INDUSTRIAL ACCEPTANCE CORPORATION LTD.

AND

THE T. EATON CO. LIMITED OF MONTREAL ..... APPELLANTS;

1951
*Oct. 25

1952
**Mar. 12, 13, 14, 17.
*Jun. 4

AND

ACHILLE LALONDE ..... RESPONDENT,

AND

ALBERT LAMARRE ..... TRUSTEE.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Bankruptcy—Assets not equalling 50 per cent of unsecured claims—Discretion to refuse discharge—Terms—After-acquired salary—Whether non-exempt portion vests in trustee—Whether distinction between salary earned in bankrupt business and elsewhere—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 23(ii), 142, 143—Article 599 C.P.

The trial judge refused the respondent his discharge in bankruptcy on the grounds that the assets did not equal 50 per cent of the claims of the unsecured creditors; that the debtor had failed to pay to the trustee the seizable portion of his after-acquired salary; and the insufficiency of his answers as he gave his evidence. The Court of Appeal for Quebec reversed that judgment and granted him his absolute discharge on the main grounds that his debt position had developed from circumstances for which he could not be held responsible and that he did not have to account for salary earned elsewhere than in carrying on the business in which he went bankrupt.

Held, that the conduct of the bankrupt, while not sufficient to justify the absolute refusal, did justify his discharge only subject to the imposition of terms.

Parliament, in adopting the language of s. 23(ii) of the *Bankruptcy Act,* intended that only such portion of the salary of the debtor as was subject to seizure by legal process under the law of the respective provinces should vest in the trustee. The section discloses a clear intention that the bankrupt should retain those exemptions which the Legislature of the Province in which he resided provided for him. Apart from such exemptions, the section applies to all property subject to execution or seizure including wages or salary which could only be reached by garnishee or attachment procedure.

There is nothing in the Bankruptcy Act to support the making of any distinction between a salary earned by the debtor in carrying on the business which was the subject-matter of the bankruptcy and a salary earned elsewhere.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.
**REPORTER'S NOTE:—The appeal was first argued on October 25, 1951. By order of the Court, it was re-argued on March, 1952.

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The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 of the *Act* plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court which had refused the respondent his discharge from bankruptcy.

John L. O'Brien Q.C. and *E. E. Saunders* for the appellant, Industrial Acceptance Corporation. This is a clear case of a judgment based on the facts and on the credibility of the witnesses and should not therefore have been reversed by the Court of Appeal. The trial judge could by virtue of s. 142(2) of the *Bankruptcy Act,* in his discretion, give various orders, including the refusal of the discharge, its suspension, or the attachment of conditions to the discharge. *In re Geller* (2).

The trial judge had no discretion but to refuse the discharge in view of the failure to deposit part of the salary earned subsequently to the bankruptcy. The Court of Appeal erred in finding that the respondent was not obliged to give to the trustee any of his after-acquired earnings if earned in a different occupation. (Ss. 23, 142, 191 of the *Act.*).

Under s. 142, it is mandatory for the Court to refuse the discharge in all cases where the bankrupt has committed a bankruptcy offence or any offence connected with his bankruptcy. As to the obligation to turn the seizable portion of the debtor's salary over to the trustee: *Clarkson* v. *Tod* (3), *In re Scherzer* (4) and *In re Baillargeon* (5).

Failure to deposit was a bankruptcy offence and contempt of Court, which made it mandatory on the Court to refuse the discharge. The trent of the authorities is that the deposit must be made even before an order of the Court is made.

(1) Q.R. [1951] K.B. 226.
(2) 20 C.B.R. 359.
(3) [1934] S.C.R. 230.
(4) 15 C.B.R. 194.
(5) 15 C.B.R. 77.

On the question as to whether, on the Court refusing the discharge on the ground that an offence against the *Act* has been committed, there should not have been a conviction of that offence by a competent Court, the words in s. 142(2) of the *Act* appear to be clear. They do not provide that the discharge is to be refused where the bankrupt has been convicted of an offence, but where he has committed an offence. *Electric Motor & Machinery* v. *Bank of Montreal* (1).

R. Gerard Sampson and *Cicely M. Sampson* for the appellant, The T. Eaton Company. This appellant adopted the argument of John L. O'Brien Q.C., but added that it was entitled to oppose the discharge of the respondent notwithstanding that its claim was of an alimentary nature for necessaries of life, and with respect to this appellant's claim, the application for discharge should have been refused and in any event costs should not have been awarded against this appellant. *In re Reynolds* (2) and *Vincent* v. *Daigneault* (3).

Redmond Quain Q.C. for the respondent. Strictly speaking, the case of *Jackson* v. *Tod* (*supra*) is only authority for the proposition that some part of the ordinary salary of the bankrupt earned before his discharge, in the same occupation as he was engaged in at the time of his bankruptcy, is divisible amongst his creditors.

The consequences of the bankrupt being guilty of an offence under the old *Act* are, of course, that he can never get a discharge—or so, at any rate, would seem to be the case. Even if the consequences do not go that far and the cases would seem to indicate that they do, it would be at variance with a practice prevailing in this country and elsewhere to find a person guilty of an offence without a full and thorough trial before a judge and a competent Court.

The power of the judge in dealing with an application for discharge is not a discretionary one for, amongst other reasons, the reason that he is obliged to consider the report of the trustee and the resolution of the inspectors and must

(1) Q.R. 52 K.B. 162. (2) 5 C.B.R. 69.
(3) Q.R. 70 S.C. 551.

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give them their due weight. If he was in the present case exercising a discretion, he did not exercise it in such a way as to preclude review.

The judgment was not one that should be upheld. The Court does not appear under s. 142(1) of the *Act* to be given the authority to refuse to give a conditional discharge. What it is empowered to do is to refuse to give an absolute discharge. It should be noted that under the new *Act*, the provision whereby the Court was bound to refuse the discharge has been omitted.

The judgment of the Court was delivered by

ESTEY, J.:—This is an appeal pursuant to leave granted under s. 174(2) of the *Bankruptcy Act* (R.S.C. 1927, c. 11) from a judgment of the Court of King's Bench, Appeal Side, of the Province of Quebec (1), reversing the judgment of the Superior Court and granting to the respondent, Achille Lalonde, his absolute discharge in bankruptcy.

Achille Lalonde, against whom the receiving order was made, entered into the business of selling automobiles and agricultural implements and operating a garage in the spring of 1947. Approximately two months later he formed Lalonde Motor Sales Limited, which took over the business and assumed the assets and liabilities thereof. Lalonde personally guaranteed the indebtedness of, as well as subsequent obligations incurred by, the company. This business, as operated first under his own name and then under that of Lalonde Motor Sales Limited, continued for about eleven months, when a receiving order was made against the company. A few days later T. A. Lalonde presented a petition in bankruptcy dated July 28, 1948, against his son, the respondent in this appeal. The respondent was judged a bankrupt on the third day of August, 1948, and on July 25, 1949, he requested an appointment for the hearing of his application for a discharge in bankruptcy.

The liabilities of Achille Lalonde, as guarantor, approximated $90,000, and his other obligations over $1,900, a total indebtedness of about $92,000. His assets realized $22,600, which permitted a payment to the creditors of about 12 cents on the dollar.

(1) Q.R. [1951] K.B. 226.

Mr. Justice Marquis, presiding in the Superior Court, had before him the trustee's report, the minutes of the inspectors' meeting at which that report was considered and the evidence of the respondent-debtor Achille Lalonde. The trustee's report, which under s. 148(8) is prima facie evidence of the statements therein contained, set out that the debtor's guarantee of the debts of Lalonde Motor Sales Limited was the cause of his bankruptcy; a dividend of about 12 per cent would be paid to the unsecured creditors; the conduct of the debtor, both before and after bankruptcy, had not been reprehensible; and that he had not committed an act of bankruptcy. The trustee, however, recommended that the discharge should be refused because

Que l'actif du débiteur n'était pas égal à cinquante pour cent de son passif non garanti.

Mr. Justice Marquis refused the discharge and based his decision largely upon grounds that may be grouped under three headings: that the assets did not equal 50 per cent of the claims of the unsecured creditors; that the debtor had failed to pay to the trustee the seizable, or non-exempt, portion of his salary; and the insufficiency of his answers as he gave his evidence.

The learned judges in appeal reversed his judgment, mainly upon a consideration of the first two of these bases. The relevant portions of s. 142 provide that the judge shall refuse or suspend the discharge, or impose a condition, if, as set out in s. 143(*a*), the "assets of the bankrupt . . . . are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities unless he satisfies the court" that this low valuation "has arisen from circumstances for which he cannot justly be held responsible."

Lalonde's personal bankruptcy was due to the failure of Lalonde Motor Sales Limited, a company which he had formed to take over his personal business, which he completely controlled and managed. Such a company has a separate legal existence, but when, as here, the bankruptcy of that company, which he alone had managed, was the cause of his own bankruptcy, it was quite proper that the learned judge should examine Lalonde's conduct of that business in order to determine whether, within the meaning of s. 143(*a*), his debt position had developed "from circumstances for which he cannot justly be held responsible."

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Lalonde estimated the company had done a million dollars' worth of business in eleven months and entertained the opinion that the future was bright. In fact, he says that after he was aware of the indebtedness of the company he tried to continue in the hope that the sales would realize a sufficient profit to permit it to carry on. He deposed that, while the company kept books, there was no record made of his personal drawings, as to the amount of which the only evidence was his own statement that he drew money as he needed it and

J'ai essayé de vivre comme les gens avec qui je transigeais.

He did not produce a balance sheet or any records of the company, but was content to state to the court that these were all in the hands of the trustee in bankruptcy of the company and to give evidence of figures based upon his estimates and recollections. Upon these figures the learned trial judge found a sum of $45,000 unaccounted for. The Appellate Court examined the figures and concluded that they had accounted for at least a part thereof. These figures, incomplete and, at most, but approximately accurate, with great respect, did not provide sufficient proof upon which to found a conclusion that the debtor had made a satisfactory explanation as to why his assets were less than 50 cents on the dollar.

The learned judges of the Court of King's Bench, after referring to the fact that the assets did not equal 50 per cent of the unsecured liabilities and to the provisions of s. 143(*a*), stated:

ATTENDU que par son témoignage nullement contredit, le failli établit que si la valeur de son actif n'égale pas cinquante cents par dollar de ses obligations non garanties, cela provient de circonstances dont il ne saurait raisonnablement être tenu responsable;

The debtor, in his pleadings, took the position that if the assets did not equal 50 cents on the dollar that was because que ladite liquidation n'a pas été faite avec les soins voulus.

At the hearing before the learned judge he withdrew that allegation.

At the hearing he did complain that the Kayser-Fraser Company Limited shipped to him too many automobiles. Here again he merely stated that the company shipped these automobiles without his ordering them, but did not indicate on what basis automobiles were properly shipped

to him. His evidence as to this allegation, as well as upon other items, was based upon recollection expressed in most general terms and entirely unsupported by any documents which, if they existed, were available, because, as he deposed, the records of the company were in the possession of the company's trustee. The evidence, however, of the number of automobiles on hand, having regard to the nature and volume of the business, did not support this contention. Moreover, he did not show to what extent that contributed to his bankruptcy which, in view of the company's financing methods, would appear to be important. The same remarks apply to his complaints with respect to the finance company, both in relation to his own and the company's business, and of the Turcotte Company.

The learned judges in the Appellate Court commented upon the fact that the sale of the Val d'Or property was, upon the evidence, in the best interests of the estate. It would rather appear that the learned judge of the first instance was not making a finding as to the merits of the sale. He did comment upon the fact that the purchase price of $20,200 was less than the municipal valuation of $27,500, but it was Lalonde's attitude, as he gave his evidence, his professed ignorance as to details thereof, and particularly that he did not know his brother-in-law had purchased it, that impressed the learned trial judge and undoubtedly influenced him, along with the other facts, in his estimation of Lalonde.

Throughout his evidence Lalonde's statements are so vague and general in character that a reading thereof justifies agreement with the learned judge, who had the added advantage of observing him as he gave his evidence, when he stated:

> CONSIDERANT que les déclarations du failli devant la Cour, lors de l'enquête sur la présente demande, n'ont pas été à notre point de vue suffisantes pour justifier sa demande;

The learned judge was evidently of the opinion that Lalonde, upon his own evidence, had not satisfied the onus placed upon him by s. 143(*a*) to establish that though the assets were less than 50 cents upon the dollar it was due to circumstances for which he could not justly be held responsible.

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The learned judge also commented upon Lalonde's failure to pay, as requested, the seizable portion of his salary to the trustee.

The learned judges in the Court of Appeal commented upon the debtor's failure to pay the salary as follows:

> ATTENDU qu'il est vrai que le failli n'a déposé aucun produit de son salaire chez le syndic avant qu'une demande ne lui en ait été faite; que l'article 143 qui énumère les faits qui peuvent être un motif de refus de libération, ne fait nullement une obligation au failli de rendre compte du salaire qu'il gagne, hors les opérations du commerce qui sont la cause de sa faillite;

Lalonde, after becoming bankrupt, was employed by The Sherwin-Williams Co. of Canada Limited at a salary of $390 per month. On April 25, 1949, the trustee verbally and in writing requested Lalonde to deposit the seizable portion of his salary with him. The trustee based his request upon the view that all of the salary vested in him except that which was exempt under s. 23(ii), where the provincial laws with respect to exemptions are adopted. The exemptions provided to those in the Province of Quebec earning salaries or wages are provided for in Article 599(11) of the *Civil Code of Procedure*. There it is provided that one who is earning a salary in excess of $6.00 per day is entitled to two-thirds thereof by way of an exemption. Upon a date that the evidence does not fix accurately, but in the summer months, Lalonde left the employment of The Sherwin-Williams Co. of Canada Limited and accepted employment with his father at a salary of $50 per week. He was, therefore, earning more than $6.00 per day with both employers and, within the meaning of Article 599 of the *Civil Code of Procedure,* in the trustee's view, one-third of the salary, as earned, vested in him. Lalonde paid to the trustee $175, whereas he should have paid $1,800.

The attention of the learned judges was not directed to the decision *in Re Tod* (1), where this Court held that the salary of a debtor in bankruptcy, earned subsequently to his being adjudged bankrupt, vested in the trustee, subject to the court fixing an alimentary allowance.

S. 23 of the Canadian act is based upon s. 15 of the English Bankruptcy Act of 1869 (32 & 33 Vict., c. 71) and now contained in s. 38 of An Act to Consolidate the Law

(1) [1934] S.C.R. 230.

Relating to Bankruptcy (1914, 4 & 5 Geo. V, c. 59). There are, however, important differences. In particular, s. 38(2) of the English act reads:

> 38. The property of the bankrupt divisible amongst his creditors, ... shall not comprise the following particulars:—
>
> (2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

The corresponding s. 23(ii) of the Canadian Act reads:

> 23. Les biens du débiteur, susceptibles d'être partagés entre ses créanciers . . . . ne doivent pas comprendre ce qui suit:
>
> (ii) Les biens qui, au préjudice du débiteur, sont exempts d'exécution ou de saisie selon la procédure judiciaire, conformément aux lois de la province dans laquelle sont situés les biens ou dans laquelle est domicilié le débiteur.

S. 2(*f*) defines "property" as follows:

> "biens" comprend les deniers, marchandises, choses en action, ...

Mr. Justice Smith, in writing the judgment of *In re Tod, supra*, stated at p. 241:

> The English decisions referred to above seem to establish beyond any question that, by the language of the English Act, "all such property as . . . . may be acquired by or devolve on him before his discharge," the instalments of salary such as are in question here vest in and belong to the trustee as they fall due, subject to the alimentary provisions referred to.
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> This precise language is adopted in the Canadian Act and is not capable of any difference of meaning in Canada from its meaning in England.

It would appear that Parliament, in adopting the language of s. 23(ii) (particularly when compared with the language of s. 38(2) in the English act) intended that only such portion of the salary as was subject to seizure by legal process under the law of the respective provinces should vest in the trustee. Moreover, the omission of any such provision as that contained in s. 51(2) of the English act, under which, on the application of the trustee, an order might be made against a bankrupt in receipt of a salary to pay the whole or part thereof to the trustee, appears to support the foregoing view.

Neither the provisions of s. 23 nor of any other section of the act appear to support, with great respect, the distinction suggested by the learned judges in the Appellate

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Court between a salary earned in carrying on the business the subject matter of the bankruptcy and that earned elsewhere.

It follows the trustee was within his rights when he requested Lalonde to pay to him the seizable or non-exempt portion of his salary and it was the duty of the debtor to pay over such salary to him. The record discloses that in response to the trustee's request he did pay the sum of $175, but he made no explanation to the trustee of his failure to pay a further sum in excess of $1,600 and at the hearing he made no other suggestion than that it was due to illness, in respect of which neither its character nor duration was specified, nor, indeed, the time of its occurrence. The learned judge, however, did not consider whether his failure constituted an offence under s. 191(*b*) of the *Bankruptcy Act*. He was nevertheless justified, where, as here, no satisfactory explanation was made as to his failure, in taking into consideration his conduct in relation to his non-payment of the required portion of his salary in the exercise of his judicial discretion to refuse, suspend or direct the discharge, subject to a condition.

Mr. Quain, on behalf of Lalonde, contended that s. 23(ii) applied only to property subject to seizure under execution and that the phrase in s. 23(ii) "execution or seizure under legal process" did not apply to wages or salary which could only be reached by a garnishee or attachment procedure. His contention was that this is the effect of *Re Tod, supra.* The application in that case was made by the trustee asking the court to direct that a bankrupt, earning a salary of $10,000 a year, should pay all in excess of $100 per week to the trustee. The decision is based largely upon *Hamilton* v. *Caldwell* (1), with regard to which Mr. Justice Smith, writing the judgment of this Court *in Re Tod,* stated at p. 242:

> The decision is that it is competent to the court to make such an order and this decision is arrived at on the general principles of equity and not by virtue of any special provisions in the Scottish act.

Hamilton v. *Caldwell* was a decision of the House of Lords under the Scottish act in which, as in Canada, there is no section corresponding to s. 51(2) of the English act.

(1) (1919) 88 L.J. (N.S.) P.C. 173.

The Bankruptcy Court in *Re Tod, supra,* exercised its power to fix an alimentary allowance which, under the Canadian act, might be more than but not less than the exemption provided to the bankrupt by s. 23(ii). The relevant exemption law in Ontario was *The Wages Act* (R.S.O. 1927, c. 176). S. 7 thereof provided to the debtor an exemption of 70 per cent of his salary, with power in a court to reduce that percentage. The court in *Re Tod* acted within the scope of that enactment. The application considered (in *Re Tod, supra*) was quite different from that here under consideration and the language used must be read and construed in relation to the issues raised.

It would appear that when the Parliament of Canada saw fit to omit s. 51(2) of the English act and to entirely rewrite s. 23(ii), being the corresponding section in the Canadian act, it disclosed a clear intention that s. 23(ii) should retain to the bankrupt those exemptions which the Legislature of the province in which he resided provided for him. The language in s. 23(ii), as expressed in French:

et tous les biens qui peuvent être acquis par lui ou qui peuvent lui être dévolus avant sa libération;

and as in English:

and all property which may be acquired by or devolve on him before his discharge;

is sufficiently comprehensive to include a procedure by way of garnishment or attachment of salary or wages. In the Province of Quebec the exemptions where salary or wages are garnisheed or attached are fixed, as already stated, by Article 599(11) of the *Civil Code of Procedure.*

It is not submitted that the learned judge, in the exercise of his judicial discretion contemplated by s. 142, overlooked any fact. The learned judges in the Appellate Court did not agree with certain of his conclusions, as already discussed. Moreover, the learned judges appear, in addition to the items already considered, to have been influenced by the fact that the creditors had not adduced evidence in support of their respective allegations. No witnesses were called by the creditors, but they had a right to submit their contentions upon the evidence adduced before the learned judge. Upon the evidence before him the learned judge, in the exercise of his judicial discretion, concluded that Lalonde was not entitled to his discharge.

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A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law. *In re Richards* (1); *In re Wood* (2); *In re Labrosse* (3); *In re Lobel* (4); *Re Smith* (5). A consideration of the whole of the evidence, with great respect, does not warrant a reversal of the judgment of the learned judge of the first instance.

Appellate courts, however, where they have concluded that the discretionary judgment of the judge of the first instance ought not to be disturbed, have repeatedly relieved against what has appeared to them to be an undue severity in the terms imposed. *Re Nicholas* (6); *Re Swabey* (7); *Re Thiessen* (8). The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases. The conduct of the debtor in this case, while not sufficient, with great respect, to justify the absolute refusal, does justify his discharge only subject to the imposition of terms.

The usual practice would suggest a reference of this matter back to the judge of first instance. There are, however, here present reasons, including the fact that the assets are not large, which, in the interests of the debtor and the creditors, justify a present final disposition and the avoidance of the expense incident to further proceedings.

(1) (1893) 10 Mor. B.R. 136.
(2) (1915) Han. B.R. 53.
(3) 5 C.B.R. 600.
(4) [1929] 1 D.L.R. 986.
(5) [1947] 1 All E.R. 769.
(6) 7 Mor. B.R. 54.
(7) 76 T.L.R. 534.
(8) [1924] 1 D.L.R. 588.

The claim of the appellant, The T. Eaton Co. Limited, is for necessaries and, therefore, an alimentary debt as defined in s. 2(*b*). Section 147 provides:

> 147. An order of discharge shall not release the bankrupt or authorized assignor.
>
> * * *
>
> (*d*) from any debt or liability for necessaries of life, and the court may make such order for payment thereof as it deems just or expedient.

Under the terms of this provision we direct that the debtor make payment forthwith of the claim for the necessaries of life by The T. Eaton Co. Limited in the sum of $92.60.

We further direct that under the provisions of s. 142(2) (*d*) the debtor, as a condition of his discharge, shall consent to a judgment against him by the trustee for a part of the balance of the debts proved in these proceedings in the sum of $5,000 and that the said sum of $5,000 shall be paid: $1,500 on June 30, 1953; $1,500 on June 30, 1954; and $2,000 on June 30, 1955.

The Court appreciates the exhaustive presentation by counsel of their respective submissions and is particularly grateful to Mr. Quain, who undertook the presentation of the debtor's case at its request.

The appellants, Industrial Acceptance Corporation and T. Eaton Co. Ltd. of Montreal, will have their costs in this Court and in the Courts below, payable to them out of the estate. The respondent, Lalonde, will have costs in this Court only, payable out of the estate.

Solicitors for Industrial Acceptance Corporation: *O'Brien, Stewart, Hale & Nolan.*

Solicitor for The T. Eaton Co. Ltd. of Montreal: *R. Gerard Sampson.*

Solicitors for the respondent: *Quain, Bell & Gillies.*