THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

DWORKIN FURS (PEMBROKE) LIMITED, ALLIED BUSINESS SUPERVISIONS LIMITED, ALPINE DRYWALL & DECORATING LIMITED, M. F. ESSON & SONS LIMITED, AARON'S LADIES APPAREL LIMITED ..... RESPONDENTS.

1966
*Nov. 15, 16, 17
Nov. 16

1967
Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Associated corporations—What constitutes "control"—Casting vote—Validity of Articles of Association requiring unanimous consent for motions before meetings of shareholders or directors—Income Tax Act, R.S.C. 1952, c. 148, s. 39.

The five respondent companies were assessed by the Minister on the basis that each was associated with one or more other companies within the meaning of s. 39(2), (3) and (4) of the *Income Tax Act*, R.S.C. 1952, c. 148, and was therefore not entitled to the benefit of the lower rate of tax on part of its income. The issue in all five cases was the meaning of "controlled" as found in s. 39(4) of the Act. The Exchequer Court rejected the Minister's assessment. The Minister appealed to this Court where it was ordered that the 5 appeals be heard together.

*PRESENT: Fauteux, Abbott, Judson, Hall and Spence JJ.

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

In the Dworkin appeal, another company owned 48 per cent of the shares in its own name and 2 per cent in the names of Roy and Helen Saipe as its nominees. The other 50 per cent were owned by a third party. Roy Saipe was president of Dworkin but did not have a casting vote in the event of an equality of votes.

In the Allied appeal, one Aaron owned 50 per cent of the shares and, as president, had the right to exercise a second or casting vote in the event of an equality of votes.

In the Alpine Drywall appeal, one Jager owned 50 per cent of the shares and the other 50 per cent were owned by one Wagenaar. The latter attended the day-to-day operation of the business and Jager, as president, was responsible for the financing, etc. and had a casting vote.

In the M. F. Esson appeal, that company was controlled by the Esson family who also owned 50 per cent of the shares of another company. The other 50 per cent were owned by an individual who had been appointed general manager with exclusive authority and who had been given an option, exercisable some 3 years later, to buy the Esson family's shares. In the meantime, the senior Esson was president of that other company and had a casting vote in the event of an equality of votes.

In the Aaron appeal, a group held two-thirds of the shares but a provision in the company's Articles of Association required all motions put before any meeting of shareholders or directors to have unanimous consent. In the Minister's view that provision was illegal and *ultra vires*.

Held: The appeals by the Minister should be dismissed. None of the five respondent companies was an associated corporation.

In the Dworkin appeal, it was clear, in the light of *Buckerfield's Ltd. v. M.N.R.*, [1965] 1 Ex. C.R. 299, which held that "controlled" meant *de jure* control and not *de facto* control, that the respondent was not controlled by the other company.

In the Allied appeal, as was held by the trial judge, a casting vote was not the property of the holder but an adjunct of an office. That right did not give control.

The Alpine Drywall and M. F. Esson appeals did not differ from that of the Allied appeal.

In the Aaron appeal, the Article in question was neither illegal nor *ultra vires*. It is beyond question that a majority may bind the minority in a company. A contract between shareholders to vote in a given or agreed way is not illegal. The Articles of Association are in effect an agreement between the shareholders and are binding upon all shareholders.

Revenu—Impôt sur le revenu—Corporations associées—Contrôle—Voix prépondérante—Validité de règlements exigeant le consentement unanime pour les motions devant les assemblées d'actionnaires ou de directeurs—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, art. 39.

Le Ministre a cotisé les 5 compagnies intimées comme si chacune était associée avec une ou plusieurs autres compagnies dans le sens de l'art. 39(2), (3) et (4) de la *Loi de l'Impôt sur le Revenu*, S.R.C. 1952, c. 148, et n'avait pas alors droit au bénéfice du taux d'impôt moindre sur une partie de son revenu. Il s'agit de déterminer dans ces 5 appels le sens

qu'il faut donner au mot «contrôle» tel qu'il se trouve dans l'art. 39(4) de la Loi. La Cour de l'Échiquier a rejeté la cotisation du Ministre. Ce dernier en appela devant cette Cour alors qu'il fut ordonné que les 5 appels soient entendus ensemble.

Dans l'appel de la compagnie Dworkin, une autre compagnie détenait 48 pour-cent des actions de Dworkin en son propre nom et 2 pour-cent au nom de Roy et Helen Saipe en qualité de personnes désignées. L'autre 50 pour-cent était détenu par une tierce personne. Roy Saipe était président de Dworkin mais n'avait pas une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie Allied, un nommé Aaron détenait 50 pour-cent des actions et, comme président, avait le droit d'exercer une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie Alpine Drywall, un nommé Jager détenait 50 pour-cent des actions et l'autre 50 pour-cent était détenu par un nommé Wagenaar. Ce dernier s'occupait des affaires journalières et Jager, comme président, était responsable du financement, etc. et avait une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie M. F. Esson, cette compagnie était contrôlée par la famille Esson qui détenait 50 pour-cent des actions d'une autre compagnie. L'autre 50 pour-cent était détenu par un individu qui avait été nommé gérant général avec autorité exclusive et à qui on avait donné une option, dont l'échéance était rapportée à quelque 3 ans plus tard, d'acheter les actions de la famille Esson. Entre temps, Esson le père était président de cette autre compagnie et avait une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie Aaron, les deux-tiers des actions étaient détenus par un groupe mais, une clause dans les règlements de la compagnie exigeait l'unanimité pour toute motion présentée à une assemblée des actionnaires ou des directeurs. Le Ministre considéra cette clause comme étant illégale et *ultra vires*.

Arrêt: Les appels du Ministre doivent être rejetés. Aucune des 5 compagnies intimées était une corporation associée.

Dans l'appel de la compagnie Dworkin, il est clair, vu la cause de *Buckerfield's Ltd. v. M.N.R.*, [1965] 1 Ex. C.R. 299, qui a décidé que le mot «contrôle» signifiait un contrôle *de jure* et non pas un contrôle *de facto*, que la compagnie intimée n'était pas contrôlée par l'autre compagnie.

Dans l'appel de la compagnie Allied, tel que décidé par le juge au procès, une vois prépondérante n'est pas la propriété de son détenteur mais est un accessoire d'un office. Ce droit ne donne pas le contrôle.

Les appels de la compagnie Alpine Drywall et de la compagnie M. F. Esson ne diffèrent pas de l'appel de la compagnie Allied.

Dans l'appel de la compagnie Aaron, le règlement en question n'était pas illégal ni *ultra vires*. Il n'y a aucun doute qu'une majorité peut lier la minorité dans une compagnie. Un contrat entre les actionnaires pour voter d'une certaine manière n'est pas illégal. Les règlements d'une compagnie sont en réalité une entente entre les actionnaires et lient tous les actionnaires.

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

APPELS de 5 jugements de la Cour de l'Échiquier du Canada[1]. Appels rejetés.

APPEALS from 5 judgments of the Exchequer Court of Canada[1]. Appeals dismissed.

G. W. Ainslie and *L. R. Olson,* for the appellant.

C. S. Bergh, for the respondent, Dworkin Furs (Pembroke) Ltd.

R. B. Slater and *A. Anhang,* for the respondent, Allied Business Supervisions Ltd.

R. A. F. Montgomery, for the respondent, Alpine Drywall & Decorating Ltd.

G. B. Cooper, for the respondent, M. F. Esson & Sons Ltd.

R. B. Slater and *A. Anhang,* for the respondent, Aaron's Ladies Apparel Ltd.

The judgment of the Court was delivered by

HALL J.:—These are appeals by the Minister of National Revenue from judgments of the Exchequer Court of Canada in the following cases:

Dworkin Furs (Pembroke) Limited v. M.N.R.;
Aaron's Ladies Apparel Limited v. M.N.R.;
Allied Business Supervisions Limited v. M.N.R.;
Alpine Drywall & Decorating Limited v. M.N.R.;
M. F. Esson & Sons Limited v. M.N.R.

In the Exchequer Court the appeals of Aaron's Ladies Apparel Limited and Allied Business Supervisions Limited were heard together at Winnipeg by Thurlow J. along with appeals from eight other companies. The appeal of Alpine Drywall & Decorating Limited was heard in Calgary in conjunction with that of another company by Cattanach J. The appeal of Dworkin Furs (Pembroke) Limited was heard in Ottawa by Jackett P. and the appeal of M. F. Esson & Sons Limited was heard at Moncton by Thurlow J. The present appeal concerns the five named respondents only.

By Order of this Court dated September 20, 1966, the appeals of the Minister of National Revenue against the

[1] Dworkin Furs (Pembroke) Ltd. v. M.N.R. [1966] Ex. C.R. 228, [1965] C.T.C. 465, 65 D.T.C. 5277; Allied Business Supervisions Ltd. v. M.N.R. [1966] C.T.C. 330, 66 D.T.C. 5244; Alpine Drywall & Decorating Ltd. v. M.N.R. [1966] C.T.C. 359, 66 D.T.C. 5263; M. F. Esson & Sons Ltd. v. M.N.R. [1966] C.T.C. 439, 66 D.T.C. 5303; Aaron's Ladies Apparel Ltd. v. M.N.R. [1966] C.T.C. 330, 66 D.T.C. 5244.

five named respondents were ordered to be heard together and the appellant was granted leave to file a joint factum applicable to all five appeals. At the conclusion of the argument on behalf of the appellant, the Court said:

For reasons which will be delivered later, the appeal in each of the above cases, except in the case of *Aaron's Ladies Apparel Limited*, is dismised with costs; with respect to the appeal in the latter case, the only points on which the Court needs to hear counsel for respondent are related to Article 6 of the Articles of Association, the Court desiring to have submissions of counsel as to the validity and effect of Article 6.

The issue in all five appeals is the meaning of "controlled" as found in subs. (4) of s. 39 of the *Income Tax Act*. Subsection (1) of s. 39 of the *Income Tax Act* provides that the tax payable by a corporation under Part 1 of the *Income Tax Act* is 18 per cent of the first $35,000 taxable income and 47 per cent of the amount by which the income subject to tax exceeds $35,000. However, subss. (2) and (3) of s. 39 provide that when two or more corporations are "associated" with each other, the aggregate of the amount of their incomes taxable at 18 per cent is not to exceed $35,000. Subsection (4) of s. 39 of the *Income Tax Act* then defines the circumstances under which a corporation is associated with another corporation. Subsection (4) of s. 39 provides in part:

For the purpose of this section, one corporation is associated with another in a taxation year if at any time in the year,

(*a*) one of the corporations controlled the other,

(*b*) both of the corporations were controlled by the same person or group of persons,

* * *

The word *controlled* as used in this subsection was held by Jackett P. to mean *de jure* control and not *de facto* control and with this I agree. He said in *Buckerfield's Limited et al v. Minister of National Revenue*[1]:

Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control

[1] [1965] 1 Ex. C.R. 299 at 302-3, [1964] C.T.C. 504, 64 D.T.C. 5301.

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

Hall J.

by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* (1943) 1 A.E.R. 13 where Viscount Simon L.C., at p. 15, says:

> "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ld.* (1947) A.C. 109 per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.

This definition of *controlled* applies to all five appeals.

In Dworkin Furs (Pembroke) Limited, Dworkin Furs Ltd. owned 48 per cent of the issued shares in its own name and 2 per cent in the names of Roy Saipe and Helen Saipe as its nominees. The other 50 per cent were owned by one Sadie Harris. Roy Saipe was President of this respondent, but the By-laws of the company provided that in the event of an equality of votes, the Chairman did not have a casting vote.

It is clear in the light of *Buckerfield* that in these circumstances Dworkin Furs (Pembroke) Limited was not controlled by Dworkin Furs Ltd.

In the case of Allied Business Supervisions Limited, Alexander Aaron was the owner of 50 per cent of the issued shares while two other individuals, Joseph Tomney held 31 per cent and Roy N. Hall 19 per cent respectively. Aaron and Tomney were elected directors of the company on December 17, 1959, for an indefinite period until their term of office should be changed by the shareholders at a subsequent shareholders' meeting. On the same day Aaron was elected President of the company.

This company was incorporated under the Saskatchewan *Companies Act*, R.S.S. 1953, c. 124. The company adopted as its Articles of Association *Table A* of the *Companies Act*. Article 46 of *Table A* reads:

> 46. In the case of equality of votes whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

It was urged on behalf of the appellant that the fact that Aaron as President had at meetings of Shareholders and Directors a second or casting vote gave him control of the company within the *Buckerfield* definition of *controlled*. Thurlow J. held that the existence of the right to exercise a second or casting vote did not give Aaron control. He said:

> the casting vote, unlike the votes arising from shareholding, which are exercisable without responsibility to the company or to other shareholders is in my opinion not the property of the holder, but is an adjunct of an office.

and with this I agree.

In the case of Alpine Drywall & Decorating Limited, the shareholding situation was that one William Jager owned 50 per cent of the issued shares and Clarence Wagenaar the other 50 per cent. The appellant relied on evidence which established that at the time this company was incorporated, Wagenaar and Jager had agreed:

> (*a*) Wagenaar would attend to the running of the day to day business of the Respondent; and
> (*b*) Jager would attend to the corporate end of the business and the arranging of the necessary financing to carry on the business.

and Jager was elected President of the Company.

Articles 43 and 45 of the respondent provided:

> 43. The president, or in his absence the vice-president (if any) shall be entitled to take the chair at every general meeting, or if there be no president or vice-president, or if at any meeting he shall not be present within fifteen (15) minutes after the time appointed for holding such meeting, the members present shall choose another director as chairman, and if no director be present, or if all the directors present decline to take the chair then the members present shall choose one of their numbers to be chairman. The chairman at any meeting of shareholders may appoint one or more persons (who need not be shareholders) to act as scrutineers.
>
> 45. Every question submitted to a meeting shall be decided in the first instance by a show of hands and in the case of an equality of votes, the chairman shall, both on a show of hands and on a poll have a casting vote in addition to the vote or votes to which he may be entitled as a member.

The arrangement or agreement between Wagenaar and Jager, while it might be said to give Wagenaar *de facto* control, did *not* give him *de jure* control, which is the true test, and this case does not differ from that of Allied Business Supervisions Limited.

The case of M. F. Esson and Sons Limited involved determining whether the company was controlled by the same group of persons who controlled Esson Motors Limited.

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

Hall J.

It is a fact that Miller F. Esson, Sr., Miller F. Esson, Jr. and John F. Esson controlled the respondent. Prior to May 7, 1962, the shareholding of Esson Motors Limited was:

Miller F. Esson, Sr.	66
Miller F. Esson, Jr.	66
John F. Esson	66
Total	198

On May 7th, 1962, Miller F. Esson, Miller Esson, Jr., Jack Esson, and Esson Motors Limited, entered into an agreement with Edward Earle McKenna wherein it was agreed:

(*a*) McKenna was to be appointed general manager of Esson Motors Limited for a term of three years, and was given complete and exclusive authority to manage the business of Esson Motors Limited.

(*b*) The Essons were to transfer one half of the issued capital stock (99 shares) to McKenna.

(*c*) The Essons granted to McKenna an irrevocable option to purchase from them the remaining capital stock during the period 29th May, 1965 until 26th May, 1966.

Pursuant to the terms of the Agreement, the shares were transferred so that as of the 7th of May, 1962, the shareholders in Esson Motors Limited were as follows:

Miller F. Esson, Sr.	33	
Miller F. Esson, Jr.	33	
John F. Esson	33	
		99
Edward McKenna	99	
Total		198

At all material times Miller F. Esson, Sr. was President, Miller F. Esson, Jr. was Vice-President and John F. Esson Secretary-Treasurer of Esson Motors Limited.

By-law 4(*b*) of Esson Motors Limited read:

The president shall preside at meetings of the board. He shall act as chairman of the shareholders' meetings if present.....

Paragraph (*c*) of Section 102 of the *Companies Act* of New Brunswick, R.S.N.B. 1952, Chapter 33, under which Esson Motors Limited was incorporated, provides:

> "In the absence of other provisions in that behalf in the letters patent or by-laws of the company,
>
> * * *
>
> (*c*) all questions proposed for the consideration of the shareholders at such meetings shall be determined by the majority of votes, and the chairman presiding at such meetings shall have the casting vote in the case of an equality of the votes.

Thurlow J. disposed of the casting vote argument as he had done in *Allied Business Supervisions Limited v. Minister of National Revenue*[1]. He was right in so doing.

In the appeal respecting Aaron's Ladies Apparel Limited, a company incorporated under the Saskatchewan *Companies Act* (ibid), the following question had been propounded:

1. Within the meaning of the *Income Tax Act,* R.S.C. 1952, Chapter 148, as amended:

(*c*) during the period commencing on February 1, 1960, and ending on July 14, 1961, did Isidore Aaron and Alexander Aaron together control Aaron's Ladies Apparel Limited?

(*d*) during the period commencing on July 14, 1961, and ending on December 31, 1962, did Aaron's (Prince Albert) Limited control Aaron's Ladies Apparel Limited?

The shareholding of the Respondent, Aaron's Ladies Apparel Limited was as follows:

1 February 1960—14 July 1961		
Isidore Aaron	349	
Alexander Aaron	349	
Margaret Pratt	310	
Total	1,008	
14 July 1961—31 December 1961		
Aaron's (Prince Albert) Limited ..		698
Margaret Pratt		310
Total		1,008

This case differs from the others in that there could be no argument that but for Article 6 of the Articles of Association Isidore Aaron and Alexander Aaron controlled the respondent company by reason of holding 698 out of 1,008 shares in their own names prior to July 14, 1961, and thereafter in the name of Aaron's (Prince Albert) Limited which they also controlled. Subsections (1) and (2) of s. 18 of *The Companies Act* read:

18. (1) There may be registered with the memorandum articles of association prescribing regulations for the company, and such articles may adopt all or any of the regulations contained in table A in the first schedule.

(2) If the articles are not registered or, if articles are registered, in so far as the articles do not exclude or modify the regulations in that table, those regulations shall, so far as applicable, be the regulations of

[1] [1966] C.T.C. 330, 66 D.T.C. 5244.

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

Hall J.

the company in the same manner and to the same extent as if they were contained in duly registered articles.

The Articles of Association of the respondent's company provided in part as follows:

1. The provisions contained in Table A in the First Schedule of the *Companies Act* as hereinafter modified shall apply to this company.

4. A poll may be demanded by one member and para. 44 of the said Table A shall be amended accordingly.

6. That all motions put before any meeting of shareholders or directors of the company shall require the unanimous consent of all its members, and paras. 46, 47 and 82 of the said Table A shall be amended accordingly.

Paragraphs 46, 47 and 82 read:

46. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

47. A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

82. A committee may meet and adjourn as it thinks proper. Questions arising at a meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

Paragraph 44 reads:

At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least two members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has on a show of hands been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

The appellant contends that Article 6 above is illegal and *ultra vires* as being (*a*) contrary to the provisions of *The Companies Act*; (*b*) it constitutes an unreasonable restriction on the rights of a member to have a reasonable opportunity of bringing before the meeting any proposal or matter within the scope of the business of the meeting; and (*c*) it is contrary to the fiduciary relationship which the directors at a directors' meeting have towards the company which require them to give their entire ability to the best interests of the company and its shareholders.

All three points may be dealt with together as they extent to which they bind the shareholders of a company.

That a majority may bind the minority in a company is beyond question.

Section 14(*b*) of the *Interpretation Act* of the Province of Saskatchewan, R.S.S. 1953, c. 1, provides:

> 14. In an Act words making a number of persons a corporation shall:
> (*b*) vest in a majority of the members of the corporation the power to bind the others by their acts.

Similar wording is also to be found in the *Interpretation Act* of Canada, R.S.C. 1952, c. 158, s. 30.

The nature and effect of Articles of Association were stated by Duff J. (as he then was) in *Theatre Amusement Co. v. Stone*[1] as follows:

> The articles of association are binding upon the company, the directors and the shareholders, until changed in accordance with the law. So long as they remain in force, any shareholder is entitled, unless he is estopped from taking that position by some conduct of his own, to insist upon the articles being observed by the company, and the directors of the company. This right he cannot be deprived of by the action of any majority. In truth, the articles of association constitute a contract between the company and the shareholders which every shareholder is entitled to insist upon being carried out.

A situation similar to the one here was dealt with by this Court in *Ringuet et al v. Bergeron*[2]. In that case certain shareholders, Bergeron, Pagé and Ringuet, had contracted amongst themselves to vote unanimously at all meetings of the company and to vote for each other as directors. The contract provided for a penalty for breach of the contract in the following terms:

> 11. Dans toutes assemblées de ladite Compagnie, les parties aux présentes s'engagent et s'obligent à voter unanimement sur tout objet qui nécessite un vote. Aucune des parties aux présentes ne pourra différer d'opinion avec ses co-parties contractantes en ce qui concerne le vote. Le vote prépondérant du Président devra toujours être en faveur des deux parties contractantes.
>
> 12. Si l'une des parties ne se conforme à la présente convention, ses actions seront cédées et transportées aux deux autres parties contractantes en parts égales, et ce gratuitement.
>
> Telle est la sanction de la non exécution d'aucune des clauses de la présente convention par l'une des parties contractantes.

For a period the contracting parties observed the terms of the contract, but later two of the parties began to take

[1] (1914), 50 S.C.R. 32 at 36, 16 D.L.R. 855, 6 W.W.R. 1438.
[2] [1960] S.C.R. 672, 24 D.L.R. (2d) 449.

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

Hall J.

steps to oust Bergeron from the management of the company. A shareholders' meeting was called whereat Ringuet and Pagé voted themselves in as a new board of directors. Bergeron was thus completely excluded from the management of the company. He brought action alleging that Ringuet and Pagé, in failing *inter alia* to vote for his election to the board of directors, had violated the contract. The trial court rejected the action, but in the Court of Queen's Bench the Chief Justice and Owen J. found for Bergeron, Pratte J. dissenting.

In this Court, upholding the Court of Queen's Bench, Judson J. for the majority said:

> The Chief Justice found nothing illegal in the agreement and decided that it should be given its full effect. The ratio of the dissenting opinion is to be found in the distinction drawn between the rights of a shareholder and the obligations assumed on becoming a director. While majority shareholders may agree to vote their shares for certain purposes, they cannot by this agreement tie the hands of directors and compel them to exercise the power of management of the company in a particular way. This appears in the following extract from the reasons of Pratte J.:
>
> > «Mais la situation des directeurs est bien différente de celle des actionnaires. Le directeur est désigné par les actionnaires, mais il n'est pas à proprement parler leur mandataire; il est un administrateur chargé par la loi de gérer un patrimoine qui n'est ni le sien, ni celui de ses co-directeurs, ni celui des actionnaires, mais celui de la compagnie, une personne juridique absolument distincte à la fois de ceux qui la dirigent et de ceux qui en possèdent le capital actions. En cette qualité, le directeur doit agir en bonne conscience, dans le seul intérêt du patrimoine confié à sa gestion. Cela suppose qu'il a la liberté de choisir, au moment d'une décision à prendre, celle qui lui paraît la plus conforme aux intérêts sur lesquels la loi lui impose le devoir de veiller.»
>
> There can be no objection to the general principle stated in this passage, but, in my view, it was not offended by this agreement. However, the conclusion of Pratte J. was that a director who has bound himself as this contract bound the parties has rendered himself incapable of doing what the law requires of him and that clause 11 requiring unanimity at all meetings had that effect. He also held that clause 11 was not severable and that therefore the agreement was invalidated in its entirety.
>
> Owen J. agreed that the undertaking of unanimity at directors' meetings which he considered was required by clause 11 might be contrary to public order but that it was not necessary to decide this since the clause was severable from the other provisions of the agreement to which he gave full effect. The defendants had failed to comply with other clauses in the contract—the voting of Bergeron's salary, the election of Bergeron as a director of the company and his appointment as secretary-treasurer and assistant general manager.
>
> The point of the appeal is therefore whether an agreement among a group of shareholders providing for the direction and control of a com-

pany in the circumstances of this case is contrary to public order, and whether it is open to the parties to establish whatever sanction they choose for a breach of such agreement.

Did the parties of this agreement tie their hands in their capacity as directors of the company so as to contravene the requirements of the *Quebec Companies Act,* which provides (s. 80) that "the affairs of the company shall be managed by a board of not less than three directors"? I agree with the reasons of the learned Chief Justice that this agreement does not contravene this or any other section of the *Quebec Companies Act*. It is no more than an agreement among shareholders owning or proposing to own the majority of the issued shares of a company to unite upon a course of policy or action and upon the officers whom they will elect. There is nothing illegal or contrary to public order in an agreement for achieving these purposes. Shareholders have the right to combine their interests and voting powers to secure such control of a company and to ensure that the company will be managed by certain persons in a certain manner. This is a well-known, normal and legal contract and one which is frequently encountered in current practice and it makes no difference whether the objects sought are to be achieved by means of an agreement such as this or a voting trust. Such an arrangement is not prohibited either by law, by good morals or public order.

It is important to distinguish the present action, which is between contracting parties to an agreement for the voting of shares, from one brought by a minority shareholder demanding a certain standard of conduct from directors and majority shareholders. Nothing that can arise from this litigation and nothing that can be said about it can touch on that problem. The fact that this agreement may potentially involve detriment to the minority does not render it illegal and contrary to public order. If there is such injury, there is a remedy available to the minority shareholder who alleges a departure from the standards required of the majority shareholders and the directors. The possibility of such injurious effect on the minority is not a ground for illegality.

I think that this litigation can be decided on the simple ground that clause 11 has no reference to directors' meetings. Clause 11 refers to meetings of the company, that is, shareholders' meetings, and not to meetings of the board of directors. On this point I agree with the Chief Justice, who stated his opinion in the following terms:

> «Au surplus, y a-t-il quelque chose qui répugne à la loi, à l'ordre public et aux bonnes mœurs qu'un groupe d'actionnaires s'entendent pour contrôler et diriger une compagnie, pour devenir ses administrateurs, ses principaux officiers? Il n'était sûrement pas besoin d'un contrat écrit pour pareille entente qui intervient chaque jour dans le monde des compagnies, étant notoire qu'un grand nombre d'entre elles sont contrôlées par un groupe d'actionnaires qui souvent même ne représentent pas la majorité des actions.
>
> L'engagement des co-contractants à voter unanimement leurs actions dans les assemblées de la compagnie ne saurait lui-même, à mon avis, être invalide; après tout, chacun des comparants n'a pas renoncé à la délibération, à la discussion, au droit de faire triompher son opinion avant de se ranger à l'avis de la majorité qui en principe doit gouverner.»

1967

MINISTER OF NATIONAL REVENUE v. DWORKIN FURS (PEMBROKE) LTD. *et al.*

Hall J.

I have the greatest difficulty in seeing how any question of public order can arise in a private arrangement of this kind. The possibility of injury to a minority interest cannot raise it. If this were not so, every arrangement of this kind would involve judicial enquiry. Minority rights have the protection of the law without the necessity of invoking public order. This litigation is between shareholders of a closely held company. The agreement which the plaintiff seeks to enforce damages nobody except the unsuccessful party to the agreement. No public interest or illegality is involved.

I am of opinion that the same reasoning applies here. Control of a company within *Buckerfield* rests with the shareholders as such and not as directors. A contract between shareholders to vote in a given or agreed way is not illegal. The Articles of Association are in effect an agreement between the shareholders and binding upon all shareholders. Article 6 in question here was neither illegal nor *ultra vires*.

The appeal in respect of Aaron's Ladies Apparel Limited will accordingly also be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent, Dworkin Furs (Pembroke) Ltd.: Soloway, Wright & Company, Ottawa.

Solicitors for the respondents, Allied Business Supervisions Ltd. and Aaron's Ladies Apparel Ltd.: Pitblado, Hoskin & Company, Winnipeg.

Solicitors for the respondent, Alpine Drywall & Decorating Ltd.: MacLeod, Dixon & Company, Calgary.

Solicitors for the respondent, M. F. Esson & Sons Ltd.: Friel & Cooper, Moncton.