *Customs Act*, to enter, at any time in the day or night, into any building or other place within the jurisdiction of this Court, to search for and seize and secure any goods which you have reasonable grounds to believe are liable to forfeiture under the *Customs Act*, and, in case of necessity, to break open any doors and any chests or other packages for that purpose.

Witness the President of our Exchequer Court of Canada, at Ottawa, this ..... day of ..... in the year of our Lord one thousand nine hundred and ..... and in the ..... year of our Reign.

and if consequential changes are made in the writ and other documents involved.

In the case of the application under the *Excise Act*, I am prepared to grant the application if the body of the writ is similarly revised to follow closely the language of section 76(1) of the *Excise Act*, and other consequential changes are made.

In the case of the application under the *Narcotic Control Act*, the first paragraph of the body of the writ should be revised to read as follows:

You are hereby authorized and empowered, pursuant to subsection (3) of section 10 of the *Narcotic Control Act*, aided and assisted by such person as you may require, at any time, to enter any dwelling house and search for narcotics.

The second paragraph should correspond to the second paragraph suggested above for the writ under the *Customs Act*. Similarly, the first paragraph of the body of the writ under the *Food and Drugs Act* should follow closely the wording of subsection (3) of section 36 of that Act as amended by the statutes in 1960-61 and other consequential changes made in the documents.

Upon the applications being recast as indicated above, I am prepared to grant the necessary orders.

BETWEEN:

LOUIS J. HARRIS ..... APPELLANT;

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AND

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

*Revenue—Income tax—Lease option agreement—200-year lease with option to purchase—Determination of capital cost allowance—“Price fixed by contract or arrangement”, meaning of—Income Tax Act, s. 18(1).*

On October 1, 1960, the appellant as lessee entered into a contract to lease a service station in Toronto for 200 years at an annual rental of \$3,100.08 and was granted an option to buy the property at the expiration of the term for \$19,500. In 1960 appellant claimed a capital cost allowance of \$30,425.80, which the respondent disallowed. Section 18(1) of the *Income Tax Act* provides:

“A lease-option agreement, a hire-purchase agreement or other contract or arrangement for the leasing or hiring of property . . . by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee . . . shall, for the purpose of computing the income of the lessee, be deemed to be an agreement for the sale of the property to him and rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property and not for its use; and the lessee shall . . . be deemed to have acquired the property . . . (b) . . . at a capital cost equal to the price fixed by the contract or arrangement . . .

Appellant appealed, contending that “the price fixed by the contract” for the purposes of s. 18(1) was the total rent payable during the 200-year term plus \$19,500, *viz.* \$639,516.

*Held:* That the capital cost of the service station property as determined by the provisions of s. 18(1) was \$19,500.

1. Having regard to the variety of forms which contracts or arrangements falling within the description of s. 18(1) might take, the determination of what is “the price fixed by the contract or arrangement” must depend on the interpretation of the particular contract or arrangement.
2. The words “price fixed by the contract or arrangement” in s. 18(1) were used in contradistinction to the words “rent or other consideration paid or given thereunder” and must be taken to refer to the consideration to be given for the property under the terms of the contract in the event of the transaction resulting in the property vesting in the taxpayer. In the present case the contract clearly fixed the sum of \$19,500 as the whole price to be paid for the property at the material time.

(*Partington v. Attorney General* (1869-70) L.R. 4 H.L. 100, per Lord Cairns at p. 122, referred to.)

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Thurlow at Toronto.

*J. J. Robinette, Q.C.* for appellant.

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*D. S. Maxwell, Q.C.* and *D. G. H. Bowman* for respondent.

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

THURLOW J. now (November 20, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board<sup>1</sup> dismissing the appellant's appeal from an assessment of income tax for the year 1960. In his return for that year the appellant claimed a deduction of \$30,425.80 as "depreciation" on a service station property on which he had taken a long term lease during the year and the issue in the appeal is whether he was entitled to such a deduction in computing his income for tax purposes. The Minister disallowed the deduction and his action in so doing was upheld by the Tax Appeal Board.

The property in question is situated in Toronto. It was purchased in March 1960 for \$31,000 by Douglas Leaseholds Limited who thereupon spent \$8,500 on improvements to it and leased it for 25 years to B. P. Canada Limited at a rental of \$3,900 per annum on terms *inter alia* requiring the latter to pay the taxes and to keep the buildings on the property insured and in repair. By indenture dated October 1st, 1960 Douglas Leaseholds Limited as lessor leased the same property to the appellant for a term of 200 years commencing on that date at an annual rental of \$3,100.08 and agreed that at the expiration of the term the appellant, if not in default under the lease, should have the option of purchasing the property from the lessor for \$19,500. In the transaction the appellant covenanted *inter alia* to pay taxes and to keep the premises in repair and he was required to deposit \$10,000 with the lessor as security for the performance of his covenants, the lessor agreeing to return the deposit at the expiration of the term if the appellant had observed and performed his covenants. The appellant paid the deposit, received a total of \$975 paid by B. P. Canada Limited as rent for October, November and December 1960, and himself paid \$775.02 to Douglas Leaseholds Limited for rent under his lease for the same months. In his income tax return the appellant, who is a successful obstetrician and

gynecologist enjoying a substantial income from his practice, *inter alia* accounted for the \$975 as income and against it claimed the sum of \$30,425.80 for "depreciation" thus showing a loss with respect to the property for the year of \$29,450.80 but he did not claim as an expense the \$775.02 which he had paid to Douglas Leaseholds Limited. The reason for this course appears from the somewhat confusing statutory provisions upon which the appellant justifies his computation of his income. In making the assessment the Minister, as previously mentioned, disallowed the deduction of the amount claimed less an amount of \$775.02 which he allowed as rental expense.

The basis for the appellant's position is found in ss. 11(1)(a) and 18(1) of the *Income Tax Act* R.S.C. 1952, c. 148, the latter subsection as enacted by S. of C. 1958, c. 32, s. 8. These read as follows:

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year;

(a) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

18. (1) A lease-option agreement, a hire-purchase agreement or other contract or arrangement for the leasing or hiring of property, except immovable property used in carrying on the business of farming, by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property is leased or hired (hereinafter in this section referred to as the "lessee") or in a person with whom the lessee does not deal at arm's length shall, for the purpose of computing the income of the lessee, be deemed to be an agreement for the sale of the property to him and rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property and not for its use; and the lessee shall, for the purpose of a deduction under paragraph (a) of subsection (1) of section 11 and for the purpose of section 20, be deemed to have acquired the property.

(a) in any case where, at the time the contract or arrangement was entered into, the lessee and the person in whom the property was vested at that time (hereinafter referred to as the "lessor") were persons not dealing at arm's length, at a capital cost equal to the capital cost thereof to the lessor, and

(b) in any other case, at a capital cost equal to the price fixed by the contract or arrangement minus the aggregate of all amounts paid by the lessee

(i) in the case of a contract or arrangement relating to moveable property, before the 1949 taxation year, and

(ii) in the case of any other contract or arrangement, before the 1950 taxation year,

under the contract or arrangement on account of the rent or other consideration.

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The appellant's case is that the transaction by which Douglas Leaseholds Limited granted to him a 200-year lease with an option to purchase the property at the end of the term was a lease-option agreement or other contract or arrangement for the leasing of property by which it was agreed that the property might on the satisfaction of a condition, that is to say on exercise of the option and payment of the price, vest in him or his successors in title and was thus a transaction of the kind referred to in s. 18(1), that the transaction was not one of those excluded by s. 18(4) from the operation of s. 18(1) and that accordingly the transaction must be treated as an agreement for the sale of the property to him and the rent which he paid must be treated as having been paid on account of the price of the property and not for its use. He was therefore, in his view, entitled, in computing his income for tax purposes, to treat the whole of the rent payable for the 200-year term as well as the \$19,500 payable on exercise of the option to purchase, that is to say, a total sum of \$639,516.00, as "the price fixed by the contract or arrangement" for the purpose of calculating the deduction to which he was entitled under s. 11(1)(a).

Against this view counsel for the Minister raised three grounds upon which he submitted that s. 18(1) did not apply to the transaction at all and three further grounds based on the assumption that s. 18(1) would apply, on the first two of which it was submitted that no deduction whatever could be made and on the third of which it was submitted that the permissible deduction would be reduced to inconsequential size. On the first branch of the argument it was submitted that s. 18(1) did not apply because:

- (a) it was not established that the transaction in question was not within the excluding provision of s. 18(4) as there was no satisfactory evidence that \$19,500 was less than 60 per cent of the value of the property at the material time;
- (b) the transaction was not really a lease at all and the appellant at the material time was not lessee of the property but merely the holder of an *interesse termini* and s. 18(1) did not apply to such a transaction;

- (c) that the option offends the rule against perpetuities and, as it is therefore void, s. 18(1) did not apply to the transaction.

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Counsel then went on to submit that if, contrary to these contentions s. 18(1) did apply to the transaction the effect of that provision was that the appellant was not entitled to the allowance made by the Minister in respect of the rent paid by the appellant but that he was nevertheless not entitled to the deduction for capital cost allowance claimed because:

- (d) the transaction was not entered into for the purpose of gaining income but solely or, in the alternative, primarily for the purpose of reducing the appellant's income tax and thus fell within the prohibition or exception provided by Regulation 1102(1)(c);
- (e) the deduction claimed represented an expense made or incurred in respect of a transaction which, if allowed would unduly and artificially reduce the appellant's income and its deduction was therefore prohibited by s. 137(1) of the Act;
- (f) on the correct interpretation of s. 18, as applied to the transaction, the deduction must be based on a capital cost of \$19,500 for the property since this is the price fixed for it by the contract. Counsel then submitted that in the event of this contention being upheld the re-assessment should be referred back to the Minister to allow the proper deduction on this basis and to disallow the rental expense item. As an alternative to this point it was submitted that if the price fixed by the contract was indeed to be taken at the appellant's figure of \$639,516, s. 18(4) would exclude the transaction from the operation of the section.

As I agree with the first submission in (f) above and have further reached the conclusion that on this point the appeal fails it is unnecessary for me to express my views on the submissions outlined in (a), (b), (c), (d) or (e) or on the alternative submission outlined in (f).

On the first submission in (f) the matter to be determined is the capital cost to be fictitiously attributed for the purpose of s. 11(1)(a) to the property which is the subject matter of the fictitious purchase created by s. 18(1). This is defined in s. 18(1) as "the price fixed by the contract or

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arrangement” and in approaching the interpretation to be put upon these words a few observations of a general nature may be useful.

First, s. 18(1) must in my opinion be taken as meaning neither more nor less than precisely what it says. Its interpretation may be influenced by reading it with the other provisions of s. 18, of which it is a part, but the principle that there is no equity about a tax is well established and there is no basis for the admission of any principle of “equitable construction”. *Vide Partington v. Attorney General*<sup>1</sup> where Lord Cairns said at p. 122:

I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The principle so expressed is usually cited in support of a taxpayer’s submission but it appears to me to operate both ways.

Secondly, the subsection is plainly divided into two parts. The first is directed to achieve a statutory conversion of the contract or arrangement into an agreement for the sale of the property and to declare that the rent or other consideration which the taxpayer has agreed to pay shall be regarded as having been paid or given on account of the price of the property and not for its use. The consequence of regarding the transaction as an agreement for the sale of the property to the taxpayer is that the property of which he is then in fact only lessee, is regarded as his and in computing his income he is entitled to the deduction provided by s. 11(1)(a). The consequence of the declaration that the rent or other consideration paid or given shall be deemed not to have been paid or given for the use of the property is that it cannot be deducted as an expense in computing the taxpayer’s income. The statute also declares that the rent or other consideration paid or given is to be regarded as paid or given on account of the price of the property. A consequence of this is that if the money was borrowed the interest on it

<sup>1</sup> (1869-70) L.R. 4 H.L. 100.

would qualify for deduction under s. 11(1)(c)(ii). This part of the subsection, however, as I read it is concerned only with the statutory conversion of the transaction into an agreement of sale and with certain stated consequences which are to flow from such conversion. The definition of the capital cost of the property to the taxpayer for the purpose of calculating the deduction under s. 11(1)(a) to which the taxpayer is to be entitled is not dealt with in this part of the subsection but is the subject matter of the second part of it. In the second part the subsection declares that the taxpayer shall for the purpose of s. 11(1)(a) be deemed to have acquired the property at a capital cost equal to "the price fixed by the contract or arrangement" less, in the case of contracts made before 1950, amounts paid as rent or other consideration prior to certain stated times. Here it is I think of importance to note that the expression used is "the price fixed by the contract or arrangement" and that the expression "contract or arrangement" appeared earlier in the subsection in company with the words "for the leasing or hiring of property . . . by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property is leased or hired". It is thus this contract or arrangement, rather than the "agreement for the sale of the property" fictitiously created by the subsection, which is referred to in the expression "the price fixed by the contract or arrangement".

Thirdly, in the subsection the expression "rent or other consideration paid or given thereunder" is used in contradistinction to the expression "the price fixed by the contract or arrangement" the former being used with reference to rent or consideration for the use of the property during the lease or hiring and for the option itself while the latter includes the word "price" and appears to me to refer to the consideration to be given for the property under the terms of the contract in the event of the transaction resulting in the property vesting in the taxpayer.

Fourthly, it is apparent that contracts or arrangements of the kind with which s. 18(1) deals may take more than one form. One well known variety consists of a leasing or hiring at a rental but contains a provision that at the conclusion of the lease or hiring the owner will at the option of the lessee or hirer sell the property to him for the amounts paid as

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rental, or for parts of such amounts, in some cases with, and in others without some further consideration payable at that time. Another variety provides for payment of either a nominal or substantial payment on acquisition of the property by the lessee or hirer but does not purport to treat any part of the rental payments as part of the price payable for the property. Cases are also readily conceivable wherein no price whatever may be payable at the time of vesting as for example where the vesting might be simply dependent on some extraneous or fortuitous event. In all these cases it appears to me that the determination of what is "the price fixed by the contract or arrangement" must accordingly depend on the interpretation of the particular contract or arrangement.

Next it is to be observed that Parliament in enacting s. 18 appears to have contemplated that "the price fixed by the contract or arrangement" may be less than the total rent or other consideration paid or given under the contract or arrangement since it provides in s-s. (2)(b) that on rescission of the contract or arrangement the amount of such rent or consideration paid in excess of the capital cost at which the lessee is deemed to have acquired the property shall be deemed to have been paid for use of the property and not on account of its price and would accordingly be deductible as expense in the year in which rescission occurred.

Finally, neither the remaining clauses of s-s. (1) nor the definitions of s-s. (3) nor the exclusions effected by s-s. (4) appear to me to have any influence one way or the other on the interpretation of the expression "the price fixed by the contract or arrangement" in s. 18(1).

These considerations lead me to conclude that the words "rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property" do not bear the interpretation which the appellant's contention requires. They do not say that rent or other consideration is deemed to be part of the "price fixed by the contract or arrangement" or of the capital cost of the property for the purpose of s. 11(1)(a) but merely that for the purpose of computing the taxpayer's income rent or other consideration paid or given shall be deemed to be "on account of" the price of the property. To find what the capital cost of the

property is to be for the purpose of s. 11(1)(a) one must look to the contract or arrangement itself.

In the present case the material provision of the indenture is:

At the expiration of the term hereby demised, and provided the Lessee is not in default hereunder, said Lessee shall have the option of purchasing the demised premises from the Lessor at the price of NINETEEN THOUSAND FIVE HUNDRED (\$19,500.00) DOLLARS.

The Lessee may exercise the said option by giving to the Lessor three (3) months' notice in writing that he intends to purchase the demised premises and upon the exercise of the said option the sale shall be completed within a thirty (30) day period after the option has been exercised.

As a matter of interpretation this to my mind clearly means that \$19,500 is the price and the whole of the price to be paid for the property at the material time and as nothing about the nature of the property or in the other provisions of the indenture indicate any other intention \$19,500 is in my opinion "the price fixed by the contract" within the meaning of s. 18(1) and the capital cost at which for the purpose of s. 11(1)(a) the appellant is deemed to have acquired the property.

Subsection (2) of s. 18 goes on to provide that:

18. (2) Where a lessee is deemed by subsection (1) to have acquired property under a contract or arrangement and that property includes property (hereinafter referred to as "depreciable property") in respect of which the lessee has been allowed, or is entitled to, a deduction under paragraph (a) of subsection (1) of section 11 in computing his income for a taxation year, the following rules apply:

- (a) the capital cost at which, for the purpose of a deduction under paragraph (a) of subsection (1) of section 11 and for the purpose of section 20, the lessee shall be deemed to have acquired the depreciable property is,
  - (i) . . .
  - (ii) . . . the capital cost at which the lessee is deemed by subsection (1) to have acquired the property minus the fair market value, at the time the contract or arrangement was entered into, of the part of the property that is not depreciable property;

As the property includes both land and improvements thereto and the improvements alone are depreciable property within the meaning of this provision and as the evidence indicates that the value of the land alone at the material time was \$9,000 it would appear that the basis for the calculation of the deduction to which the appellant is entitled is \$10,500. On the basis of the appellant's submission that the property falls within class (iii) of Schedule B

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of the Regulations, the rate of capital cost allowance on which is 5 per cent., the deduction to which he is entitled is \$525 and as it is thus not shown that the deduction to which he is entitled under s. 18 exceeds the \$775.02 which the Minister, in my opinion wrongly, allowed as rent, the amount of tax assessed against the appellant is not in excess of his liability therefor and it follows that he has no cause to complain and that his appeal fails.

As already mentioned it was suggested by counsel for the Minister that if I reached the conclusion that the appellant was entitled to a deduction of capital cost allowance based on a capital cost of \$19,500 for the property the proper course would be to refer the assessment back to the Minister to disallow the rent deduction and to allow a proper deduction for capital cost allowance. As no issue had been raised as to the allowance of \$775.02 as rent expense counsel for the Minister also asked leave to amend the reply to raise the question so that the \$775.02 deduction might be disallowed when and if capital cost allowance was deducted.

I do not think, however, that this is the correct way to deal with the matter. On a taxpayer's appeal to the Court the matter for determination is basically whether the assessment is too high. This may depend on what deductions are allowable in computing income and what are not but as I see it the determination of these questions is involved only for the purpose of reaching a conclusion on the basic question. No appeal to this Court from the assessment is given by the statute to the Minister and since in the circumstances of this case the disallowance of the \$775.02 while allowing \$525 would result in an increase in the assessment the effect of referring the matter back to the Minister for that purpose would be to increase the assessment and thus in substance allow an appeal by him to this Court. The application for leave to amend is therefore refused.

The appeal will be dismissed with costs.

*Judgment accordingly.*

BETWEEN:

HER MAJESTY THE QUEEN,

PLAINTIFF;

AND

HILBOURNE LESLIE MURRAY and BURTON CONSTRUCTION COM- PANY LIMITED .....	}	DEFENDANT.
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*Crown—Motor vehicle accident—Loss of services of serviceman—Gratuitous passenger in motor vehicle—Provincial statute barring recovery from owner and driver—Right of Crown to recover full loss—Common law of England—Legislative jurisdiction of provincial legislature—Prerogative of Crown.*

One Briggs, a member of the Canadian Forces, was a gratuitous passenger in a motor vehicle which was involved in a collision in Manitoba with a vehicle owned by the defendant company and operated by the defendant Murray. Action was brought by Her Majesty in right of Canada to recover the damage, viz. \$5,096, sustained by the Crown through the loss of Briggs' services as a result of injuries suffered by him in the accident. The parties agreed that the operator of the vehicle in which Briggs was a passenger was 75% at fault and that the defendant Murray was 25% at fault.

Section 99 of the Manitoba *Highway Traffic Act* deprives a gratuitous passenger in a motor vehicle of a cause of action against its owner or operator in case of accident unless the accident was caused by gross negligence or wilful and wanton misconduct of the owner or operator; and s. 5 of the Manitoba *Tortfeasors and Contributory Negligence Act* provides that where no cause of action exists against the owner or operator of a motor vehicle by reason of the above enactment no damages or contribution of indemnity shall be recoverable from any person for the portion of the loss or damage so caused by the negligence of said owner or operator.

Section 9(2) of the *Tortfeasors and Contributory Negligence Act* provides (2) This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

It was contended on behalf of Her Majesty that the above enactments did not apply to prevent the Crown from recovering the full amount of the loss sustained by it in consequence of the negligence of the defendants, being the amount recoverable at common law notwithstanding the negligence of the driver of the car in which Briggs was a passenger.

*Held*· That Her Majesty was entitled to recover only 25% of the loss sustained, for the following reasons:

1. Under our constitution when the Sovereign in right of Canada relies upon a right in tort against a common person She must, in the absence of some prerogative or statutory rule to the contrary, base Herself upon the general law in the province where the claim arises governing similar rights between common persons. She must take the cause of action as She finds it where Her claim arises and, if the legislature of the province has changed the general rules applicable as

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between common persons, Her Majesty must accept the cause of action as so changed.

2. By the common law of England as of July 15, 1870, (being the law in force in Manitoba to the extent that it has not been amended by Parliament or the Legislature of Manitoba) the Sovereign, in the absence of some special law to the contrary, had the same right of action in tort as a common person, including a claim as master to recover the negligence of a third person.
  3. While members of the armed forces were not at common law servants for the purposes of the action above-described Parliament, in the exercise of its legislative authority in relation to Defence, could, and did, make a special law changing the common law as applicable to Her Majesty's right to recover for loss of services of a member of the armed forces. (*Nykorak v. Attorney General of Canada* [1933] S.C.R. 331, followed.)
  4. The Manitoba Legislature, in the exercise of its legislative authority in relation to property and civil rights, could change the law defining the cause of action for loss of services as it affects persons generally in the Province.
  5. The prerogative rule that the Sovereign in right of Canada is not bound by a provincial statute unless it is made applicable to Her has no application to the provincial legislation of the nature involved here, which relates to the creation of rights in tort as between ordinary persons. The Sovereign can avail herself of that law but must take it as She finds it.
- (*Toronto Transportation Commission v. The King* [1949] S.C.R. 510; *Schwella v. The Queen* [1957] Ex. C.R. 226; *Garland Steamship Company v. The Queen* [1960] S.C.R. 315; *Gauthier v. The King* (1917) 56 S.C.R. 176; *Dominion Building Corporation v. The King* [1933] A.C. 533, discussed; *Attorney General of Canada v. Patterson and Content* (1958) 13 D.L.R. (2d) 90, disapproved.)

ACTION by Crown to recover damages sustained through the loss of services of a Crown servant injured in a collision.

The action was tried by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

*C. R. O. Munro, Q.C.* and *R. A. Wedge* for plaintiff.

*Vern Simonsen* for defendants.

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

JACKETT P. now (May 19, 1965) delivered the following judgment:

This is an action by Her Majesty in right of Canada for damages for loss of services of a member of Her Majesty's Canadian Forces.

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The case was tried upon an agreed Statement of Facts, by which the parties admitted, for the purpose of the action, certain facts which may be summarized briefly. One Briggs, a member of the Canadian Forces, was injured in Manitoba in a collision between two automobiles. Briggs was a gratuitous passenger in one of the vehicles and the other vehicle belonged to the corporate defendant and was operated by the individual defendant. Her Majesty sustained loss in the amount of \$5,096.34 by being deprived of Briggs' services while he was incapacitated as a result of his injuries. That loss was caused by the operator of the vehicle in which Briggs was riding and by the individual defendant "in the respective degrees of 75% and 25%."

The sole question upon which the parties differed in this Court is whether or not certain provisions in the *Highway Traffic Act* of Manitoba, R.S.M. 1954, chapter 112, and the *Tortfeasors and Contributory Negligence Act of Manitoba*, R.S.M. 1954, chapter 266, are applicable to the determination of the amount of the judgment to which Her Majesty is entitled.

Those provisions are

(a) the *Highway Traffic Act*:

99. (1) No person transported by the owner or operator of a motor vehicle as his guest without payment for the transportation shall have a cause of action for damages against the owner or operator for injury, death, or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death, or loss for which the action is brought.<sup>1</sup>

(b) the *Tortfeasors and Contributory Negligence Act*:

5. Where no cause of action exists against the owner or operator of a motor vehicle by reason of section 99 of the *Highway Traffic Act* no damages or contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of such owner or operator and the portion of the loss or damage so caused by the negligence of such owner or operator shall be determined although such owner or operator is not a party to the action.<sup>2</sup>

It is also worthy of note that section 9(2) of the *Tortfeasors and Contributory Negligence Act* reads as follows:

(2) This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

<sup>1</sup> First enacted by section 10 of chapter 20, Statutes of Manitoba of 1935.

<sup>2</sup> First enacted by chapter 75, Statutes of Manitoba of 1939.

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The final paragraph of the agreed Statement of Facts reads as follows:

9. The Defendants' position is that by virtue of section 99(1) of the *Highway Traffic Act* and section 5 of the *Tortfeasors and Contributory Negligence Act* the Defendants are liable for only 25% of the total loss sustained by Her Majesty. The position taken on behalf of Her Majesty is that the Defendants are liable for the total loss sustained by Her Majesty. This is the sole issue between the parties in this action.

Her Majesty's right to recover for loss of services of a member of Her Majesty's Canadian Forces, when the claim arises in one of the common law provinces, was established by the Supreme Court of Canada in *Attorney-General of Canada v. Jackson*<sup>3</sup> and *The King v. Richardson*.<sup>4</sup> The right to recover for such a loss is a right that accrues to Her Majesty as a "master" by virtue of the old common law cause of action of a master for loss of services of a servant. The relationship of master and servant between Her Majesty and a member of Her Canadian Forces, which is essential to Her Majesty being entitled to base a claim on that cause of action, is created by section 50 of the *Exchequer Court Act*.<sup>5</sup>

One of the essential elements of the cause of action of a master for loss of services of a servant is that the defendant has committed an actionable civil wrong or tort against the servant. Whether or not, in any particular case, the defendant has committed an actionable civil wrong or tort against the servant depends upon the law of the province where the claim arises. In a case where the Crown servant was a gratuitous passenger in the defendant's vehicle and the provincial legislature had taken away the right of a gratuitous passenger to recover against the owner or operator of the vehicle in which he was riding when he was injured, there was no actionable civil wrong or tort committed against the servant by such owner or operator and the Crown as master had therefore no right to recover against them for loss of services of the Crown servant. See *Attorney-General v. Jackson, supra*.

<sup>3</sup> [1946] S.C.R. 489.

<sup>4</sup> [1948] S.C.R. 57. There is no corresponding cause of action in the Province of Quebec. See *La Reine v. Dr. J. L. Sylvain*—an unreported judgment delivered by the Supreme Court of Canada on November 19, 1964.

<sup>5</sup> First enacted by the Parliament of Canada by chapter 25 of the Statutes of 1943-44 and repealed and re-enacted by section 7 of chapter 7 of the Statutes of 1951 (2nd Session).

In this case, a quite different problem arises. By virtue of the provincial legislation quoted above, if the master of the injured man were any person other than the Crown, the master would be able to recover against the defendants for loss of services because the defendants did commit an actionable civil wrong or tort against the servant; but, in such a case, the master would, by virtue of the provincial legislation quoted above, be able to recover only twenty-five per cent of the damages flowing from the loss of services. The contention on the part of Her Majesty is, however, that, while that is all that any other "master" could recover, Her Majesty in right of Canada can recover one hundred per cent of Her damages because the provincial legislation can have no application to take away or reduce any rights that Her Majesty in right of Canada would otherwise have.

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The laws of England as they were at some date, which does not, for present purposes, have to be fixed with precision, were introduced into the territory that now constitutes the Province of Manitoba. Upon the creation of the Province of Manitoba, such laws as amended prior to that time continued in force "subject . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of that . . . Province, according to the authority of the Parliament or of the Legislature . . ." See section 129 of the *British North America Act, 1967*.<sup>6</sup> By virtue of appropriate legislation of Parliament and of the provincial legislature,<sup>7</sup> the law in Manitoba is now the law of England as it was on July 15, 1870, subject to any amendments that have been made to that law by Parliament and the Manitoba legislature in their respective spheres of legislative jurisdiction. See *Walker v. Walker*.<sup>8</sup>

The common law of England relating to the civil rights and obligations of the Sovereign may be summarized very

<sup>6</sup> Made applicable to Manitoba by section 2 of *The Manitoba Act, 1870*, chapter 3 of the Statutes of Canada of 1870, which was confirmed by chapter 28 of the Imperial Statutes of 1871. Presumably, it is by virtue of section 129 that the Crown in right of Canada is bound, in respect of matters arising in the Province of Quebec, by the two Codes of Lower Canada. Compare *The Exchange Bank of Canada v. The Queen* (1886) 11 A.C. 157.

<sup>7</sup> Section 1 of chapter 12 of the Statutes of Manitoba of 1874 and section 4 of chapter 124 of R.S.C. 1927. There is a question in my mind as to whether section 1 of chapter 12 of the Statutes of Manitoba of 1874, extends to all laws within the legislative jurisdiction of the provincial legislature or only to those "relative to property and civil rights". For purposes of the present judgment, this doubt is immaterial.

<sup>8</sup> [1918] 2 W.W.R. 1 (C.A.); [1919] A.C. 947 (P.C.).

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briefly for present purposes. (I refer only to the law governing the creation of substantive rights and obligations and I exclude such matters as property or rights *in esse*, the jurisdiction of the Courts and practice and procedure.) While not a common person, the Sovereign was—and is—a person<sup>9</sup> and, at common law, was just as subject to the general law of property and civil rights regulating the creation of rights and obligations of persons as any common person, subject to this that there were a number of special rules applicable only to the Sovereign, which rules were in part the Sovereign's common law prerogatives and in part special rules of law made by statute in relation to the Sovereign.<sup>10</sup> Speaking generally, there are four classes of cases in which the question of the law applicable to the creation of the Sovereign's civil rights and liabilities may arise, namely,

- (a) claims in tort by an ordinary person against the Sovereign,
- (b) claims in tort by the Sovereign against an ordinary person,
- (c) claims in contract by an ordinary person against the Sovereign, and
- (d) claims in contract by the Sovereign against an ordinary person.

The Sovereign had, at common law, a prerogative immunity from claims in tort other than claims for property of the subject in Her possession. See *Feather v. The Queen*.<sup>11</sup> There

<sup>9</sup> Compare *Magdalen College case*, (1615) 11 Co. Rep. 67a; 77 E.R. 1236 at page 1240; and *Boarland v. Madras Electric Corporation*, [1954] 1 A11 E.R. 52.

<sup>10</sup> See Chitty's "*Prerogatives of the Crown*", (1820 page 4; *Attorney General v. Jane Black* (1828) Stuart's Reports 324; *Black v. The Queen* (1899) 29 S.C.R. 693.

<sup>11</sup> (1865) 6 B. & S. 257; 122 E.R. 1191 This prerogative is now replaced, as far as the Sovereign in right of Canada is concerned, by the *Crown Liability Act*, chapter 30 of the Statutes of 1952-53, which replaces the liability created by section 18(1)(c) of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, and the corresponding provision in earlier versions of the statute. See, for example, *The King v. Armstrong*, 40 S.C.R. 229; *The King v. Desrosiers*, 41 S.C.R. 71; *The King v. Murphy* [1948] S.C.R. 357. The liability under the *Exchequer Court Act* provision was determined in accordance with the general law of the province where the claim arose as it prevailed when the particular *Exchequer Court Act* provision was enacted by Parliament. *Ryder v. The King*, 36 S.C.R. 462, and *Canadian National Railway Company v. Saint John Motor Line Limited*, [1930] S.C.R. 482. Liability of the Sovereign under the *Crown Liability Act* depends upon the law applicable to a private person. See *Lamoureux v. Procureur Général du Canada*, [1964] Ex. C.R. 641, where Noël J. has decided that the liability is to be determined by reference to the provincial law as it was when the liability was imposed. I should have thought that a higher court might conclude that Parliament intended the Crown's liability to be that which it would have been if a private person were in the position of the Crown at all relevant times.

were, however, generally speaking, no special rules governing the creation of rights of an ordinary person against the Sovereign in contract<sup>12</sup> or the creation of Her rights against a common person in contract or in tort. Her Majesty was therefore entitled to avail Herself of the general laws of the realm governing the obligations of one person to another in contract or tort because, I repeat, She was a person and entitled to every right to which any common person was entitled in the absence of some special rule of law to the contrary.

That brief summary of the law governing the legal rights and obligations of the Crown represents the position as I understand it as of July 15, 1870, the time as of which Parliament has adopted, for Manitoba, the laws of England "relating to matters within the jurisdiction of Parliament" (R.S.C. 1927, chapter 124, section 4) and as of which the Legislature of the province has adopted such laws "relative to property and civil rights" (Statutes of Manitoba 1874, chapter 12, section 1).

Three propositions are, I think, clear: First, under the common law of England as of July 15, 1870, if any person, including Her Majesty, sued one of two joint tortfeasors for loss of services of a servant in circumstances such as those agreed upon in this case, the plaintiff would be entitled to recover the full amount of the damages flowing from the loss of services. Second, if any common person brought such an action at the present time, he would be entitled to recover only twenty-five per cent of his damages having regard to section 5 of the *Tortfeasors and Contributory Negligence Act*. Third, Parliament has the exclusive legislative authority to make laws in relation to claims in tort by Her Majesty in right of Canada against a common person (in any event, in respect of claims such as the one in issue in this case). See *Nykorak v. Attorney General of Canada*.<sup>13</sup> The submission of the Attorney General in this case is, in effect, that the common law under which a master could recover damages for loss of services of a servant is unaffected by provincial legislation in so far as Her Majesty in right of Canada is concerned.

<sup>12</sup> See *Thomas v. The Queen* [1874] L.R. 10 Q.B. 31, *Isbestor v. The Queen* [1878] 7 S.C.R. 696, *R. v. Doutré* [1874] 9 A.C. 745, and *Windsor and Annapolis Railway Co. v. The Queen and Western Counties Railway Co.* [1886] 11 A.C. 607 at p. 615.

<sup>13</sup> [1962] S.C.R. 331.

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If the common law of England in force in Manitoba, in effect, confers on Her Majesty a right to recover damages for loss of services from any common person by whose negligence a Crown servant was injured, I can appreciate the force of the Attorney General's argument.<sup>14</sup> If, on the other hand, the principle on which the Sovereign must depend at common law is that She is a person and entitled, in the absence of some special common law or statutory rule to the contrary, to avail Herself of the general law regulating the creation of rights and obligations of persons *inter se*, the situation, in my view, is quite different. As indicated earlier in this judgment, the latter alternative represents my understanding of of the Crown's position when proceeding against a common person at common law.

As far as the particular claim that is the subject matter of this action is concerned, the position, as I see it, is therefore that

- (a) as long as the common law of England remained unchanged, the Sovereign was, like any common person, entitled to avail Herself of the action for loss of services of a servant, but
  - (i) she had to accept that cause of action as defined by the rules applicable between common persons, and
  - (ii) members of the armed forces were not servants for the purpose of the cause of action;<sup>15</sup>
- (b) Parliament, in the exercise of its exclusive legislative authority to make laws in relation to "Defence" could make a special law changing the common law as applicable to Her Majesty's right

<sup>14</sup> Compare *Gauthier v. The King* (1917) 56 S.C.R. 176, per Anglin J., at pages 191-2, where, dealing with the liability of the Sovereign in right of Canada in contract, he said:

But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

This dictum must be read with *Dominion Building Corporation v. The King* [1933] A.C. 533.

<sup>15</sup> See *McArthur v. The King* [1943] Ex. C.R. 77, and *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd)* [1955] A.C. 457.

to recover for loss of services of a member of the armed forces (see *Nykorak v. Attorney General of Canada, supra*); and

- (c) the legislature of Manitoba, in the exercise of its exclusive legislative authority to make laws in relation to "property and civil rights" in Manitoba could make a law changing the law defining the cause of action for loss of services as it affects persons generally in the province.

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It follows that, as long as the Sovereign relies upon Her common law status as a person to take advantage of a cause of action available to persons generally in the province, and not upon some special right conferred on Her by Parliament, She must take the cause of action as She finds it when Her claim arises and, if the legislature of the province has changed the general rules applicable as between common subjects, the Sovereign must accept the cause of action as so changed whether the change favours Her claim or is adverse to it.

To put the matter in other terms, I have reached the conclusion that this case should be decided against the view put forward by the Attorney General, and in favour of that put forward by the defendant, because I am of opinion that, under our constitution, when the Sovereign in right of Canada relies upon a right in tort against a common person, She must, in the absence of some special prerogative or statutory right to the contrary, base Herself upon the general law in the province where the claim arises governing similar rights between common persons.<sup>16</sup>

In reaching that conclusion, I have endeavoured to apply the relevant principles as I understand them without reference to decisions in other cases because, as far as I have been able to ascertain, there are no decisions on the question that I have to decide that, in accordance with the principles of *stare decisis*, would be binding upon this Court. I shall now refer, as briefly as possible, to the various decisions that might be regarded as having some bearing on the matter for the purpose of showing why I have concluded

<sup>16</sup> Compare *Black v. The Queen* (1899) 29 S.C.R. 693, *Zakrzewski v. The King* [1944] Ex. C.R. 163, per Thorson P. at pages 169-70, *The King v. Richardson* [1948] S.C.R. 57 per Kerwin J. (as he then was) at page 59, and *Gartland Steamship Company v. The Queen* [1960] S.C.R. 315, per Locke J., at pages 344-5.

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that either they do not bear on the particular question that I have to decide or they support the conclusion that I have reached. (I shall also refer to a decision of a court of concurrent jurisdiction, the correctness of which I have not been able to accept.)

The cases that bear most closely on the problem that has to be decided in this case are

*Toronto Transportation Commission v. The King*<sup>17</sup>

*Schwella v. The Queen*<sup>18</sup>

*Gartland Steamship Company v. The Queen*<sup>19</sup>

In *Toronto Transportation Commission v. The King*, as in the present case, there was a claim in tort by the Sovereign in right of Canada against an ordinary person. The Sovereign had sued the appellant for damages to personal property arising out of a collision between a vehicle operated by a servant of the appellant and a vehicle operated by servants of the Crown. The trial Judge found the operators of the respective vehicles to be equally at fault. The Attorney General of Canada took the position that the Sovereign was entitled to recover one hundred per cent. of His damages on the view of the law that the Sovereign was not responsible for the negligence of His employees and the defence of contributory negligence was therefore not available against Him. This contention was upheld by the trial Judge. In the Supreme Court of Canada, that view of the law was rejected but it was held that, whereas at common law a plaintiff found guilty of contributory negligence could recover nothing, the Sovereign in this case was entitled, by virtue of provincial legislation enacted after 1867, to recover one-half of His damages. Kerwin J. (as he then was), delivering the judgment of the majority of the Supreme Court of Canada, said at page 515:

. . . The Crown coming into Court could claim only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown. . . . Here, if the common law alone were applicable, the Crown would have no claim by reason of the fact that it failed to prove that the negligence of the Commission's servants caused the damage. . . .

The Crown is able to take advantage of the Ontario *Negligence Act* and is therefore entitled to one-half of the damages.

<sup>17</sup> [1949] S.C.R. 510.

<sup>18</sup> [1957] Ex. C.R. 226.

<sup>19</sup> [1960] S.C.R. 315.

In the *Toronto Transportation Commission* case, the Supreme Court of Canada held that provincial legislation changing the general law governing the creation of rights in tort operated to enable the Sovereign in right of Canada to recover where at common law He would have had no right. The only difference between that case and the case that I now have to decide is that the provincial legislation here in question cuts down the rights that a person would otherwise acquire under the general law of the province.

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*Schwella v. The Queen* also involved a proceeding by the Sovereign in right of Canada against an ordinary person in tort. There was a motion to strike out third party proceedings by which the Sovereign, as respondent in petition of right proceedings, sought to recover over against two ordinary persons as third parties. There being no common law right to claim contribution or indemnity against a third party in respect of a tortious liability, the Sovereign based Her third party proceedings upon the Ontario *Negligence Act*, which was enacted by the Ontario legislature subsequent to 1867. One of the grounds upon which the application was made to strike out the third party proceedings was that the Ontario *Negligence Act* did not confer upon the Sovereign the right to contribution or indemnity which it conferred upon ordinary persons in the province. Mr. Justice Thurlow pointed out, at page 230 of the report, that the applicant's contention that no right of contribution or indemnity is conferred on the Crown by the *Negligence Act* is "that the legislature of a province cannot confer rights or impose obligations on the Crown . . . and that, as the Crown is not bound by the obligation, it is not entitled to take the benefit of the right." Thurlow J. held that when the Crown . . . in exercise of the same rights possessed by any individual sues to recover damages caused by negligence, the *Negligence Act* may apply to afford to the Crown a claim where, but for the provisions of the *Negligence Act*, the Crown would have no claim at all.

He emphasized that

. . . in such a case the Crown can claim "only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown."

He relied upon *Toronto Transportation Commission v. The King, supra*. Thurlow J. further stated that

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. . . the right of the Crown to take advantage of the provisions of the *Negligence Act* does not depend on a statute of the Parliament of Canada but on a recognized right of the Crown to take advantage of a provincial enactment. . . .

The *Gartland Steamship Company* case is one in which the Sovereign in right of Canada proceeded against a common person in tort for damages caused by the defendant's ship to property belonging to the Government of Canada. In addition to applying the decision in the *Toronto Transportation* case, *supra*, to enable the Sovereign to recover a portion of Her loss notwithstanding that the defence of contributory negligence had been established, the Supreme Court of Canada held that the defendant was entitled to limit its liability to the Crown, by virtue of section 712 of the *Canada Shipping Act*, notwithstanding that there was nothing in the Act making that provision binding upon the Sovereign in favour of the defendant. In holding that the defendant was entitled to limit its liability by virtue of section 712, Locke J., whose judgment, while otherwise dissenting, was adopted by all the other judges on this point, said at page 345:

It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed by the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.

In none of these cases was provincial legislation having the effect of changing the general law so as to restrict the creation of rights in tort held applicable to the Sovereign in right of Canada. For that reason none of them decides the precise question that I have to decide. On the other hand, in each of these cases, the Sovereign in right of Canada sued a common person in tort, and, in each of them, statutes regulating the creation of rights as between ordinary persons were held to be applicable to the creation of the rights of the Sovereign notwithstanding that such statutes were not expressed to be applicable to the Sovereign. Moreover, in two of these cases, that is, all except the *Gartland Steamship* case, provincial legislation was held to be applicable to the creation of rights of the Sovereign in right of

Canada in tort, without having been adopted, by some reference express or implied, as part of a federal legislative scheme. It is true that, in none of these cases, did the Court find it necessary to express, in the terms that I have adopted, the principle which, as I have concluded, is applicable to the determination of the case before me. That principle does, however, as it seems to me, constitute the basic premise or assumption upon which each of them was decided.

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The next authority to which I must refer is the decision of the Supreme Court of Canada in *Gauthier v. The King*<sup>20</sup> which, according to the submission of counsel for the Attorney General, is authority for the contention that section 5 of the Manitoba *Tortfeasors and Contributory Negligence Act* is not applicable to this claim by the Sovereign in right of Canada. In the *Gauthier* case, there was a claim in contract by an ordinary person against the Sovereign in right of Canada and the Attorney General did not deny, when the case was before the Supreme Court of Canada, that the Sovereign was answerable for breach of the contract. The sole question in issue was whether there was an arbitration award which, in accordance with the terms of the contract, was binding on the Sovereign. The contract did provide for an amount payable by the Sovereign to be determined by arbitration. That amount was determined in the manner contemplated by the contract. However, before the Arbitration Board made its award, the Sovereign revoked the authority that it had conferred on the Board by the contract. At common law, such a revocation would have put an end to the Board's power to function and would have made the award a nullity but the revocation would have been a breach of the contract for which the Sovereign would be liable in damages. This was the position adopted by the Attorney General in the Supreme Court of Canada. *Gauthier*, however, relied upon the Ontario *Arbitration Act*, under which a party to a contract was deprived of his common law capacity to revoke the appointment of arbitrators unless he obtained the consent of the Supreme Court of Ontario, and under which a contractual arbitration award, when made, acquired the status of an order of that Court. If this statute applied, it followed that, in the *Gauthier* case, there was a

<sup>20</sup> (1917) 56 S.C.R. 176.

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valid arbitration award and Gauthier was entitled to judgment for payment of the amount thereof. The Supreme Court of Canada held that this provincial legislation did not apply to the Sovereign in right of Canada and that Gauthier was entitled only to such damages as he sustained by the Sovereign's having revoked the arbitrators' authority in breach of the contract.

In considering the decision of the Supreme Court of Canada in the *Gauthier* case, it is important to have in mind that the provincial legislation did not change the common law concerning the creation of claims by one person against another in contract. What it did was limit the capacity of a party to a contract to do something that would be a breach of the contract. Having this in mind, if we turn to the judgment of Anglin J., whose reasons would appear to have been adopted by the Chief Justice as well as by Davies J., we find that he says, at page 190:

. . . no doubt the construction and legal effect of a contract made and to be performed in any province of Canada must ordinarily be determined in the Exchequer Court according to the general law of that province.

After making that general statement of principle, Anglin J. discussed, and rejected, a contention on behalf of Gauthier that the then section 19 of the *Exchequer Court Act*, whereby this Court was given jurisdiction in claims in contract against the Sovereign, imposed a liability in contract to "be determined according to the law of the province in which the cause of action arises". This contention had apparently been based upon an analogy with the then section 20(c) of the *Exchequer Court Act*, which, it had been held, not only gave the Court jurisdiction in negligence claims against the Sovereign but created a legal liability in negligence, which did not previously exist.<sup>21</sup> Anglin J. held that section 19, unlike section 20, did not "create or impose new liabilities" but, "Recognizing liabilities (*in posse*) of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered". Having reached that conclusion, Anglin J. said, at pages 191-2:

But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action

<sup>21</sup> See footnote 11, *supra*.

arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

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After thus stating his view of the general principle, Anglin J. proceeded to show that English statutes taking away the Crown's right to revoke a submission to arbitration were not part of the English law introduced into Upper Canada, and then held that the Ontario legislation to the same effect did not apply to the Sovereign in right of Canada both because Ontario legislation could not, in his view, of its own force take away "any privilege of the Crown in right of the Dominion" and because the provincial legislature never intended "to subject the Crown in right of the Dominion to the jurisdiction" of the provincial court in a matter in respect of which Parliament had given the Exchequer Court exclusive jurisdiction.

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As already indicated, in considering the effect of the *Gauthier* decision, it must be borne in mind that the statute under consideration was not one that changed the common law in respect of the "construction and legal effect of a contract" but was one that superimposed a particular legal regime upon parties that had entered into arbitration agreements. Furthermore, it was a legal regime which was incompatible with the laws made by Parliament with reference to the adjudication of claims against the Sovereign in right of Canada. Finally, some weight must be given to the later decision of the Privy Council in *Dominion Building Corporation v. The King*.<sup>22</sup>

In *Dominion Building Corporation v. The King*, it appears that the Attorney General of Canada took the position that Ontario law was applicable to determine the rights of the parties under a contract between the Sovereign in right of Canada and a common person for Lord Tomlin (delivering the judgment of the Judicial Committee of the Privy Council), in summarizing an argument made on behalf of the Crown with reference to the effect of an Ontario statute said, at page 547, parenthetically, "it being Ontario law which governs the present case". The argument on behalf of the Crown was that the Sovereign was not bound by section 14 of the Ontario *Mercantile Law Amendment Act*, which, if

<sup>22</sup> [1933] A.C. 533.

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the matter had been between subject and subject, would have entitled Dominion Building Corporation to succeed in its claim for breach of contract notwithstanding its failure to fulfil its obligations under the contract within the stipulated times. Obviously, if the Attorney General had been of the view that laws made by the Ontario legislature had no application to cut down the rights that the Crown would otherwise have under contracts between the Sovereign in right of Canada and a common person, he would have so contended. That point was not, however, taken, and for that reason the judgment of the Judicial Committee cannot be said to be a decision on it. It was, however, argued that the provincial statute was not binding upon the Sovereign by reason of the provision in the Ontario *Evidence Act* that no act "affects the rights of His Majesty" unless it is expressly stated that His Majesty is bound and it was held, in rejecting this argument, that His Majesty was bound thereby.

The decision in *Gauthier v. The King*, taken by itself, does seem to constrain one to the conclusion that the law applicable to determining claims in contract against the Sovereign in right of Canada being, "the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion" is unaffected by legislation of a provincial legislature. Having regard, however, to the character of the provincial statute under consideration in the *Gauthier* case and to the fact that no question arose in that case as to the applicability of a provincial statute dealing with the construction or legal effect of contracts between ordinary persons, I cannot reach the conclusion that that decision is inconsistent with the view of the law concerning the rights of the Sovereign in contract and tort, upon which, as I have already indicated, I propose to decide this case. I am strengthened in this view by the course of events in the *Dominion Building Corporation* case.

Counsel for the Attorney General, when confronted with the apparent anomaly, from the point of view of our constitutional law, between his submission in this case that the Sovereign in right of Canada is not subject to the rule in section 5 of the *Manitoba Tortfeasors and Contributory Negligence Act* and the decision of the Supreme Court of

Canada in the *Toronto Transportation Commission* case that the Ontario *Negligence Act* is applicable to confer on the Sovereign in right of Canada a valid claim in negligence notwithstanding contributory negligence, fell back on the prerogative rule that the Sovereign is not bound by a statute unless named expressly or by necessary implication but may nevertheless take advantage of a statute in which She is not so named. I am quite clear in my mind that this is not a satisfactory explanation of the matter. It is, however, not so easy to formulate a view that expresses the fallacy involved in his explanation and is, at the same time, consistent with the long, and seemingly inconsistent, line of authorities involved.<sup>23</sup>

In *Gauthier v. The King, supra*, Anglin J. said at page 194 that he thought "it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense". He said that "This would seem to be a corollary of the rule that the Crown is not bound by a statute unless named in it." This corollary is, with respect, clearly sound if the provincial legislature is legislating in a field where it can make laws in relation to the rights, property or prerogatives of the Sovereign in right of Canada as well as those of the Sovereign in right of the province. The more usual thing, I should have thought, would be that, while the legislature may extend a rule made for the public generally so as to restrict the prerogatives or affect the rights or property of Her Majesty in right of the province, the exclusive legislative authority to extend such a rule so as to restrict the prerogatives or affect the rights or property of Her Majesty in right of Canada is vested in Parliament,<sup>24</sup> so that, no matter what reference is made in such a provincial statute to the Crown, it could have no application to Her Majesty in right of Canada. As I understand Anglin J.'s judgment in the *Gauthier* case, he holds that the provincial legislature did not intend to apply the legislation there in question to the Crown in right of Canada

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<sup>23</sup> See Appendix "A".

<sup>24</sup> *Nykorak v. Attorney General of Canada* [1962] S.C.R. 331; *Burrard Power Co. v. The King* [1911] A.C. 87.

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and that, if it had intended to do so, the legislation "would . . . be *pro tanto ultra vires*".

It is important to bear in mind in considering the *Gauthier* case that Anglin J. did not say that a change in the general law of contract could not affect the rights *in posse* of the Sovereign in right of Canada. He said that "Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion". In other words, the legislature cannot make laws "in relation to" the "privileges" of the Sovereign in right of Canada. Where, however, the "privilege" of the Sovereign is, as appears from the decision of the Supreme Court of Canada in the *Gartland Steamship Company* case, *supra*, a "privilege" to claim against the subject in accordance with "law by legislation lawfully enacted" for ordinary persons, and the particular field of law is a field within provincial competence, a general law made by the legislature will "affect" the rights *in posse* of the Sovereign in right of Canada.

As I see it, therefore, the provincial statute in this case is *not* one that is *not* binding upon the Sovereign in right of Canada by reason of the prerogative rule that She is not bound unless the statute is made applicable to Her, in which event She could nevertheless take advantage of it. This provincial legislation could not be made expressly applicable to Her Majesty in right of Canada because the legislature has not the legislative jurisdiction to do so. However, this provincial legislation does change the general law relating to the creation of rights in torts as between ordinary persons; Her Majesty has the privilege of availing Herself of that law but, if She does, She must accept that law as it is at the time Her claim arises; and, if it has been amended by the appropriate legislative authority, She must accept the law as so amended.<sup>25</sup>

As indicated earlier, there is a decision on the very point that I have to decide in this case. I refer to *Attorney-General of Canada v. Patterson and Content*<sup>26</sup> where, dealing with provincial legislation to the same effect as the Manitoba legislation under consideration in this case, Currie J. said, at page 94: "Under the circumstances and the nature and form of the action it is my opinion that the Attorney-General of

<sup>25</sup> See Appendix "B".

<sup>26</sup> (1958) 13 D.L.R. (2d) 90.

Canada is not bound by the provisions of s. 3 of the *Contributory Negligence Act*, R.S.N.S. 1954, c. 51." Currie J. cited, in support of his opinion:

*The King v. Lithwick & Cole* (1921), 57 D.L.R. 1, 20 Ex. C.R. 293; *Halifax v. Halifax Harbour Com'rs*, [1935] 1 D.L.R. 657, S.C.R. 215; *C.N.R. v. St. John Motor Line, Ltd.*, [1930], 3 D.L.R. 732, S.C.R. 482, 37 C.R.C. 29; *T.T.C. v. The King*, [1949] 3 D.L.R. 161, S.C.R. 510, 63 C.R.T.C. 289; *A.-G. Can. v. Jackson*, [1946], 2 D.L.R. 481, S.C.R. 489, 59 C.R.T.C. 273.

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I have already discussed what was decided in the *Toronto Transportation Commission* case and in the *Jackson* case. The *Saint John Motor Line* case is an application of the line of jurisprudence that held that section 19 (c) of the *Exchequer Court Act* made the Sovereign liable for the negligence of His servants in accordance with the law applicable between subject and subject at the time that the liability was created. In the *Halifax* case and in the *Lithwick* case, there were applications of the rule that laws made for ordinary persons do not apply to deprive His Majesty of prerogative rights or to impose taxes on His Majesty's property. With great respect, I have been unable to accept the rule applied in the *Patterson* case for the determination of the case before me.

Having regard to the conclusion that I have reached for the reasons already stated, I need come to no conclusion with regard to a submission made on behalf of the defendants that the decision in the *Jackson* case is directly applicable in this case because, according to the submission, having regard to section 5 of the *Manitoba Tortfeasors and Contributory Negligence Act*, no tort was committed by the defendants against Briggs in respect of seventy-five per cent of Her Majesty's damages. In that connection, I need only say that I have not been able to satisfy myself that section 5 can be read in that way.

There will be judgment in favour of the plaintiff in the sum of \$1,274.09 with costs of the action incurred on or before March 12, 1965, the date upon which a confession of judgment in that amount was served on the Attorney General. The defendant will have judgement against the plaintiff for its costs incurred after March 12, 1965.

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The following is a list of representative authorities concerning the prerogative and statutory rules that the Crown is not bound by legislation unless the legislation is made applicable to the Crown either expressly or by necessary implication, and that the Crown may, nevertheless, take advantage of such legislation.

*Case of Non Abstante*, (1582) 12 Co. Rep. 18; 77 E.R. 1300.  
*The Case of the Master and Fellows of Magdalen College in Cambridge*, 11 Co. Rep. 67a at 77—E.R. 1236 (1615).

*Chitty's "Prerogatives of the Crown"*, (1820) 382.

*Lambert v. Taylor*, (1825) 4 B. & C. 138; 107 E.R. 1010.

*Attorney-General v. Donaldson*, (1842) 10 M. & W 117; 152 E.R. 406.

*Baron de Bode v. The Queen*, (1848) 13 Q.B. 364; 116 E.R. 1302.

*Moore v. Smith*, (1859) L.J. 28, Mag. Cas. 126.

*The Mersey Docks and Harbour Board Trustees v. Cameron*, (1865) 11 H.L.C. 443; 11 E.R. 1405.

*Weymouth v. Nugent*, (1865) 6 B. & S. 22; 122 E.R. 1106.

*In re Henley & Co.*, (1878) 9 Ch. Div. 469.

*Ex parte Postmaster-General. In re Bonham*, (1879) 10 Ch. D. 595.

*The Attorney General and the Humber Conservancy Commissioners v. Constable*, (1879) 4 Ex. D. 172.

*The Queen v. Justices of Kent*, (1889) 24 Q.B.D. 181.

*Perry v. Eames*, [1891] 1 Ch. 658.

*Wheaton v. Maple & Co.*, [1893] 3 Ch. 48 (C.A.).

*The Hornsey Urban District Council v. Hennell*, [1902] 2 K.B. 73.

*Cooper v. Hawkins*, [1904] 2 K.B. 164.

*Attorney-General for New South Wales v. Curator of Intestate Estates*, [1907] A.C. 519.

*Commissioners of Taxation for the State of New South Wales v. Palmer*, [1907] A.C. 179.

*Gauthier v. The King*, [1915] Ex. C.R. 444: (1917) 56 S.C.R. 176.

*Hamilton v. The King*, (1916) 54 S.C.R. 331.

*In re Buckingham*, [1922] N.Z.L.R. 771.

*The Loredano*, [1922] P. 209.

*Cayzer, Irvine & Co. v. Board of Trade*, [1927] 1 K.B. 269.

*In re Silver Brothers Ltd.*, [1932] A.C. 514.

*Dominion Building Corporation v. The King*, [1933] A.C. 533.

*City of Halifax v. Halifax Harbour Commissioners*, [1935] S.C.R. 215.

*Attorney-General v. Hancock*, [1940] 1 K.B. 427.

*Attorney-General v. Randall*, [1944] All E.R. 179.

*The King v. City of Verdun*, [1945] Ex.C.R. 1.

*Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58.

*Attorney-General for Ceylon v. Silva*, [1953] A.C. 461.

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#### APPENDIX "B"

The principle that I have adopted for the decision of this case would achieve the result reached (although not by the same reasoning) by the Privy Council in the *Dominion Building Corporation* case, *supra*, where Lord Tomlin said at page 549:

Is the Crown bound by the enactment? Their Lordships are of opinion that it is. Under the provisions of the *Interpretation Act* (R. S. Ont., 1927, c. 1), s. 10, no Act shall affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. The expression "the rights of His Majesty", in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract. Upon this view of the matter the statutory provision operates in the present case.

As previously indicated, however, no question was raised in that case as to the authority of the provincial legislature to enact the particular law in relation to the contracts of the Sovereign in right of Canada and there is no indication, in the judgment, of the constitutional basis upon which the provincial law in question became applicable to such contracts. It must have been either

- (a) because the provincial legislature had authority to make laws in relation to contracts of the Sovereign in right of Canada, in which event there must be, from this point of view, a difference between the legislature's authority in relation to such contracts and its

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authority in relation to claims in tort by the Sovereign in right of Canada for injuries to members of the armed forces (*Nykorak v. Attorney General of Canada, supra*), or

(b) because the Sovereign has the same privilege as any other person to make claims in tort under the general laws applicable where the claim arises, in which event, it is difficult to understand why it was relevant to consider the rule that the Crown is not bound by a statute unless mentioned.

My view is that, no consideration was given to the constitutional question because it was not raised and, for that reason, the *Dominion Building* case cannot be regarded as a binding authority except for the result, which is that provincial legislation changing the law relating to the construction or legal effect of contracts will apply to contracts of Her Majesty in right of Canada.

BETWEEN :

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

AND

RANDOL H. GAULT ..... RESPONDENT.

*Revenue—Income tax—Contract for sale of insurance brokerage business—Consideration half of renewal commissions for three years—Deductibility of by purchaser—Whether payment on account of capital—Whether commissions dependent upon use of or production from property—Income Tax Act, ss. 6(1)(j), 12(1)(b).*

The respondent Gault, an insurance broker, entered into a contract in Montreal in March 1960 with the executors of the will of a deceased insurance broker for the purchase of the goodwill and records of the latter's business. The contract provided that the respondent would pay the estate half of renewal and certain other commissions for three years on policies issued to the deceased broker's clients, that he would furnish the estate quarterly statements, and that a representative of the estate should have the right to check the respondent's books and records at all reasonable times. The respondent was assessed to income tax in respect of the sums paid the estate pursuant to the contract in 1960 and 1961. The Tax Appeal Board allowed his appeal [36 Tax A.B.C. 324], and the Minister of National Revenue appealed to this Court, contending that the payments were made in the purchase of a capital asset, i.e. an insurance business, and that their deduction was accordingly prohibited by s. 12(1)(b) of the *Income Tax Act*.

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*Held*: That the Minister's appeal be dismissed.

1. The contract was essentially not one of sale but of agency for the collection and equal division between the parties thereto of certain commissions as and when they were received. The contract did not fix a price for the payment of which respondent was responsible in any event, an omission inconsistent with a contract of sale as defined in article 1472 of the Quebec Civil Code. *Schacter v. Minister of National Revenue* [1962] C.T.C. 437, distinguished.
2. Moreover, the amounts received by both parties to the contract were "dependent upon use of or production from property", to wit, the entire office records of the deceased broker, and were therefore required to be included in computing the income of both parties to the contract by virtue of s. 6(1)(j) of the *Income Tax Act*.

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APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Montreal.

*Paul Boivin, Q.C.* for appellant.

*Donald J. Johnston* for respondent.

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

DUMOULIN J. now (May 31, 1965) delivered the following judgment:

The Minister of National Revenue is appealing a decision of the Tax Appeal Board, dated September 24, 1964<sup>1</sup>, allowing the respondent's appeal from the assessments of December 12, 1962, wherein taxes in the amounts of \$5,235.99 for the year 1960, and \$7,408.18 for 1961 were assessed.

During those two material years, the respondent, Randol H. Gault, carried on, in Montreal, an insurance broker's business under the firm name and style of Percy R. Gault Reg'd.

On March 21, 1960, Randol H. Gault acquired from the Toronto General Trusts Corporation the insurance business of his lifelong friend, the late Herbert J. Bulley, also of the City of Montreal, as appears from a photostat of the Sales Agreement produced in this Court, exhibit A-1 of appellant, and annexed to the Tax Appeal Board file.

This transaction implemented an option extended to the respondent by a clause, the eighth one, of the deceased testator's will, hereunder reproduced in its pertinent provision:

<sup>1</sup> 36 Tax A.B.C. 324 at 330.

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I direct my Executors and Trustees, in disposing of my insurance business, that preference be given to my friend, Randall H. Gault, in view of my long and friendly association with him.

The terms and considerations according to which Randol Gault availed himself of this proffered transfer of the late Mr. Bulley's office affairs and goodwill are set out in the deed, exhibit A-1, wherein the Executors of the deceased are called "the Vendors" and the respondent assumes the quality of "the Purchaser".

The undergoing citations are taken from exhibit A-1, entitled "Memorandum of Agreement Entered into at the City and District of Montreal as of the 21st day of March, 1960":

NOW, THEREFORE, IT IS AGREED BETWEEN THE PARTIES:

1. THAT the Vendors hereby sell and transfer to the Purchaser, with warranty as to their own acts and deeds only, all the goodwill of the Insurance business of the late Herbert J. Bulley, together with all existing records such as Expiry Lists, Agent's copies of policies and endorsements, prior correspondence concerning insured property, information concerning previous custom of payment by clients, etc., which are pertinent to the continuation of the said business after the 20th of March, 1960;

2. THAT in consideration of the said sale and transfer the Purchaser hereby undertakes to pay to the Vendors:—

- (a) 50% of all commissions paid on policies issued or renewed for any clients of the late Herbert J. Bulley for an annual term and with an effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963 inclusive;
- (b) 50% of all commissions paid on policies issued or renewed for any clients of the late Herbert J. Bulley for a three-year term and with an effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963 inclusive.
- (c) 50% of all commissions paid on any policies increased or new policies issued for any clients of the late Herbert J. Bulley whether for an annual term or a three-year term with effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963 inclusive;
- (d) From the payments as set forth in sub-paragraphs a, b and c hereof there shall be deducted 50% of any return commissions on any policies issued or renewed for any clients of the late Herbert J. Bulley with effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963, inclusive, and subsequently cancelled or otherwise reduced in premium during the said period;
- (e) From the payments as set forth in sub-paragraphs a, b and c hereof there shall also be deducted the full return commission charged to the purchaser on any policies issued or renewed for any clients of the late Herbert J. Bulley with effective date of issue or renewal as at any time prior to the 21st March, 1960, and

subsequently cancelled or otherwise reduced in premium, during the immediate policy term.

3. . . .

4. . . .

5. THAT at the time of making payment following the end of each quarter or four-month period, as the case may be, the Purchaser shall furnish the Vendors with a statement of all relevant transactions during such quarter or period certified correct by the Purchaser;

6. THAT the Vendors or their authorized representatives shall have the right to check the books and records of the Purchaser at all reasonable times for purposes of verification of statements and figures;

The Minister disallowed the deduction of the stipulated payments made by the respondent as evidencing "the purchase of a capital asset, i.e., an insurance business", in derogation to section 12(1)(b) of the *Income Tax Act*.

On the other hand, the respondent contends that the commissions paid to the Estate did not, at any time, become part of Randol Gault's income for the reasons given in paragraphs 10 and 11 of the Reply to the Notice of Appeal. Those paragraphs read thus:

10. The commissions paid over to the Estate by the Respondent were not part of the purchase price of the insurance brokerage business of the late Herbert J. Bulley but represented the interest retained by the Estate in the receipts of the insurance brokerage business of the late Herbert J. Bulley continued by the Respondent, the whole as indicated by Exhibit A-1.

11. The said commissions received by the Estate being payments dependent upon use of or production from the business of the late Herbert J. Bulley constituted income to it under the provisions of section 6(1)(j) of the *Income Tax Act* and cannot be income of the Respondent at the same time when by agreement said commissions belonged to the Estate and not the Respondent.

The argument derived from section 6(1)(j) will be looked at further down, since I attach greater significance to the plea that the true nature and meaning of the consideration for the so-called "sale and transfer was the undertaking to divide for a period of three years the commissions paid on certain policies issued to clients of the late Herbert J. Bulley".

In despite of certain expressions used, a terminology spontaneously flowing from the pen of laymen with no pretence at technical accuracy, and more intent on recording the material conditions of a deal than its exact legal identity, the question remains whether or not we have here a sale and purchase of a capital asset.

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It could hardly be maintained that Randol H. Gault did, essentially, subscribe and agree to anything, beyond an undertaking to collect, during a triennial period, March 21, 1960, to March 20, 1963, the commissions "issued or renewed for any clients of the late Herbert J. Bulley for an annual . . . or, for a three-year term". As his reward for this care, Gault was allotted one half (50%) of all renewal premiums received through his medium. To his obligation of remitting the other half to Bulley's executors at the end of each quarter or four-month period is joined the production of a "statement of all relevant transactions". Provisions are written into the covenant (para. 2, sub-para. (d) and (e)) for the proper reimbursement of the respondent in cases of reduced or cancelled policies during the life of the agreement.

Each and every obligation assumed by the respondent may be duly fulfilled without any personal disbursement on his part, a feature irreconcilable with the accepted notion of sale.

This Memorandum of Agreement, even though it may be repetitious to say so, does not extend beyond the scope of a mere agency for the purpose of collecting, as and when they fall due, the renewal premiums pertaining to insurance policies originally sold to his erstwhile clients by the now deceased Herbert J. Bulley.

The Memorandum of Agreement foresees no fixed price whatever for the acquittal of which Randol Gault might be responsible, an omission inconsistent with the contract of sale as defined in the first paragraph of article 1472 C.C., hereafter cited:

1472 Sale is a contract by which one party gives a thing to the other for a *price in money* (italics added) which the latter obliges himself to pay. Sale, in the common law, is also based, generally, upon the factor of a specified pecuniary consideration, in proof whereof we read, in Black's Law Dictionary, Fourth ed., 1951, p. 1503, that:

Sale, is a contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment or promise of payment of a *certain price in money*, transfers to the latter the title and the possession of property.

It could be held that all halved commissions forwarded by the respondent to the executors of the Bulley estate, in the

strict sense of the law, were not “payments” but “remittances” of amounts collected in their stead. Gault’s responsibility was exactly co-extensive to the amounts received by him and had he, peradventure, during some period of time, not collected anything, he would then owe nothing.

Moreover, one does not readily perceive the reason for the arbitrary differentiation between the respondent’s own share of the premiums and that which he hands over to the estate. The commissions retained by Randol Gault, the collecting agent, are, indisputably, income. Then, why should equivalent sums, of similar origin, remitted to the executors be, at the one time, capital instalments as regards the respondent, and income the moment they reach the estate?

A second submission of the respondent raised the possible applicability of section 6(1)(j), worded as follows:

6. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(j) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property. . . .

Section 139(1), paragraph (ag) has this definition of “Property”:

(ag) “Property” means property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or a chose in action.

It consequently follows, in the language of section 6 (1)(j), that “amounts received by the taxpayer”, including Gault and the Bulley estate, “were dependent upon use of or production from property”, to wit: the entire office records of the deceased, and must, therefore, “be included in computing the *income*” of both.

I might note that paragraph 11 of the Reply to the Notice of Appeal, propounding this argument, elicited no written rebuttal from the appellant.

Of the two precedents urged on the Minister’s behalf, that of *Irvin Charles Schacter* and *Minister of National Revenue*<sup>1</sup>, albeit evincing quite a few analogies, is nonetheless distinguishable in that the 70% percentage of the regular annual fees of a retiring chartered accountant,

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<sup>1</sup> [1962] C.T.C. 437 at 440.

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selling his professional "goodwill" to Schacter, was definitely consolidated and set at a fixed price of \$17,153.50. This amount was paid by Schacter to the vendor, cash, "at the time of the execution of the indenture". The "purchaser", then, did not attend to the periodical perception of fees owing to the "vendor", but acquitted, *instantly*, a price of \$17,153.50, from his personal funds, for the payment of which he, otherwise, might have been sued, even though the deal had eventually proved a losing one.

In conclusion, I would agree with this finding of the learned member of the Tax Appeal Board, Mr. Maurice Boisvert, Q.C., writing: "I am satisfied that the dominant consideration in the memorandum of agreement. . . was that of an agency based upon the division of revenue rather than one of sale".

FOR THE REASONS ABOVE, the appeal is dismissed, with all taxable costs in favour of the respondent.

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BETWEEN:

UNITED MERCHANTS AND MANUFACTURERS, INC. . . . . } PLAINTIFF;

AND

A. J. FREIMAN LIMITED and GERALD N. SPRINGER (trading under the name of GERRY SPRINGER COMPANY), STIX INTERNATIONAL INCORPORATED and C. E. SPRINGER & COMPANY LIMITED } DEFENDANTS.

*Patents—Infringement—Removable plastic strip applied by pressure sensitive adhesive—Description in claims exceeding description in disclosure—Onus of proving first invention date—Patent Act, c. 203 ss. 28(1)(a), 36(1)(a), 36(2).*

Plaintiff company sued for infringement of a patent relating to surface coverings. The disclosure indicated that the patentee contemplated bonding, by a pressure sensitive adhesive, of a plastic film with or without cloth or decoration to a paper base which could be readily stripped off, thus permitting the plastic film to be secured by the pressure sensitive adhesive to a given surface. Plaintiff relied on claims set out as follows:

1. Method of making decorated surface covering material in sheet form which includes the steps of applying. . . a permanent adhesive. . . .
2. A plastic film-strip paper in sheet form adhesively bonded to each other; and
3. Laminate for covering surfaces combining in combination a film of vinyl chloride in sheet form bearing an ornamental design on one side thereof, the reverse being secured temporarily to . . . a paper backing.

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The plaintiff's witnesses and counsel emphasized that an essential characteristic of the invented product was its pressure sensitive adhesive quality which enabled it to be applied to a surface by simple pressure and to be readily removed therefrom. The evidence disclosed that in the commercial development of the invention no adhesive other than a pressure sensitive adhesive was ever used.

*Held:* That the action be dismissed.

1. A proper reading of the claims disclosed no limitation that the product be removable and re-applable nor even that a pressure sensitive adhesive be used, and the claims were therefore invalid as going beyond the description of the disclosure. (*Minerals Separation North American Corp. v. Noranda Mines Ltd.* [1947] Ex. C.R. at p. 352, referred to. *Radio Corporation of America v. Raytheon Manufacturing Co.* 27 C.P.R. 1 at 12, *Mullard Radio Valve Company v. The Philco Radio and Television Corporation of Great Britain* [1936] 53 R.P.C. 323 at p. 345, *B.V.D. Company Ltd. v. Canadian Celanese Ltd.* [1937] S.C.R. 221 at pp. 228, 233, applied.)
2. It was not permissible for the Court to limit the claims by reference to the disclosure, where the pressure sensitive adhesive feature was stressed. (*Ingersoll Sergeant Drill Company v. Consolidated Pneumatic Tool Company Ltd.* (1908) 25 R.P.C. 61 at p. 83, applied.)
3. Moreover the patentee had not complied with s. 36(2) of the *Patent Act* which required that he claim distinctly and in explicit terms the things or combination he regards as new and in which he claims an exclusive property and privilege.
4. Because the defendant in an infringement action has by ss. 28(1)(a) and 63(1)(a) of the *Patent Act* the onus of proving knowledge or use before the invention date it does not follow that he must also prove the first invention date. The application date of a patent or the foreign application date pursuant to s. 29(1) of the *Patent Act* is assumed to be the date of the invention and the onus is on the inventor or his assignee to allege and prove an earlier date. (*Omark Industries (1960) Ltd. v. Gouger Saw Chain Co.* 27 Fox P.C. at pp. 39 and 40, followed.)

**ACTION for infringement of a patent.**

The action was tried by the Honourable Mr. Justice Noël at Ottawa.

*David Watson and John D. Richard* for plaintiff.

*Ross G. Gray Q.C. and J. G. Fogo* for defendants.

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

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Noël J. now (June 9, 1965) delivered the following judgment:

This is an action for infringement of patent No. 563,020 issued on September 9, 1958, to David Silman, the inventor, and assigned to the plaintiff, United Merchants and Manufacturers, Inc., which is a body politic and corporate having its head office and principal place of business at the City of New York, in the State of New York, U.S.A. The defendant, A. J. Freiman Limited, is a body politic and corporate having its head office and principal place of business in the City of Ottawa, in the Province of Ontario. The defendant Gerald N. Springer operates a sole proprietorship under the name of Gerry Springer Company, having its place of business at the City of Toronto, in the Province of Ontario. The defendant Stix International Incorporated is an American body politic and corporate having an office and place of business in the city of New York, in the State of New York, U.S.A. The defendant C. E. Springer Company Limited is a company incorporated under the laws of the Province of Ontario and having its head office and principal place of business at the City of Toronto, in the Province of Ontario.

The plaintiff has listed in the particulars of breaches a list of alleged infringements made by the said defendants which it is not necessary to go into at this stage.

The statement of defence produced by the defendants herein, as well as the particulars of objection filed on their behalf, contain a large number of defences which, however, can be summarized as follows: the defendants have not infringed the patent and particularly the claims relied on, as there is a difference between the defendant's products and the product claimed by the patent, and even if they have, the patent is not valid because it has been anticipated, the said claims being so extremely broad that they read of surface coverings in the prior art, because it lacks inventiveness and because the claims are so worded that they claim more than the inventor invented, if he invented anything. It is further alleged: that the said invention as claimed in the patent was not described in the disclosure and that the specification of the patent does not correctly or fully describe the invention or its operational use as contemplated by the inventor and does not set forth clearly the various

steps in the method of making or using the product in such full, clear, concise and exact terms as to enable any person skilled in the art to make or use it; that the said claims fail to state distinctly and in explicit terms the things and combinations that the appellant regarded as new and in which was claimed an exclusive property or privilege as required by section 36(2) of the Act; that the alleged invention, as claimed in each of the claims of the patent, was not a combination but a mere aggregation of elements; and, finally, that the specification of the said letters patent is ambiguous. Furthermore, C. E. Springer and Company Limited's statement of defence as well as that of Stix International Incorporated contain a counterclaim for a declaration that Canadian patent No. 563,020 is and always has been invalid and void.

The alleged invention, according to the plaintiff, relates to surface coverings and the inventive ingenuity, according to counsel for the plaintiff, comes from a combination of the various components which make up this product. These components, according to counsel for the plaintiff, are the cloth, the adhesive, the film, the resin and the paper. There is also the primer which, however, is an optional component. These components can be found in the introductory paragraphs in the patent and in some of the claims. The introductory paragraphs of the disclosure, up to the description of the figures, indicate what the patentee claims for his invention and is reproduced hereunder:

This invention relates to plastic films, pressure sensitive adhesives, and temporary carriers, and the combination thereof in making up articles adapted to cover surfaces.

It is known, of course, to produce a "band-aid" or bandage comprising a strip of plastic sheet, medicated or otherwise, having an adhesive undercoating to which a temporary backing, as for example, gauze, is adhered; the gauze being adapted to be stripped off from the adhesive and plastic covering just before the band-aid is adhesively applied to a surface to be covered.

It is also known to make disposable railroad tickets by supplying the under side of the ticket with an adhesive coating, and temporarily fixing the adhesive coated ticket to a backing such as paper or some other temporary carrier. When the period for which the ticket is issued becomes effective, the paper may be stripped off from the back of the ticket, leaving behind it a substantial residue of the adhesive composition which continues to adhere to the under-side of the ticket. Following removal of the temporary paper backing, the ticket is fixed as by the undercoating of adhesive to what may be termed for convenience a ticket holder or card, and during the period for which the ticket is effective, remains adhesively

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secured to this ticket holder, and at the end of such period is stripped off therefrom subsequently to be replaced by another ticket for the next ensuing period of use.

According to the present invention, however, a disposable backing is supplied and adhesively secured to the undersurface of a decorative article or object in the piece, for example, a web of cloth or plastic film bearing a design on its upper surface. A surface covering of this type may be used as wall-paper in children's rooms and other rooms, to cover shelves in the kitchen, and to attractively ornament the interior and exteriors of cabinets, tables and other home furnishings.

Another object of the present invention is the production of what may be termed a "package" article for the housewife comprising a composite sheet made up of bonded components, which she herself may use to cover any desired surface in the home or out of it with a decorative covering.

A further object is the production of a composite laminated article comprising decorated plastic film or cloth in the piece removably secured as by an adhesive to a temporary paper backing.

A still further object is a method and means for making laminated objects comprising plastic film or cloth in web-like form, temporarily bonded to a removable carrier wherein the surface of the carrier out of contact with the plastic film or cloth is printed with instructions to guide the housewife or other user in stripping the carrier from the film or cloth and adhesively securing what remains, namely, the cloth or film carrying an undercoating of adhesive to a plane or other surface.

A still further object is a product of the character described adapted to cover curved and other non-planar surfaces as well as straight line surfaces by reason of its inherent plasticity or flexibility.

Another object of the invention is a method of making a laminated package adapted to cover a surface which comprises the steps of printing instructions for use on one side of a temporary carrier, coating its other side with a resin of such character as to furnish a relatively smooth surface to the carrier, subsequently depositing a pressure sensitive adhesive on the resin coated carrier on the opposite side to that on which the printed instructions appear, and thereafter adhesively applying a plastic film coating or cloth, having a distinctive design or texturized surface, or not, as may be desired, to the side of the carrier opposed to that which bears the instructions.

A further object is a method and means for annealing plastic film surface coverings of the character referred to above so as to relieve the stresses and strains therein, both natural and those acquired as a result of prior processing, thereby establishing dimensional stability in the finished article.

With the above and other objects in view, as will be apparent, the present invention consists in the construction, combination, and arrangement of parts and/or steps, all as hereinafter more fully described, claimed and illustrated in the accompanying drawings wherein;

The disclosure further indicates that the patentee contemplated the bonding by a pressure sensitive adhesive, of a plastic film with or without cloth, and with or without design or decoration, to a temporary base, preferably of relatively heavy paper arranged in such a way that when the product is to be used for the purpose intended, the paper

may be readily stripped off, thus exposing the pressure sensitive adhesive which remains adherent to the plastic film whereby it may be adhesively secured to the surface to be covered. The paper can be more readily stripped off if a carrier of the phenolic resin type is interposed between the paper and the adhesive.

It is also stated therein that: "If desired, the paper which serves as the temporary carrier for the plastic film may also comprise printed instructions explaining how the article may be employed to cover the surface."

The preferred film is a polyvinyl chloride one in combination with non-migratory plasticizers of the polymeric type and the plasticizer is a component of that film which gives it softness. The ornamentation or design should comprise vinyl inks so that the printed matter and its composition will be compatible with the base to which they are to be applied. The preferred adhesive is of the polyisobutylene type which tends to enhance the flexibility of the product in its relation to the application thereof to curved surfaces and other uneven irregularities. It comprises a synthetic rubber type composition which does not oxidize or promote oxidation. To serve as an anchoring base between the polyisobutylene type adhesive and the plastic film, a primer coating of the rubber latex type may be utilized so that the adhesive will stick more readily to the film. This particular type was used in the early stage but it appears that in the last few years this primer coating was dispensed with and the film sensitive adhesive adheres right to the film. The slip strip paper which refers to the manner in which the temporary backing paper can easily be stripped off may be kraft paper and the instructions may be printed on the outer surface of the slip strip with a phenolic thermosetting resin, namely phenol formaldehyde which prevents offset.

The terms "piece goods" or "goods in the piece" or "object in the piece" are used to indicate by way of example, a bolt or web of cloth or plastic and the words "web-like form" according to the plaintiff means a large piece of material.

It appears from the above that the patentee's declared invention comprises two embodiments, one in which the ornamented surface is a film of plastic preferably a vinyl chloride, sometimes called polyvinyl chloride or vinyl plastic, and one in which the surface is a cloth, backed up by a

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pressure sensitive adhesive. This pressure sensitive adhesive is covered with a temporary layer of paper sometimes referred to as a temporary carrier.

Counsel for the plaintiff in opening clearly stressed the invention and its component parts by stating that the adhesive remained permanently tacky, that it can be applied to a surface and then removed without leaving any residue and that this can be done with no water, no paste and no tools. He emphasized it is washable, waterproof, alcoholic resistant, durable, and can be used to cover and protect. He finally added "it is the very simplicity of the product and the very fact these additional tools are not needed, which is one of the merits of the product".

It is alleged that the art to which the invention in suit relates is that of surface covering to ornament and to protect and that prior to this invention there was very little of relevance in this art. There was the possibility of painting the surface or of wallpapering all of which, however, suffered from many disadvantages such as requiring respectively paint and paste, without having the same appearance nor being as easy to handle as the product of the invention in suit.

With regard to the temporary layer of paper, or the carrier it was urged that it could be stripped off by the user and that it performed several functions namely: covering the adhesive surface and, therefore, making the articles easier to manage, protecting the adhesive surface, thereby preventing dirt from adhering to the adhesive and providing an exceedingly more convenient vehicle for carrying the instructions for use. According to counsel for the plaintiff, this latter characteristic was an important part of the invention because it allowed, for instance, the housewife or the ordinary man to use the material without going wrong. This is what the plaintiff terms a package article in which the user has everything he needs, not only the material, but also something which, in addition to being protective, contains instructions as to how the material should be used.

The invention date, according to the plaintiff's response of June 29, 1961, under Rule 22A, is the period January to April 1951 and the nature of the acts upon which it then declared it intended to rely for the purpose of establishing the same are disclosures of the invention by the inventor to

others. Some attempt was made by the plaintiff to establish this date by means of Mr. Morton Strauss at pp. 72 to 73 of the transcript wherein this witness stated that Mr. Silman, the alleged inventor of the patent in suit, had shown him a sample of Con-Tact on September 2nd or 3rd, 1952:

- Q. Did you acquire any knowledge of the product which afterwards became known under the trade name "Con-Tact"?
- A. As a matter of fact, the following day of my employment I was presented with a very small sample by Mr. David Silman. This sample was some six inches or eight inches square, and represented a piece of what today has become Con-Tacts.

This witness then referred to Ex. 1 (a current sample of Con-Tact) as being the Con-Tact he was referring to.

There is also further evidence by this witness on this point at pp. 90 and 123 of the transcript with reference to the first offering for sale of Con-Tact to a store called Spiegel's, in New York, in the months of April or May of 1954. Cf. pp. 89-90 of the transcript:

- Q. And when was Con-Tact, what became known as Con-Tact, first introduced to the market or, let me clarify my question; when was it offered to the market?
- A. It was first shown and offered to a retail organization in the early Spring of 1954, some year and three-quarters later. Somewhere around February or March I personally took the merchandise to a Chicago mail-order house called Spiegel's, which is a very large multi-million dollar organization, and offered the merchandise to them for sale in their catalogue, which goes directly to some several million consumers in the United States.

The filing of the United States application for the invention appears from Ex. 6 to have been made on August 9, 1954 and that, in my view, under section 29 of the Act, is the earliest date the plaintiff can rely on as the invention date here. I say this because the January to April 1951 date has not been established and I am not satisfied that the evidence of Mr. Strauss satisfactorily establishes the September 2nd or 3rd, 1952 date or even the early 1954 Spring date (which was not properly alleged). I am supported in this conclusion by the fact that the alleged inventor although, according to counsel for the plaintiff, available, was not produced to testify concerning the date of his invention.

I might also deal with a submission made by counsel for the plaintiff that the defendants having, under section 28(1)(a) and section 63(1)(a), the onus of proving that prior knowledge or use occurred before the invention date,

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they, therefore, had to prove also plaintiff's first invention date. This is not my understanding of the position under the Act with regard to the establishment of a date of invention earlier than the one that is established by the records of the Patent Office. I dealt with this subject at some length in *Omark Industries v. Gouger Saw Chain*<sup>1</sup>, and reference thereto will indicate that, in my opinion, the application date of a patent or the foreign application date pursuant to section 29(1) of the Act is assumed to be the date of the invention unless, of course, it is established that the invention was made earlier than that date and the inventor, or his assignee, has the burden or onus of alleging and proving such earlier date. In the above referred to case, at p. 39, I pointed out that:

... the *prima facie* validity of a patent does not go beyond the application date and if he (the patentee or his assignee) desires to go beyond this date, he must prove it by cogent evidence.

Having, indeed, under Rule 22A of the *Exchequer Court Rules and Orders* the obligation to state the "particulars of the date which he proposes to assert and the nature of the acts upon which he intends to rely" (which acts I believe may comprise prior uses, disclosure to other persons, written descriptions, drawings, sales, etc.) "for the purpose of establishing his invention date" it would, in my view, follow that this obligation cannot be discharged unless the patentee, or his assignee, who alone is in a position to establish such a date does so in a convincing manner, otherwise the invention will be assumed to have been made on the date which appears on the face of his patent (or the convention date).

Counsel for the plaintiff, at the end of the trial, stated that the plaintiff relied on three claims only, i.e., claim 5, which deals with a method of making decorative surface covering material in sheet form; claim 8, which is a product claim and deals with a plastic film slip strip paper in sheet form adhesively bonded to each other, and claim 13, which is also a product claim and which deals with a laminate (i.e., a material composed of several layers joined together) for covering surfaces using a film of vinyl chloride bearing an ornamental design. These three claims are set out hereunder:

5. Method of making decorative surface covering material in sheet form which includes the steps of applying a decorative pattern to the top side of the material and a permanent adhesive to the under side thereof,

<sup>1</sup> 27 Fox. P. C. 1 at 39 and 40.

securing a temporary paper backing to the exposed adhesive, said backing being adapted subsequently to be stripped from the adhesive, and printing instructions on the exposed surface of said temporary paper backing for stripping the backing from the adhesive and applying the decorative surface covering to a surface to be covered.

8. As a new article of commerce, a plastic film-slip strip paper in sheet form adhesively bonded to each other, the exposed surface of the paper out of contact with the plastic film being printed with instructions for stripping the paper from the plastic film and subsequently adhering said plastic film to any desired surface.

13. Laminate for covering surfaces comprising in combination, a film of vinyl chloride in sheet form bearing an ornamental design on one side thereof, the reverse side of the film being secured temporarily to one side of a paper backing, the other side of the paper backing bearing printed instructions for separating the backing from the film and applying the separated film as a surface covering.

Before dealing with the claims, it might be useful to repeat here, what has been stated so frequently in patent cases, that the claim or claims in a patent alone define the monopoly where the patentee has a statutory duty to state in the claims what is the invention he desires to protect and it is in the claims only that one should find the forbidden field described.

In the *Minerals Separation v. Noranda case*<sup>1</sup> Thorson P. set down clearly the obligations of the patentee with regard to the matter of drafting claims as follows:

"Section 14(1)" (which is now section 36(2)) "also requires that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege. By his claims the inventor puts fences around the fields of his monopoly and warns the public against trespassing on his property. His fences must be clearly placed in order to give the necessary warning and he *must not fence in any property that is not his own*. The terms of a claim must be free from avoidable ambiguity or obscurity and must not be flexible; they must be clear and precise so that the public will be able to know not only where it must not trespass but also where it may safely go."

(*The italics are mine*).

Before approaching the question of validity and infringement, the first duty of the Court is to construe the claims, and this should be done like any other document with due regard, however, to the special functions of the claims. After properly instructing itself as to the technical matters involved and acquainting itself with the art of the patent in suit, and looking at the meaning of the words used in the

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<sup>1</sup> [1947] Ex. C.R. 306 at 352.

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claims, the Court must then see what invention, if any, they define.

Now, although in determining what the claims mean, the specification at large must be considered and the whole document read, this does not mean to use the language of Lord Loreburn in the *Ingersoll Sergeant Drill Company v. Consolidated Pneumatic Tool Company*<sup>1</sup> that one can tolerate "the idea of allowing a patentee to use perfectly general language in the claim and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification . . .".

It is indeed a cardinal rule of interpretation that when plain ordinary words are used, they should be given their plain ordinary meaning. It is also well established in patent law that, if a particular term is proven to have a special meaning in the art, unless such term has been defined in a dictionary sense in the disclosure, it should be given the meaning ascribed to it in that art.

It is also a rule peculiar to patent law that the claim or claims must be construed without reference to any document relied upon as an anticipation in order to prevent the construing "of a claim with an eye to avoiding the effect of a prior document". Of Lord Green in *Molins et al v. Industrial Machinery Company*<sup>2</sup>.

One must, therefore, divorce one's mind from the prior art and look at what the claims mean as they stand. Once that is done, the evidence as to the prior art may be considered. In the present case, it consists of prior documents and prior uses. It then follows that, when looking at the prior art, one should not look at and compare the prior art with the plaintiff's product as made and sold in the market place but with the claims in the patent relied upon. I might add that, to determine whether or not there is infringement, one must compare the defendants' product not with the disclosure nor with what the plaintiff is doing in the market place, but only with the claims of the patent. It is indeed a quite wrong approach to compare the defendants' product with the plaintiff's product, unless prior thereto the claim relied on has been properly sustained in the light of the prior art and the plaintiff's product has been shown to embody the claim.

<sup>1</sup> (1908) 25 R.P.C. 61 at 83.

<sup>2</sup> (1938) 55 R.P.C. 31 at 39.

I will now proceed to the construction of the three claims relied on by the plaintiff herein with emphasis only on those elements which could be contentious or which require a proper determination of their significance. I shall strive to do this in the light of the common knowledge which persons skilled in the relevant art are assumed to have had at the date of the patent, which knowledge is acquired with the aid of the expert evidence as to the state of the art at the date of the patent, the meaning of technical terms and the working of the invention.

The first point of contention with regard to claim 5, which point also applies to claim 13, is the meaning of the expression "surface covering" material. Mr. Parrington, on behalf of the plaintiff, was asked at p. 277 of the transcript:

Q. . . . Can you explain what that is that you have just cut off?

A. This exhibit represents a surface covering material; . . . On the surface which I display to the court we see a decorated, which means to say, a printed and textured surface, obviously in a wood grain design . . .

Now here I may say that the words decorative or decorated surface covering have no special meaning in the art and, consequently, these words cannot be confined to printed or textured surface, such as suggested by the witness nor as urged by counsel for the plaintiff, so as to exclude emblems for instance on the basis that the purpose of emblems is not to decorate and protect surfaces. These words must, in my view, be given their clear ordinary meaning which obviously is a very broad one and extends, in my opinion, to all materials that are adapted to cover a surface and are decorative, i.e., that please the beholder, that have "eye appeal", that are "nice to look at", because "decorative" connotes "eye appeal" and an emblem may well cover a surface and be decorative or have "eye appeal". It is even questionable that the decorativeness of the material is an essential element in the embodiment of the alleged invention. It indeed appears from the disclosure of the patent in suit that such decorativeness of the material is optional (cf. column 3 of the patent where the following words appear "with or without a design or decoration" and claim 8 contains no such decorative requirement). Furthermore, as in the disclosure of the patent and in the submission of counsel for the plaintiff, emphasis is laid on the use of adhesives, the relevant art herein appears clearly to be not

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merely the surface covering art to protect and decorate, but the adhesive coated material surface covering art in general.

The second point of difficulty is the words "in sheet form" which are found in the three claims. Mr. Parrington here again explained the term at p. 312 of the transcript as follows:

- A. That is an expression of the trade and would mean to say a piece of material of considerable length and more than average dimension, or a piece of material of substantial width and length, again as an expression of our trade.

The witness then stated that a plastic raincoat would not be in sheet form and, of course, that is clearly so.

He was later presented with Ex. L, which is a laminate a little less than seven inches wide by a little less than nine inches long, and he admitted this was in sheet form.

It appears to me from the evidence that although some of the witnesses have drawn a distinction between "sheet form" and "roll form" they are merely talking about the manner in which the same material has been sold. In my view, the question is what can be correctly described as sheeted material, rolled or not rolled. The mention made in the disclosure of webs and cloth in the piece and the suggestion by the plaintiff that this would indicate that the words "in sheet form" are confined to huge lengths of material, is not supported by the evidence nor does the plain ordinary meaning of the words "in sheet form" indicate that such is the case. These words, in my view, merely mean that the material is a sheet, i.e., that it is not three-dimensional but something that is flat and thin irrespective of size and can even encompass a band-aid, as appears from the very reference to a band-aid in the disclosure of the patent in suit at column 1, lines 15 and 16, where the word "sheet" is used to describe a component of the band-aid:

It is known, of course, to produce a "band-aid" or bandage comprising a strip of plastic sheet...

I therefore have no hesitancy in finding that small pieces of sheet material are also in sheet form. Indeed, I have no doubt what would happen if someone took a piece of Stix material, cut it in a small size and placed it on the market; the plaintiff would undoubtedly take the position, and rightly so if the claim is valid, that such material is in sheet form and sue for infringement.

There are also other expressions which must be defined. They are the words "permanent adhesive" in claim 5, "adhesively bonded" in claim 8 and "the reverse side of the film being *secured temporarily* to one side of a paper backing" in claim 13.

I should first like to deal with the term "secured temporarily" which is very ordinary and very broad language and which clearly cannot be held necessarily to require that the temporary securing be accomplished by an adhesive. It is general language which, in my view, would apply to any means of securing the laminate temporarily and it would include not only the pressure sensitive adhesives but also the heat and solvent activated ones (which are respectively adhesives activated by heat and by solvents). Indeed, it would encompass any mode, even a mechanical one, of securing the laminate together.

With regard to the term "permanent adhesive" the very fact that a considerable part of the evidence was devoted to finding out what it meant and that varying interpretations were given as to the number of possible meanings it may have, indicates clearly that in any event it is a very broad term.

Mr. Parrington, on behalf of the plaintiff, looking at Ex. 21, which is a sheet cut off the roll of a piece of Con-Tact stated at p. 278 of the transcript:

A. ... We find on the obverse side, or the side opposite the printing a layer of pressure sensitive adhesive described as that backing or permanent pressure sensitive, or permanent adhesive, and if I demonstrate just quickly, we see it sticks upon contact even in the absence of pressure and is removable.

And at p. 331 of volume 3, this same witness, at line 25, referring to the outer surface of the plastic film states:

A. ... we find a pressure sensitive or permanent adhesive.

At p. 333 of the transcript he states that pressure sensitive adhesives are designed to last indefinitely.

It therefore appears that what the plaintiff's witness is saying here is that pressure sensitive adhesives connoting permanent tackiness must, therefore, be a permanent adhesive.

It does not follow, however, from this, and relying only on the plaintiff's evidence in this respect, that the expression "permanent adhesive" refers only to pressure sensitive adhesives.

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There is indeed no reference in the disclosure to permanent adhesive whatsoever and, therefore, within the patent specification, there is nothing which would indicate that permanent adhesive by definition connotes necessarily a pressure sensitive adhesive. As a matter of fact, Mr. Parrington, the plaintiff's witness, admits this very point at p. 535, volume 4, of the transcript:

Q. Are you suggesting that the term "permanent" as applied to adhesive means that it must be a pressure sensitive adhesive?

A. No, the expression "permanent" means to infer that it acts as an adhesive permanently.

Now as a heat activated adhesive or a solvent adhesive, as admitted by this same witness, acts also as a permanent adhesive, the words "permanent adhesive" cannot, in my view, be read as applying only to a pressure sensitive adhesive.

I have also considered the words "permanent adhesive" in this context in the whole of claim 5, and particularly in relation to the words "securing a temporary paper backing to the exposed adhesive, said backing being adapted subsequently to be stripped from the adhesive" with a view to determining whether they indicated necessarily a pressure sensitive adhesive. Here also I must conclude that they do not, because the evidence, in my opinion, discloses that even the heat activated adhesive can be peeled off and the degree of pulling would involve just about the same amount of force as with the pressure sensitive adhesive.

Mr. Parrington, in connection with a heat activated adhesive, being a permanent adhesive and being removable, was cross-examined in this regard at p. 537 of the transcript:

Q. Have you ever heard of heat activatable adhesives?

A. Yes.

Q. What are they?

A. Adhesives responsive to heat and therefore called thermoplastic materials.

Q. . . . can heat activated adhesives be used to laminate one surface to another surface?

A. Yes.

Q. Can it be used to laminate a plastic film to a sheet of paper?

A. Yes.

Q. And assuming that such a laminate were made... could such an adhesive be regarded as permanent adhesive?

A. Yes, it could.

Q. Could it be regarded as a temporary adhesive?

A. Yes, it could be regarded as a temporary adhesive too.

The witness was then asked whether the backing paper could be regarded as being temporarily secured to the film to which he replied:

A. No, Mr. Gray, not without employing a number of other qualifications, which you haven't qualified.

Q. Such as what?

A. For instance, the adhesive—My Lord, it may be bonded to the paper with the application of heat. It is then a permanent adhesive until it is re-softened by the application of heat. Re-softening again gives it adhesive quality, but it does not imply that it is separable from the paper to which it was applied, unless the paper were of such a sort as to have only a mild degree of adhesion to the adhesive film.

This same witness was then asked if his answer would be different if the paper were coated with an anti-adhesive coating to which he replied:

A. My answer would be, then, no, we do not have a permanent adhesive because in the instance of using a thermoplastic adhesive against an anti-adhesive coating on paper, we would effect no bond.

This answer in my view indicates to me that the witness here was quibbling and had no desire to answer the real point involved in this line of questioning, which, however, he does answer in some measure when further examined on this point and when he finally admits that, of course, the permanency of the adhesive, if an anti-adhesive coating is used, is a matter of degree depending upon how much is used in a particular case. He indeed had to admit that the degree of anti-adhesiveness had a bearing on whether there was a permanent adhesive or not, as, if he had not, having stated in earlier testimony that even Con-Tact uses an anti-adhesive coating, he would then have had to admit that the plaintiff's product could not be considered as a permanent adhesive. He also admitted that pressure sensitive adhesives are also thermoplastic or thermosensitive. It therefore follows that a heat activatable adhesive, with a certain degree of anti-adhesive coating applied thereto is not only a permanent adhesive, but also could have a backing paper temporarily secured to the film.

There appears to be further confusion possible in using the term "permanent adhesive" in that within the pressure sensitive adhesives, there can be two types of laminated material, one that can be easily separated and the other

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which one cannot separate without destroying the film. This was brought out by the defendants' witness, Mr. Palmquist at p. 1034, at line 3, of the transcript:

- Q. As a matter of terminology, do you distinguish between the sort of pressure sensitive adhesive in the material you just referred to and the pressure sensitive adhesive in the early material, the exposed surface of which cannot be removed?
- A. Well, our terminology—we refer to the one as the permanent type adhesive and the other as a removable type of adhesive.

And at p. 1280, this same witness cross-examined by counsel for the plaintiff on the suggestion that there is something different between what is a permanent adhesive and something which creates a permanent bond, replied:

- A. Well, this is the type of terminology that we can use in our organization to contrast combinations of materials that can be easily removed. There is an entirely different concept to what a permanent adhesive might be. It might be one that would last forever...

Later, the witness stated that his definition with respect to permanent was not in connection with the life of the adhesive. Finally, at p. 1287, line 13, Mr. Palmquist stated:

- A. In the usage of the art permanent can be something with respect to its life, and it also can describe a property with respect to the degree with which it bonds to a surface. In our particular thinking and terminology we are talking about the degree of bonding, and not how long it lasts.

It, therefore, in my view, follows that whatever the term "permanent adhesive" means, and I believe we can say that it may have many and various meanings, it certainly cannot be said to be synonymous with pressure sensitive adhesive whether or not it is read in the context of claim 5 of the patent in suit.

The definition of pressure sensitive adhesive as taken from p. 80 of the American Adhesive Index, edited by Patrick McGuire, and read to Mr. Palmquist by counsel for the plaintiff, is as follows:

An adhesive film displaying permanent tackiness and universal adhesion; an adhesive surface which requires only temporary pressure to achieve adhesive bonding.

It does not, however, follow, in my opinion, that because this definition discloses that pressure sensitive adhesion means one that is permanently tacky (i.e., sticky, must have a grab to it, not completely dry and yet not so wet that it just strips out) that a permanent adhesive is one that is necessarily a pressure sensitive adhesive but it could also be

a heat or solvent activated adhesive or any other type of adhesive providing it gives rise to a permanent bond and because of this, the term "permanent adhesive" must, as used in claim 5, be taken to have that very broad meaning.

I am further convinced that such is the proper construction to be given to the words "permanent adhesive" if consideration is given to the words used on numerous occasions in the disclosure of the patent in suit, namely "pressure sensitive adhesive", to describe an adhesive that always remains tacky. That term was immediately available and at hand and, in my view, should have been used in the claim if the disclosed invention was to be properly described. In addition, in claim 6 (which up until the end of the evidence, was involved in these proceedings but which thereafter was withdrawn from suit by counsel for the plaintiff) this very terminology of "pressure sensitive adhesive" was used. The fact that in claim 6 the patentee used this specific terminology and that in other claims he refers to adhesives at large or to polyisobutylene adhesives, indicates necessarily that when the patentee uses these different phrases he is not using them as having the same meaning. That also confirms the view that the words "permanent adhesive" as used in claim 5 mean something much broader than pressure sensitive adhesive.

I now come to the term "adhesively bonded to each other". These words, in my view, are even broader than "permanent adhesive" and can in no way be restricted to a pressure sensitive adhesive even in the context of the wording used in the claim which indicates that the backing paper is to be stripped from the film in order to adhere to a surface. The language here also is clearly sufficiently broad to cover the heat activatable adhesives.

I now come to the term "slip strip" used in claim 8 in association with the word "film" at lines 16 and 17 of column 8 of the patent in suit as follows: "film-slip strip". Mr. Parrington was questioned at p. 303 of the transcript, by counsel for the plaintiff as to the meaning of these words and his answer was:

- A. ... this falls in the vernacular of the trade. That is, a paper that may be slipped or stripped off; it may be slipped back on. It is another expression for temporary backing, removable backing.

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This same witness was then cross-examined later on this subject and shown Ex. H which is a "decal" transfer. He was then asked at p. 492 of the transcript:

Q. Referring to the backer, the paper that is slid off the film of Exhibit H, is that a temporary paper backing?

A. This is obviously a fibrous structure like paper. I would identify this very probably as paper, but not positively. Since it has been separated from the decal I think it would fall in the category of "temporary".

Q. Would it fall in the category of being regarded as a slip strip?

A. In the vernacular of the pressure sensitive trade we might identify this as a slip strip.

Q. Or slip strip paper?

A. Yes, or slip strip paper.

He then, however, refused to agree that if the film were a plastic film, the laminate could be termed a plastic film slip strip paper by stating:

A. No. The defect in so identifying is that the article cannot be conveniently returned to the paper for later re-application, in my estimation.

Having thus brought into the significance of the word slip strip the requirement also that it should be returnable to the paper for later application, he was then queried on this matter as follows:

Q. Is that (its returnability) a necessary quality of the expression "slip strip paper"?

A. That is an implication of the expression "strip slip".

Q. But a few moments ago you said it would be appropriate to term this a slip strip paper.

A. That is true.

Having admitted as this witness did that the "decal" material was a slip strip paper, if the film thereon was a plastic film, it clearly follows, in my view, that it would be necessarily a plastic film slip strip paper. To import into the words used, in the absence of the words "pressure sensitive adhesive", which, as seen, is one which is always tacky, the further requirement as put by the witness that in his estimation (and it may be noted that he is not relying on any particular significance of these words in the art) the articles must also be able to be conveniently returned to the paper for later reapplication is not acceptable not only because of the prior testimony of the witness to the effect that "in the vernacular of the pressure sensitive trade we might identify this" (the "decal" transfer, Ex. H.) "as a slip

strip" but also because of the clear ordinary meaning of the words slip strip which can be found for instance in the Shorter Oxford English Dictionary where one of the meanings of slip is (3) a long and relatively thin (sic) and narrow (sic) piece or strip of some material and where the significance of strip is "to doff, take off, peel away, remove from".

Having regard to these meanings, it can be taken, in the absence of a proven technical meaning in the art different from the plain and ordinary meaning, that we are merely dealing here with a material that can be stripped off something and it connotes no requirement that it be possible to reapply it. It therefore encompasses all materials that can be stripped or peeled off.

This disposes of the terms used in the three claims in suit which gave rise to some difficulty. Before leaving the subject, it might be useful to review here the meaning of the language of the three claims in the light of the conclusions that I have just reached.

Claim 5 deals with a method of making a material (it is not restricted to a plastic film) whether it is a film or a cloth or any other material, adapted to cover a surface. The material must be decorative (appealing to the eye) and in sheet form (i.e. thin and flat irrespective of size) and involve the following steps: the application of a decorative pattern on the top side of the material, of a permanent adhesive to the under side (and this means any adhesive, whether pressure sensitive or heat activatable, as long as it creates a permanent bond), then the securing of a special type of temporary paper backing to the exposed adhesive and, finally, the printing of instructions on the exposed surface of the temporary paper backing.

Claim 8 is directed to a new article of commerce, more particularly a plastic film (which includes any plastic including cellulose acetate film) slip strip paper (i.e., a removeable backer made of paper). It also calls for a combination of any film and a removeable paper backer to be in sheet form (ie. thin and flat irrespective of size) and then the words "adhesively bonded to each other" which encompasses any type of adhesive so long as it has some sort of bonding action, with instructions printed on the paper dealing with the manner in which to use the product.

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Claim 13 calls for a laminate for covering surfaces comprising a film of vinyl chloride, which (according to the plaintiff's witness Parrington, at p. 298 of the transcript) is also known under the terms "vinyl film, vinyl film and sheeting, polyvinyl chloride, a film of vinyl chloride, vinyl chloride film". The laminate bears an ornamental design on one side of it, and the reverse side of the film is "*secured temporarily*" to one side of the paper backing which may be done by means of any type of appropriate adhesive or even without an adhesive at all and finally here also the other side of the paper backing bears printed instructions as to how the product is to be used.

The above, in my view, not only establishes that the language used in the three claims, and particularly with regard to the matter of adhesiveness of the laminate, is extremely broad but also that it goes beyond not only the invention as described in the disclosure and as emphasized by the plaintiff's witnesses, but also the invention as described by the plaintiff's counsel. Indeed, both of the plaintiff's witnesses, Mr. Strauss and Mr. Parrington, were at great pains to emphasize that a fundamental and essential characteristic of the invented product was its ability to be put on and taken off, that there were no messy solvents, or heat required in view of this always tacky pressure sensitive adhesive. There are indeed many references in the evidence to this pressure sensitive adhesive feature as being essential to the invention such as, for instance, its application to a surface by simply pressing upon it, the fact that there is no need for special tools, except scissors, no spilling or wiping up (none of which would be applicable if a heat or solvent activated adhesive was used). The evidence is also to the effect that, in the development of Con-Tact, no adhesive was ever used other than pressure sensitive adhesives. Finally, the evidence of commercial success has no significance whatsoever except in relation to the pressure sensitive adhesive.

It therefore appears that a proper reading of the three claims discloses no limitation that the product be removable and reapplicable nor even that a "pressure sensitive adhesive" be used (although claim 6, which is not in suit, calls for such an adhesive). In view of this, it necessarily follows that the disclosure of the specification does not

support the claims and, if this is so, the claims are invalid on this basis alone. It also follows that the patentee has not complied with the requirement of section 36(2) of the Act which requires the applicant to state in the claims distinctly and in explicit terms the things or combinations that he regards as new and which he claims an exclusive property or privilege.

In *Radio Corporation of America v. Raytheon Manufacturing Co.*<sup>1</sup> Thorson P. clearly dealt with a similar situation when he said:

. . . It is a cardinal principle of patent law that an inventor may not validly claim what he has not described. In the patent law jargon, it is said that the disclosures of the specification must support the claims. If they do not, the claims are invalid.

The fact that, in none of the claims in suit, the pressure sensitive adhesive or the removeability of the product and its reapplicability, two essential characteristics of the patentee's invention, are not mentioned at all makes these claims different from and much wider than the alleged invention and the patentee, therefore, is not entitled to these claims.

Further authority on this matter can be found in the *Mullard Radio Valve Company v. The Philco Radio and Television Corporation of Great Britain*<sup>2</sup> in the House of Lords where this very question of a patentee claiming too extensively was dealt with by Lord MacMillan at p. 345 as follows:

A patentee may make a most meritorious discovery and may give an entirely adequate description of his inventive idea and of the manner of putting it into practice, but when he comes to formulate the claim to his invention he may claim a monopoly wider in extent than is warranted by what he has invented.

And at p. 346 he continued:

. . . A patentee is granted his monopoly in order to protect the invention which in his specification he has communicated to the public. He is not entitled to claim a monopoly more extensive than is necessary to protect that which he has himself said is his invention.

At p. 347 he added, and this is rather pertinent to the present case:

It was argued for the Appellants that if an article is new, is useful and has subject-matter, then it is necessarily patentable and entitled to protection. But a claim may be for an article which is new, which is useful and which has subject-matter, yet it may be too wide a claim because it extends beyond the subject-matter of the invention.

<sup>1</sup> 27 C.P.R. 1 at 12.

<sup>2</sup> (1936) 53 R.P.C. 323.

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The language of the three claims here, as we have seen, is so broad that it clearly extends beyond the subject-matter of the invention and as this language is couched in clear ordinary words which cannot, in my view, be legitimately limited in their scope by a reference to the specification, they must be held to be invalid.

Dealing with a very similar situation in *B.V.D. Company Ltd. v. Canadian Celanese Ltd.*<sup>1</sup> Davis J. stated at p. 228:

A formidable objection to the validity of the patent is advanced by counsel for the appellant upon the ground that the claims are not limited to the use of woven cellulose yarns but extend to the use of a cellulose derivative in any form.

The objection then, to the validity of the claims is that they omit any reference to what counsel for the respondent at the trial described in the opening statement as "the new ... and all important feature of the invention" namely, the form in which the thermoplastic derivative of cellulose to be acted upon is to be present in the layers of fabric to be united.

At p. 230 he added:

Unless the claims in the Canadian patent can properly be narrowed by the introduction of a limitation to the use of the cellulose derivative in the form of yarns, filaments or fibres, they are, we think, clearly anticipated by the United States patent of Van Heusen and the British patents of Green and Henry Dreyfus.

And then at p. 233, after asking why the claims omit what counsel stated at the trial was "the new ... and all important feature of the invention" and why this was left out of the claims, he concludes at p. 233 as follows:

... We cannot say. Throughout the somewhat long specification there is a continuous reference to the use of the thermoplastic derivative of cellulose in the form of yarns, filaments or fibres and it is plainly the very essence of the disclosure in the specification. Why, then, was it left out of the claims? It may have been a slip of the draftsman or it may have been a deliberate omission in an effort to secure a wider field of protection than the disclosure warranted.

The same question may be asked in the present case and we may well wonder why, when in claim 6, which is not in suit, the term "pressure sensitive adhesive" was used, it was not used in the claims in suit. I might also point out that in the American judgment (Ex. 7) filed by the plaintiff, which sustained the American patent of the plaintiff, the two corresponding claims used the words "pressure sensitive permanent adhesive".

There appears to me to be no possible justification for the patentee here to have used, as he did in the three claims in

<sup>1</sup> [1937] S.C.R. 221.

suit, such general language as “permanent adhesive”, “adhesively bonded” and “secured temporarily”. In view of the proper terminology used in claim 6 of the patent, the only reason for so doing appears to me to have been to secure a wider field of protection than the disclosure warranted.

It also appears that I cannot, in order to limit these claims, go to the disclosure where the pressure sensitive adhesive is stressed because there is nothing which can justify me in doing so. There is indeed, as far as I know, no dictionary meaning in the specification which could give a particular significance to the words used in the claims and which would necessarily limit them to a pressure sensitive type of adhesive. If this cannot be done, no assistance can be obtained by a reference to the disclosure. Moreover, to do so in such circumstances would be quite unwarranted. It would be doing what the Lord Chancellor, Lord Loreburn said should not be done in *Ingersoll Sergeant Drill Company v. Consolidated Pneumatic Tool Company Ltd.*<sup>1</sup> when he said at p. 83:

... Obviously, the rest of the Specification may be considered in order to assist in comprehending and construing a Claim, but the Claim must state, either by express words or by plain reference, what is the invention for which protection is demanded. The idea of allowing a patentee to use perfectly general language in the Claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the Specification, is wholly inadmissible. I should have thought it was also a wholly original pretension.

Now two of the claims, claim 5 and claim 8, are not only unreasonably broad but they are quite ambiguous. Indeed, the use of the terms “permanent adhesive” and “adhesively bonded” when the clear words “pressure sensitive adhesive” had been used extensively in the disclosure and even in one claim, and were available, when there were a number of adhesives mentioned in the specification of the patent, can only indicate to me that the patentee was deliberately using general language. If one looks at the claims of the patent, one is struck by the fact that the patentee took great pains to differentiate in the claims the various types of adhesive. In claims 1 to 4 he mentions a polisobutylene adhesive, in claim 5 a permanent adhesive, in claim 6 a pressure sensitive adhesive, in claims 6, 7, 10 and 11 a polisobutylene type of adhesive, in claims 7, 10 and 11 a thermoplastic adhesive

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<sup>1</sup> (1908) 25 R.P.C. 61.

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(for the other adhesive near the cloth), in claims 7, 9, 10, 11 two coatings of adhesives, in claim 8, adhesively bonded, in claim 12 "secured" or "adherents" (with no reference to an adhesive at all) and finally, in claim 13, "secured temporarily" (with no reference to an adherent at all).

Such a deliberate use of general language can only indicate that the purpose of using such language (as stated by Lord Justice Romer in *British Hartford Fairmont Syndicate Ltd. v. Jackson Bros. (Knottingley) Ltd.*<sup>1</sup>) "may well have been intentional and created with the object", to use the words of Lord Loreburn in the *Natural Kinematograph case*<sup>2</sup>.

...of holding in reserve a variety of construction for use if the patent should be called in question, and in the meantime to frighten off those who might be disposed to challenge the patent.

The three claims in suit, 5, 8 and 13 go far beyond the invention and upon that ground alone these three claims are, in my view, invalid.

In view of the conclusions I have reached with regard to the three claims relied on herein, it becomes unnecessary to deal with the other submissions made for the defence and particularly with the defence of invalidity based on the said claims being anticipated or not being inventive, other than to say that having regard to the date of invention of the patent in suit which, as already mentioned, corresponds with the American application date, i.e., August 9, 1954, and the extremely broad language of the three claims in suit, the evidence with regard to the available and applicable prior knowledge, prior patents and even prior use (in the relevant art as hereinabove defined) is such that the claims as drafted cannot, in my view, contain even the scintilla of inventiveness required to sustain them. I should also add that the presence of printed instructions and the reference thereto in the claims cannot, in my view, lend patentability to an otherwise unpatentable combination, nor can the contents of the instructions be used to import a limitation into the claims.

The action, accordingly, fails and will be dismissed with costs and the counterclaims restricted as stated by counsel

<sup>1</sup> (1932) 49 R.P.C. 495 at 556.

<sup>2</sup> (1915) 32 R.P.C. 256 at 257.

for the defendants to the claims in suit only, is therefore maintained with costs to the two defendants who have counterclaimed, i.e., Stix International and C. E. Springer Company, Limited. The said three claims in suit 5, 8 and 13 are, therefore, declared to be invalid. As the four defendants were represented by the same counsel there will only be one counsel fee at trial in the principal action and one counsel fee at trial in the counterclaims.

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BETWEEN:

NICHOLAS DETORO ..... APPELLANT;

AND

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

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 June 16, 17  
 July 19

*Revenue—Income tax—Capital gain or income—Adventure or concern in nature of trade—Acquisition of land for construction of apartment building—Transfer of property to company—Sale of company shares—Whether sale contemplated when property acquired.*

Appellant, a speculative builder, joined with an employee of a mortgage brokerage firm in purchasing a city lot which they transferred to a company formed for that purpose, and an apartment building was then erected on the lot. They then acquired additional lots, some of which they sold and upon others of which they later constructed another apartment building. Before construction of the second building was begun the first building was sold at a profit of \$40,000, the transaction being put through at the purchasers' request by a transfer of the shares in the company which owned the building. Appellant was assessed to income tax on his profit from the sale, and appealed.

*Held*, dismissing the appeal, the gain made was profit from an adventure or concern in the nature of trade and so taxable. The evidence indicated that it was not the exclusive intention of the two men at the time they acquired the property to derive rental income from a building to be constructed thereon but that they also contemplated the possibility of its sale. It was immaterial that the profit was made on the sale of shares in the company which owned the building rather than from the sale of the real property.

APPEAL from assessment under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

*Colin S. Bergh* for appellant.

*G. W. Ainslie* and *Alban Garon* for respondent.

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

CATTANACH J. now (July 19, 1965) delivered the following judgment:

This is an appeal from assessment to income tax levied by the Minister on the appellant for the 1961 taxation year.

The appellant began his working life as a construction worker specializing, at first, as a tile setter, but subsequently engaged in the building of single family dwellings in and about the City of Toronto. While the appellant could and did build the odd home pursuant to contract, nevertheless the greater number of homes which were built by him were built on a speculative basis, that is with no specific purchaser in view.

In 1958, because of competition from developers and builders on a large scale, the appellant's business was no longer profitable so he abandoned it and cast about for another means of livelihood.

During the appellant's career as a speculative builder, he had become well acquainted with Stanley W. Carr, who is also an appellant from assessment to income tax for his 1961 taxation year arising from the same transaction as gives rise to the present appeal. Mr. Carr had been the employee of a firm of financial agents and as such had been engaged in placing mortgage monies on behalf of his employer. In this capacity, Mr. Carr first became acquainted with the appellant and their business relationship ripened into a personal friendship.

In the fall of 1958 it came to the appellant's attention that a parcel of land in the City of Toronto, municipally known as 151 St. George Street, was for sale at a price of \$73,000. This particular parcel had a frontage of 57 feet, 5 inches and the parcel immediately adjacent to the north had a frontage of 56 feet, 7 inches, while the property immediately adjacent to the south had a frontage of 57 feet. The remainder of the block was taken up by two apartment buildings.

The municipal by-law in effect at that time and to which the property was subject permitted the construction of an apartment building with a floor area three and one-half times the lot area with side yards of no less than 10 feet.

Such by-law would permit of the erection of an apartment building containing 48 suites. The owners of the site, upon which there was an old house of substantial size, had made an application for and had been granted a building permit for such a building by the Municipal authority.

It became known to the appellant that no further building permits of this nature were available from the City of Toronto with respect to the immediate area because of the prospective enactment of a further zoning by-law prohibiting the erection of any building on a lot having a front lot line of less than 90 feet, any part of which would be within 15 feet of the side lot lines and further that the floor area should not exceed two times the lot area. A by-law to this effect, being by-law No. 20623 was in fact given first reading by the City of Toronto on April 13, 1959 and was subsequently approved by the Ontario Municipal Board on June 29, 1959 thereby coming into force.

The appellant also ascertained that the building permit obtained by the then owners of the site prior to the end of the 1958 calendar year would be available to a purchaser, as would other permits which might have been similarly obtained with respect to other sites in the area. The appellant investigated further and found that no applications for building permits had been made with respect to the lots immediately adjacent to 151 St. George Street to the north and south, which for purposes of convenience will hereinafter be referred to as 149 and 153 St. George Street. The appellant therefore concluded that an apartment could be erected on 151 St. George Street and that the likelihood of competitive buildings being erected on 149 and 153 St. George Street was remote because the restrictive terms of by-law No. 20623 would render such projects economically unfeasible.

The appellant thereupon telephoned his friend Stanley Carr, who was likewise impressed with the prospect of an apartment building on 151 St. George Street and readily agreed to the suggestion of the appellant that they should purchase the site and build an apartment house thereon. The arrangement between them was that the appellant, because of his building experience, should undertake the detailed supervision of the acquisition of the site, the erection of the building and subsequent to its completion

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the management and operation thereof. Carr, for his part, would supply the necessary funds from his personal resources and arrange mortgage financing and the like since that was where his experience lay. However, because of the possible implication of Carr entering into competition with clients of the firm of financial agents by whom he was employed, it was arranged that he should otherwise be inactive in the matter and that the appellant should assume the active and dominant role in all negotiations.

Accordingly on September 17, 1958 an agreement for the purchase of the land was entered into, in trust for a company to be formed, at a price of \$73,000 which funds were provided jointly on behalf of the proposed company by the appellant from the proceeds of the sale of his construction business and by Carr from his personal savings.

By Letters Patent dated December 23, 1958 a company was incorporated under the name of 151 St. George Street Limited and in accordance with the terms of purchase the land was registered in the name of the company.

All of the issued shares in the capital stock of the company were issued to the appellant and Carr in equal proportions.

On December 23, 1958 a building permit was granted to the company to excavate and build foundations. On May 3, 1959 a further building permit was issued to the company to erect a 48 suite apartment building on that site. The appellant in his testimony, described these permits as renewals of the previously issued permits although on their faces they are originals.

Demolition of the previously existing building on the site was begun on December 1, 1958. The apartment building was completed in December 1959 but had been fully leased and occupied in September 1959.

Interim financing of the construction of the building was by means of a bank loan of \$75,000. A mortgage loan of \$315,000 was obtained by the company from London Life Insurance Company out of which the bank loan was repaid and construction costs paid. Prior to this mortgage having been obtained, a mortgage commitment had been received from Investors Syndicate for a sum of \$300,000. The total cost of the building and land was \$436,396.74. The difference was made up from capital of the company and advances by

the appellant and Carr with Carr putting up the greater amount.

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In February or March of 1959, prior to the completion of this apartment at 151 St. George Street, the appellant and Carr became aware, through the architect employed by them, that other clients of that architect were desirous of building apartments at 153 and 149 St. George Street and to do so would make application to amend zoning by-law No. 20623 so as to restore the restriction of 10 foot side yards and a floor area of 3½ times the lot area rather than the restriction of 15 foot side yards and a floor area of two times the lot area as provided in by-law No. 20623.

On learning of the possibility of a change in the zoning by-law affecting 149 and 153 St. George Street the appellant approached the owners of 149 St. George Street forthwith to ascertain if they would be willing to sell, which they were. Accordingly the appellant and Carr, as trustees, on April 20, 1959, executed an offer to purchase (which was accepted) 149 St. George Street for \$85,000, paying a deposit of \$500, with \$28,500 to be paid upon closing and a first mortgage back to the vendors for the balance. The offer contained a provision that an existing building could be demolished and that if a building permit for an apartment was not forthcoming then the appellant and Carr might terminate the contract if they wished.

Similarly the owners of 153 St. George Street were approached and an offer to purchase that property was executed on July 9, 1959 by the appellant and Carr as trustees, which offer was also accepted, also at a price of \$85,000 payable by a deposit of \$1,000, \$10,000 on closing and a first mortgage back to the vendors for the balance of \$74,000. This offer was subject to the same conditions respecting the acquisition of a building permit as was the offer to purchase 149 St. George Street.

On July 17, 1959 a document was executed by the appellant and Carr acknowledging that 153 St. George Street was held by them in trust for Samuel Roy, a builder, and that 149 St. George Street was held in trust for a limited company to be formed in which the appellant and Carr were to be the only shareholders.

Subsequently the beneficiary of the trust respecting 149 St. George Street was changed to become the wives of the

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appellant and Carr who purchased the property with their own funds and from the proceeds of a loan arranged for them by Carr. This property was sold subsequently by the wives at a profit upon which income tax was levied and paid.

The appellant and Carr then became the initiators of an active and persistent campaign to have by-law No. 20623 amended as it affected 149 and 153 St. George Street. This campaign was begun by a letter dated December 4, 1959 to the Department of Buildings and Development of the City of Toronto from the architect employed by the appellant and Carr for building permits for two buildings similar to that on 151 St. George Street and with dimensions identical thereto to be erected on 149 and 153 St. George Street.

By a report to the Committee on Buildings and Development, dated February 2, 1960, the Commissioner of Planning recommended against the requested exemption from the residential standards of by-law No. 20623 being granted. A similar recommendation dated February 11, 1960 was made by the City Solicitor and the Commissioner to the Committee.

The Committee, after a meeting held on March 2, 1960, at which the architect appeared in support of his application, recommended to City Council that the zoning by-law be amended to permit of the erection of the proposed apartments on 149 and 153 St. George Street. City Council called for a poll of the owners of property in the area which resulted in 24 being in favour, 8 opposed, 12 did not reply and 2 were disinterested. (It is obvious that the appellant and Carr were in favour of the amendment). City Council thereupon enacted by-law No. 20995 on May 24, 1960 amending by-law No. 20623 to permit the erection on 149 and 153 St. George Street of apartment houses having lesser side yards, and greater floor space area than prescribed in by-law No. 20623.

However, the approval of the Ontario Municipal Board was a condition to by-law No. 20995 coming into force.

The appellant and Carr next retained counsel to obtain an early appointment before the Board and to represent them at that hearing. By its decision dated July 25, 1960, the Ontario Municipal Board approved the by-law stating that, in its opinion, the erection of the proposed apartments would not harmfully affect the proper enjoyment of the

adjoining lands for their present uses and that an undue hardship would be inflicted upon the owners of 149 and 153 St. George Street if the by-law were not approved.

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By an agreement between Samuel Roy (the beneficiary of the trust respecting 153 St. George Street) and the appellant and Carr entered into on an unspecified day in May 1960, Roy agreed to pay the appellant and Carr \$10,000 for their services in keeping the contract for the purchase of 153 St. George Street alive, by arranging numerous extensions, and for obtaining the amendment to the zoning by-law. It was subsequently agreed between Carr and the appellant that the appellant should retain the \$10,000 so paid by Roy since the appellant had conducted the bulk of the negotiations.

Immediately upon the completion of the construction of the apartment building on 151 St. George Street, the appellant and Carr began assembling other property on St. George Street for the purpose of erecting a larger apartment building thereon.

On December 28, 1959, the appellant, as trustee for the company to be incorporated, made an offer to purchase property known municipally as 268 St. George Street for \$45,000. A deposit of \$500 was made, \$14,500 was to be paid on closing with a first mortgage back to the vendor for the balance of \$30,000. It was also agreed that upon payment of \$10,000 on account of principal the existing building on the lot could be demolished. The offer was conditional upon a building permit for the erection of an apartment being obtained. This offer was accepted by the owner.

On January 26, 1960 an offer was also made to purchase numbers 274, 276 and 278 St. George Street for a price of \$137,500, which offer was accepted. A deposit of \$5,000 was paid, \$30,000 was to be paid on closing, an existing mortgage would be assumed and a mortgage for the balance would be given back to the vendor. This offer was also conditional upon the purchaser being able to obtain a building permit to erect an apartment before the closing date.

Extensions to both these offers were from time to time requested by the appellant and Carr and were granted, subject to the terms of payment of additional amounts.

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During the course of the construction of the apartment building at 151 St. George Street, the appellant was approached by a real estate agent with an offer to purchase the building on behalf of Venezuelan interests which offer the appellant, after consultation with Carr, refused.

Early in 1960 a listing was given to a real estate agent named Tasse to sell the apartment at 151 St. George Street. The appellant also advised at least eight real estate agents that the property was for sale and supplied them with an estimate of income and expenditure.

On September 27, 1960, the Company, 151 St. George Street Limited accepted an offer to purchase 151 St. George Street at a price of \$440,000 which exceeded the cost of the land and building by a very small amount. It was a condition of the offer that the transaction be closed by October 31, 1960.

On October 14, 1960 the Company, the appellant and Carr received an offer from Judges Landreville and Cooper for the property at 151 St. George Street at a price of \$480,000 which represented a profit of approximately \$40,000. This offer was accepted on behalf of the Company subject to the condition of the prior offer of September 27, 1960 not being perfected by October 31, 1960. In the opinion of the appellant and Carr the prior offer was not perfected prior to October 31, 1960 and accordingly the offer of October 14, 1960 was accepted without qualification on October 31, 1960.

By an agreement dated October 31, 1960 between Judges Landreville and Cooper of the one part and the Company, the appellant and Carr of the other part, it was provided that rather than the real estate being sold to them, they would purchase all outstanding shares in 151 St. George Street Limited, the beneficial owners of all such shares being the appellant and Carr for the like sum of \$480,000.

The offeror of the offer dated September 27, 1960 began litigation which was settled so the actual sale of the shares was delayed until 1961. The profit from this sale of shares is the subject matter of the appellant's assessment to income tax for 1961 from which the present appeal is taken.

Immediately following the sale of the shares in 151 St. George Street Limited the appellant and Carr erected an

apartment building at 268, 274, 276 and 278 St. George Street through the interposition of a joint stock company named 276 St. George Street Limited in which the appellant and Carr were the only shareholders and apartment buildings were erected on 149 and 153 St. George Street by persons other than the appellant and Carr.

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The appellant's case is set out in his Notice of Appeal as follows:

At no relevant time has the appellant purchased and sold real estate for the purpose of earning income and at no time has the Appellant dealt or traded in shares of the capital stock of corporations as a business.

The relevant facts indicate that the sale of the shares of 151 St. George Street Ltd. by the Appellant did not constitute a sale of inventory but rather a forced realization of a capital investment in order that it might be preserved intact and so that the proceeds of sale could thereupon be reinvested in like security in 276 St. George Street Ltd. from which company the Appellant receives and enjoys investment income properly subject to income tax.

The Minister has accordingly erred in assessing the Appellant to tax on the fortuitous gain received by him in 1961 on the sale of shares of 151 St. George Street Ltd. within the meaning of Sections 3, 4, and 139(1)(e) of the Income Tax Act.

In answer to the foregoing the Minister contends:

That the acquisition by the Appellant and the said Stanley Carr of a certain parcel of real property known as 151 St. George Street, in the City of Toronto, and its realization in the form of shares of capital stock of a company known as 151 St. George Street Ltd, together with a further realization of the shares of such company at a profit to the Appellant of \$18,440.73 is income from a business within the meaning of the word as defined in the Income Tax Act.

The question for determination is whether the profit realized on the sale of the shares of 151 St. George Street Limited constituted a profit realized from a venture that commenced with the acquisition of the real property known as 151 St. George Street and was, therefore, a profit from a business within the meaning of sections 3 and 4 of the *Income Tax Act* and the extended meaning of "business" as defined by section 139(1)(e) to include an adventure or concern in the nature of trade or, as contended by the appellant, the land was acquired and the apartment house built thereon exclusively as an investment for the purpose of receiving rental income therefrom and that the disposition thereof, through the sale of shares constituted the realization of a capital asset.

In my view, the fact that the profit was made by the appellant and Carr from the sale of the shares in the

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Company and not from the sale of the real property, is immaterial. The original offer from Judges Landreville and Cooper, which the appellant and Carr conditionally accepted, as the only shareholders and officers of the company, was for the acquisition of the real property from the Company. The offerors subsequently suggested that the shares of the Company be purchased rather than the real property to obviate the necessity of the incorporation of a further company to hold the property to be purchased, to which arrangement the appellant and Carr readily agreed. They had decided that the real property should be sold by the Company. Without it, the Company was of no further use to them. While they were not the initiators of the proposal they concurred in it so this was, therefore, merely an alternative method that the appellant and Carr adopted to complete the venture commencing with the acquisition of the real property. See *R. K. Fraser v. M.N.R.*<sup>1</sup> per Cameron J. at page 345 *et seq.* and in the Supreme Court of Canada<sup>2</sup> at page 376.

On behalf of the appellant it was stressed that the site at 151 St. George Street was possessed of such unique attributes as would ensure the success of the project. However, the owners of 149 and 153 St. George Street were both willing to sell prior to December 1958, the deadline date after which building permits for apartments would not be granted. While it is true that the then owners had not applied for building permits, either for themselves nor on account of any other persons, there was a three month period during which building permits might have been granted with respect to numbers 149 and 153 if they had been applied for. Therefore, the unique characteristic of 151 St. George Street, upon which the appellant and Carr rely as indicative of their intention to retain that site with an apartment constructed thereon as an income producing capital asset, did not exist on September 17, 1958, the date of their acquisition of the property and did not arise until December 31, 1958. The construction of the apartment had been begun prior to the date when this unique quality became a certainty.

<sup>1</sup> [1963] Ex. C.R. 334.

<sup>2</sup> [1964] C.T.C. 372.

Further this unique quality did not persist for any length of time. In February 1959, two months after it was a certainty that permits would not be issued for buildings on the adjoining lots, the appellant and Carr learned that there was a possibility of a change in zoning regulations to permit of the construction of apartments on 149 and 153 St. George Street. The appellant and Carr testified that such apartments, twenty feet from their building, would depress the rents that they could demand and thereby lessen their estimated returns.

However, it should be borne in mind that in the block there were already two apartments on the other sides respectively of 149 and 153 St. George Street. It was represented to the Ontario Municipal Board, on behalf of the appellant and Carr, that the continued existence of the old houses on 149 and 153 St. George Street, one of which was operated as a rooming house, constituted an eyesore and that their removal would improve the area. The Board, upon the evidence adduced before them, concluded that the erection of apartments on 149 and 153 St. George Street would not harmfully affect the proper enjoyment of adjoining lands for their present uses, that is to say, that the apartment on 151 St. George Street would not be harmfully affected. Therefore, it is difficult to conclude that the appellant and Carr seriously felt that the erection of apartments in close proximity on both sides of their apartment would effectively destroy it as a source of investment income, or so drastically reduce that income as to render its immediate disposal a necessity.

On learning of the possible amendment of the zoning regulations the appellant and Carr testified that they were faced with the following decisions:

- (1) to oppose the by-law;
- (2) to acquire 149 and 153 St. George Street and retain those lots as vacant land; or
- (3) to acquire effective control of the adjoining lots, press for the amendment of the zoning by-law to permit the erection of apartments thereon and before any such

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apartments were erected thereon, dispose of 151 St. George Street.

The appellant and Carr adopted the third course.

Since they did not embark upon the first course, I can only conclude that they must have felt that there was small chance of its success. On the other hand, if they felt there was a prospect of the by-law being successfully opposed, their failure to follow that course rebuts the allegation that 151 St. George Street was possessed of an unique characteristic.

The second course was never seriously considered by them because it was beyond their financial means to do so and in any event the additional expenditure of \$170,000 would make the project economically unsound.

In pursuance of the third course, the appellant and Carr made offers to purchase 149 and 153 St. George Street. While they never became the beneficial owners, nevertheless they realized a profit of \$10,000 for their efforts on behalf of the beneficiary, Roy, a builder, by keeping the contract alive and pressing for the amendment of the by-law. With respect to 149 St. George Street they afforded their wives the opportunity of making a profit on the sale of that property.

The appellant and Carr both testified that if the by-law were not amended they would have retained 151 St. George Street. This I do not follow. When they committed themselves to their third course of action, by offering to purchase the adjoining properties from which purchases profits were eventually realized, they were irretrievably committed to the sale of 151 St. George Street.

Neither do I follow the suggestion of the appellant and Carr that by controlling 149 and 153 St. George Street, after the amendment of the zoning by-law, and thereby preventing the building of apartments thereon, which could otherwise be built, before the sale of 151 St. George Street would result in a higher price therefor. A prudent purchaser would carefully investigate the surrounding circumstances before buying and the means of such an investigation would be as readily available to any purchaser as originally to the appellant.

Furthermore at this time, they also had made offers to purchase the lands at 268 to 278 St. George Street. They had made substantial commitments of their resources and 151 St. George Street had to be sacrificed to the larger and better apartment project at 268 to 278 St. George Street.

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The first offer accepted relieved the appellant and Carr from their undertaking at 151 St. George Street without loss, but with no substantial gain, with which they were content, but they were much more content to accept the second offer whereby a greater profit was realized.

Added to this is the fact that the construction cost of the apartment at 151 St. George Street exceeded their estimate. The appellant and Carr testified that the excess cost was incurred by reason of the use of superior materials. This factor was put forward as indicating their intention to retain the apartment as an investment. However, Carr testified that the excess cost resulted from the use of materials to enhance the external appearance of the building. During construction a dispute arose over the design of the structural steel. The engineer who drafted the original plans had over-designed the structural steel, in the opinion of the appellant and Carr and another engineer whom they consulted. This increased the cost. A compromise was arrived at whereby the cost of the steel was reduced. The concentration of the additional cost on external appearances is more consistent, to me, with an intention to sell the building, than its retention.

I am, therefore, convinced that the moment the appellant and Carr decided to campaign for a change in the amending by-law, they had resolved to sell the building, that is to say, in April 1959 about four months after the building was completed.

But this does not resolve the issue.

The narrow question is whether, when the appellant and Carr acquired 151 St. George Street on September 17, 1958, it was their exclusive purpose to construct an apartment house to derive rental income therefrom, or whether that was not their exclusive purpose at the time when the

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enterprise was begun, but that they also entertained as one of their possible purposes the sale of the building.

If the first alternative were the case, then the profit from the eventual sale would not be taxable, but if the second alternative were the case, then the resultant profit is clearly taxable.

The onus of disproving the Minister's assumption that the latter was the case when assessing the appellant as he did, falls on the appellant.

The question of fact as to what was the purpose of the appellant and Carr in acquiring this property is one that must be decided after considering all the evidence. The appellant's statement at the trial, which was reiterated by Carr, that their intention was to construct and operate an apartment building for the rental income therefrom, is only part of the evidence and while it may have been given in all sincerity it still may not reflect the true purpose at the time of acquisition.

The appellant was experienced in the field of speculative building and Carr had abundant experience in a closely allied field. Therefore they could not have been oblivious to the eventualities which did in fact happen and, in my view, it must be inferred that they foresaw and planned for the alternative course of selling 151 St. George Street from the outset.

After having given careful consideration to all the evidence I am not satisfied that it can be said the Minister was not warranted in assessing the appellant as he did.

The appeal is, therefore, dismissed with costs.

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