NORMAN R. WHITTALL ..... APPELLANT;

AND

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

1967

*May 1, 2
Oct. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital gain or income—Stock-broker-Acquisition and sale of shares—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant was the president of a firm of investment dealers and stock-brokers. He sought to deduct from his income for the years 1952, 1953 and 1954, substantial profits he had realized from the acquisition, exchange and disposition of shares of several companies of which he was a director and for which his brokerage firm had acted as underwriters. The appellant argued that the profits constituted the realization of an investment, so as to constitute a capital gain. In the Minister's view, the profits were derived from a "business" within the meaning of ss. 3, 4 and 139(1)(e) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The Exchequer Court held that the appellant had assisted materially in the marketing of the securities and that the turning of these investments into profit was not merely incidental but rather the essential feature of his personal trading operations. The trial judge held further that because of his fiduciary relationship to the companies to which he was connected, the appellant was in a position to and did avail himself of the opportunity to make these profits. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

As to the second ground stated by the trial judge, there was no suggestion that in any of the transactions the appellant had obtained for himself a personal profit at the expense of any of the companies of which he was a director, or that he had placed himself in a position where he should account for the profits as a trustee. That issue was not before the Court in this case.

As to the first ground stated by the trial judge, there was sufficient evidence on which the trial judge could properly find that the appellant was engaged in the business of buying and selling securities, and that he was not in the position of an owner of an ordinary investment choosing to realize it. Consequently, the profits were income subject to tax.

Revenu—Impôt sur le revenu—Gain en capital ou revenu imposable—Courtier—Achat et vente d'actions—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

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*PRESENT: Cartwright, Martland, Ritchie, Hall and Spence JJ.

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L'appelant était le président d'une société de courtiers. Il a cherché à déduire de son revenu pour les années 1952, 1953 et 1954 les profits substantiels qu'il avait réalisés de l'achat, l'échange et la cession d'actions de plusieurs compagnies dont il était un des directeurs et pour lesquelles la société dont il faisait partie avait agi comme soumissionnaire. L'appelant prétend que les profits constituaient la réalisation d'un placement pour en devenir un gain en capital. Le Ministre a vu ces profits comme provenant d'une «entreprise» dans le sens des arts. 3, 4 et 139(1)(*e*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148.

La Cour de l'Échiquier a jugé que l'appelant avait aidé matériellement à la mise sur le marché des valeurs mobilières en question et que le fait d'avoir tiré profit de ces placements n'était pas simplement accidentel mais était plutôt la caractéristique essentielle de ses opérations commerciales. La Cour de l'Échiquier a jugé en plus que l'appelant était, vu les rapports fiduciaires qui existaient entre lui et les compagnies auxquelles il était affilié, dans une position pour se prévaloir de l'opportunité de faire les profits en question et qu'en fait il s'en était prévalu. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Quant au second motif énoncé par le juge au procès, il n'est pas suggéré que l'appelant avait obtenu pour lui-même, dans ses opérations, un bénéfice personnel au profit d'une des compagnies dont il était le directeur, ou qu'il s'était placé dans une position où il devait rendre compte des profits comme fiduciaire. Cette question n'était pas devant la Cour dans cette cause.

Quant au premier motif énoncé par le juge au procès, il y avait une preuve suffisante sur laquelle le juge pouvait se baser pour en venir, à bon droit, à la conclusion que l'entreprise de l'appelant consistait dans l'achat et la vente de valeurs mobilières, et qu'il n'était pas dans la position du détenteur d'un placement ordinaire choisissant de le réaliser. En conséquence, les profits étaient un revenu sujet à la taxe.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed.

Douglas Mc K. Brown, Q.C., for the appellant.

G. W. Ainslie and *P. Cumyn*, for the respondent.

[1] [1965] 1 Ex. C.R. 342, [1964] C.T.C. 417, 64 D.T.C. 5266.

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The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from judgments of the Exchequer Court of Canada[1], which dismissed the appellant's appeals from re-assessments, made for income tax purposes, of his income for the taxation years 1952, 1953 and 1954. The issue for determination is as to whether profits, in the total amount of $380,983.46, realized on the acquisition and sale by the appellant of units of the St. John's Trust and of shares of Inland Natural Gas Co. Ltd., Yankee Princess Oils, Ltd. and Canadian Collieries (Dunsmuir) Ltd. were income from a business, within ss. 3, 4 and para. (*e*) of subs. (1) of s. 139 of the *Income Tax Act*, R.S.C. 1952, c. 148, or constituted the realization of an investment, so as to constitute a capital gain.

The appellant was a shareholder, officer and director of the investment dealer and stock brokerage firm of Ross Whittall Ltd., at all material times, until its winding up in 1954. Norman R. Whittall Ltd. succeeded to the business of Ross Whittall Ltd. The appellant was the president of Norman R. Whittall Ltd.

In the years 1952, 1953 and 1954 the appellant owned about 67½ per cent of the equity capital of Ross Whittall Ltd.

Ross Whittall Ltd. and Norman R. Whittall Ltd. conducted a business, similar to that of any reputable investment house, of filling orders, buying or selling for clients on a commission basis, and taking portions of underwritings which they in turn distributed to their clients.

The transactions which are in issue can be dealt with under three headings:

1. The acquisition and sale of units of the St. John's Trust and of shares of Inland Natural Gas Co. Ltd.
2. The acquisition and sale of shares of Yankee Princess Oils Ltd.
3. The acquisition and sale of shares of Canadian Collieries (Dunsmuir) Ltd.

[1] [1965] 1 Ex. C.R. 342, [1964] C.T.C. 417, 64 D.T.C. 5266.

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I THE ACQUISITION AND SALE OF UNITS OF THE ST. JOHN'S TRUST AND OF SHARES OF INLAND NATURAL GAS CO. LTD.

The re-assessments made in respect of these transactions were as follows:

for 1952		
Share of proceeds re sale of St. John's Trust units	$116,500.00	
Less cost of interest in four Wilson Syndicate units	7,500.00	
		$109,000.00
for 1953		
Proceeds of sale of shares of Inland Natural Gas Co. Ltd. which had been received from St. John's Trust Syndicate in 1952	$ 77,285.05	
Less cost of same @ $1.00 per share	37,500.00	
		$ 39,785.05
for 1954		
Proceeds from sale of shares of Inland Natural Gas Co. Ltd. which had been received		
(*a*) from St. John's Trust Syndicate in 1952		
(*b*) in exchange for shares of Canadian Northern Oil and Gas Co. Ltd.	$ 55,721.50	
Less cost at $1.00 per share	21,000.00	
		$ 34,721.50

The appellant, who had been the owner of 27 out of 164½ units created under an agreement known as the St. John's Trust Agreement, together with the other owners of the units sold them to Inland Natural Gas Co. Ltd. on October 14, 1952, for the sum of $710,000. The appellant's share of the proceeds was $116,500.

The St. John's Trust Agreement, which was dated March 8, 1952, was an agreement which the appellant, his son, Richard Whittall, W. K. McGee, who was secretary of Ross Whittall Ltd., and Frank and George McMahon had entered into with the Eastern Trust Company as trustee in order to pool the interests which they had in oil and natural gas exploration rights in the lands covered by Permits 22 and 30 issued by the British Columbia

Government. The 164½ units representing the total interest in the assets of the St. John's Trust were owned in the following proportions:

The appellant	27 units
Ross Whittall Ltd.	43 units
H. Richard Whittall	4½ units
W. K. McGee	4½ units
Frank and George McMahon	85½ units
	164½ units

The lands covered by Permits 22 and 30 were located in the St. John area of the Peace River country of British Columbia. The area covered by Permit 22 was 100,000 acres and the area covered by Permit 30, which was nearby but not contiguous to Permit 22, was 200,000 acres.

The interests in Permits 22 and 30 which the parties conveyed to the trustee were as follows:

(a) four units in the Wilson Syndicate which were conveyed to the Trustee by the following persons:

The appellant	1½ units
George McMahon	1 unit
Frank McMahon	1 unit
Richard Whittall	¼ unit
W. K. McGee	¼ unit

(b) a 51% undivided beneficial interest which Frank and George McMahon owned in the interests of Ross Whittall Ltd. in Permits 22 and 30; and

(c) the remaining 49% of the interest retained by Ross Whittall Ltd. in Permits 22 and 30 subject, however, to a carried interest.

The background to the formation of the Wilson Syndicate which owned a one-tenth "carried" interest in the lands covered by Permit 22 was as follows:

(a) Both William Innes and Peace River Natural Gas Co. applied to the Province of British Columbia for a permit to prospect for petroleum and natural gas in a certain area of northern British Columbia.

(b) By agreement dated September 20, 1949, Innes agreed to withdraw his application for a permit in consideration for Peace River Natural Gas Co.'s undertaking that when the permit was issued, it would stand possessed in trust for Innes of an undivided one-tenth interest in the permit, in any leases issued pursuant to it, and in any petroleum or natural gas

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recovered therefrom, subject to the payment by Innes of one-tenth of the costs incurred by Peace River Natural Gas in exploring, developing and drilling on the land.

(c) It was further agreed that Innes' interest would be a "carried" interest, that is, that Innes would only be obligated to reimburse Peace River Gas for his portion of the drilling, developing and exploration costs out of his share of any proceeds of sale or production from the well.

In February 1952, George McMahon had acquired the opportunity of purchasing four units in the Wilson Syndicate, which units had been purchased at a price of $5,000 per unit for the following persons:

George McMahon	1 unit
Frank McMahon	1 unit
The appellant	1½ units
Richard Whittall	¼ unit
W. K. McGee	¼ unit
Total	4 units

The interests in Permits 22 and 30 which prior to their assignment to the trustee of the St. John's Trust were owned 51 per cent by the McMahon brothers and 49 per cent by Ross Whittall Ltd. subject to a carried interest, comprised the following:

(a) a 4½% interest in a block of 10,000 acres of land carved out of Permit 22 and consolidated with the block of land mentioned in paragraph (*b*) subject to the 10% carried interest in favour of William Innes (which had been assigned to the Wilson Syndicate);

(b) a 6% interest in a block of 10,000 acres of land, covered by Permit 30, subject to a 10% carried interest in favour of the following:

Canadian Atlantic Oil Co.	7 %
Empire Petroleums Ltd.	1 %
Yankee Princess Oils Ltd.	.8%
Ross Whittall Ltd.	1.2%

(c) the 1.2% carried interest referred to in paragraph (b) above;

(d) a 20% interest in those lands covered by Permit 30 other than the 10,000 acres referred to in paragraph (b) above, and subject to a 25% carried interest which was reserved by Ross Whittall Ltd.

The registered owner of Permit 22 was the Peace River Natural Gas Company, which company was controlled by Pacific Petroleums Ltd. Apart from the 10 per cent carried

interest which had been granted to Innes by Peace River Natural Gas Co., the remaining 90 per cent interest in Permit 22 was owned by a group of companies of which Pacific Petroleums was a member. Pacific Petroleums held 50 per cent of the total interest in Permit 22, and had acquired the operating agreements. Peace River Natural Gas Co. also had an interest.

The appellant "had a fair interest in Pacific Petroleums at its inception" and both then and in February 1952, was an officer and director of that company. In February 1952, George and Frank McMahon ran Pacific Petroleums as operating executives. George McMahon was one of the senior officials of Pacific Petroleums and it was through him that the appellant became interested in purchasing the Wilson Syndicate units.

The appellant was likewise an officer and director of Peace River Natural Gas Co. Ltd. at the time of the issuing of Permit 22.

Permit 30 had been acquired by McGee, the secretary of Ross Whittall Ltd. as trustee for certain persons (including Ross Whittall Ltd. which had a 20 per cent beneficial interest). The operating agreements in respect of Permit 30 had been acquired by Canadian Atlantic Oil Company. The appellant was a director of that company and George McMahon was both its president and a director.

Before the appellant acquired his interest in the Wilson Syndicate, he was aware in his capacity as an officer and director of Pacific Petroleums Ltd. that that company had drilled a first well, a "teaser", on the lands covered by Permit 22, and that other wells were soon to be drilled.

In April 1952, Pacific Petroleums commenced drilling well No. 7 and in May 1952, well No. 9 on Permit 22; these wells revealed a large reservoir of natural gas, and "it was quite obvious that profitable returns could be anticipated" from them.

The appellant paid his portion of the St. John's Trust's drilling costs of each of these wells, which was 27/164.5 of $4\frac{1}{2}$ per cent of $330,000.

After the discovery of this gas "there was a tremendous amount of new drilling and more wells were brought in". "The burning problem with these people who had got gas was how were they going to sell it." Consequently, it was contemplated that Westcoast Transmission Company

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Limited, a corporation incorporated by an act of the Parliament of Canada, would construct a pipeline from Fort St. John to a point near Sumas, B.C., on the national border, whence it would cross into the United States. The appellant was a director of that company.

Before Westcoast could export gas to the United States, it had to obtain the consent of the Canadian Board of Transport Commissioners and the American Federal Power Commission to do so. The Board of Transport Commissioners made it clear that there would be no export of gas unless the various municipalities of British Columbia were first serviced. The British Columbia Hydro Electric Company agreed to undertake the distribution of gas in the lower part of British Columbia. In the upper part of British Columbia there was no company capable of distributing gas. Westcoast requested the appellant to incorporate a company to handle the distribution in the upper country. This he did, and caused Inland Natural Gas Company to be incorporated. The appellant became president of Inland Natural Gas. Westcoast then promised the exclusive distribution of its gas to Inland Natural Gas for the Okanagan, Cariboo and Prince George areas of British Columbia.

Inland Natural Gas after incorporation became interested in acquiring reserves of gas and gas bearing properties. To that end it caused to be incorporated a company known as St. John Gas and Oil Co., Ltd., which was a wholly-owned subsidiary and was formed for the purpose of acquiring the gas reserves and properties.

On October 15, 1952, St. John Gas and Oil Co., Ltd. purchased the 164½ units of the St. John's Trust for $710,000. The appellant's share of the proceeds was $116,500 and the gain realized by him was $109,000.

The various holders of the unit certificates under the St. John's Trust Agreement had, by a collateral agreement, agreed to purchase 710,000 treasury shares of Inland Natural Gas Company for a price of $1 per share. On October 7, 1952, the appellant purchased 116,500 shares of Inland Natural Gas.

A few days later, Ross Whittall Ltd. conveyed to St. John Gas and Oil Co., Ltd., for $40,000, the 25 per cent carried interest which it still owned in the 20 per cent

interest in Permit 30; Ross Whittall Ltd. used the proceeds of the sale to acquire 40,000 shares of Inland Natural Gas.

On October 16, 1952, pursuant to an underwriting agreement, Ross Whittall Ltd. and McMahon and Burns each agreed to purchase 250,000 treasury shares of Inland Natural Gas at 75¢ per share and to offer them for sale to the public at $1 per share.

Between October 16, 1952, and September 4, 1953, the appellant sold 113,500 shares in Inland Natural Gas at the following prices per share:

1952	*Shares Sold*		*Price Per Share*
16 October.....1952	56,000		$0.97
22 October.....1952	5,000		1.00
7 November.....1952	10,000		1.12
30 December.....1952	5,000		1.30
		76,000	
1953			
6 January.....1953	5,000		1.45
9 January.....1953	5,000		1.55
22 January.....1953	4,000		1.70
18 February.....1953	3,500		1.95
20 March.....1953	5,000		2.45
20 March.....1953	5,000		2.43
30 March.....1953	5,000		2.79
4 September.....1953	3,000		1.99
4 September.....1953	2,000		2.10
		37,500	
		113,500	

On October 29, 1953, Ross Whittall Ltd., pursuant to an underwriting agreement, purchased a further 75,000 treasury shares of Inland Natural Gas at $2 per share.

On November 24, 1953, the appellant received from Inland Natural Gas a further 18,000 shares in exchange for 36,000 shares of Canadian Northern Oil and Gas. The appellant had acquired the 36,000 shares of Canadian Northern Oil and Gas in August 1953, and they represented the appellant's portion of the shares which had been allotted by that company for the "initial money put up by the insiders of Canadian Northern Oil and Gas".

The appellant in his examination in chief stated that the reason that he sold 37,500 shares of Inland Natural Gas during 1953 was that:

> it became evident . . . that there was going to be a very serious delay in getting permits from the Board of Transport Commissioners and the Federal Power Commission to enable Westcoast to make its allowance to

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Inland of the distribution in the upper country worthwhile, . . . it was only very shortly after that the Federal Power Commission turned down our Westcoast application and the stock did really go down then.

Throughout 1954, the appellant purchased 18,000 shares of Inland Natural Gas and sold 34,000 shares. Particulars of the purchases and sales are as follows:

Date	*Number Purchased*	*Price Per Share*	*Number Sold*	*Sales Price Per Share*
15 January 1954.....			16,500	2.48/2.70
13 May.....	500	3.19		
21 May.....	2,100	2.30/2.50		
1 June.....	2,000	2.57/2.62		
6 July.....	2,900	0.91/2.51½		
8 July.....	3,000	1.31/1.36		
19 July.....	1,000	1.16		
17 September.....	2,000	1.95		
27 September.....	2,000	2.02		
19 October.....			2,500	2.63
12 November.....	2,500	2.01½		
23 November.....			2,000	2.75/2.85
3 December.....			1,000	2.68½
6 December.....			8,000	2.78½/2.83
7 December.....			4,000	2.88½
Total.....	18,000		34,000	

On March 31, 1955, the appellant purchased a further 2,500 shares of Inland Natural Gas at $2.70 per share and on June 19, 1955, sold 2,500 shares of Inland Natural Gas at $3.40/3.50.

The gain realized by the appellant upon the sales in 1953 and 1954 of the 58,500 shares of Inland Natural Gas was $74,506.55.

II THE ACQUISITION AND SALE OF SHARES IN YANKEE PRINCESS OILS LTD.

The second question for determination is whether the following gains realized on the sale of shares of Yankee Princess Oils Ltd. are part of the appellant's income for 1952. The re-assessment is as follows:

Profit on sale of shares of Yankee Princess Oils Ltd. from 29th January, 1952, to 21st April, 1952, as per schedule filed with respondent

105,250 shares $110,157.34

Less:			
Purchase of 31st January, 1952, shown as sale in error			
500 shares		383.06	
		109,774.28	
Add:			
Sale of 5th March, 1952, not included in schedule filed			
2,000 shares		2,135.00	
		111,909.28	
Less:			
Cost of shares sold			
92,800	$6,750.00		
13,950 @ 7½¢	1,046.25	7,796.25	
			$104,113.03

The 106,750 shares in Yankee Princess Oils material to this appeal were acquired by the appellant upon three occasions:

(a) 20,250 shares were acquired upon the incorporation of Yankee Princess Oils on September 24, 1948;

(b) 65,000 shares were acquired in August 1951;

(c) 40,000 shares were acquired on December 21, 1951.

In 1944, one MacDonald, the owner of C.P.R. Oil Permit 257 (which covered 10,000 acres) approached McQueen, a friend of the appellant, to say that he was in arrears on the rentals due under Permit 257 and asked McQueen if he was interested in investing moneys in that Permit. McQueen approached the appellant and his then partner, Ross, and the three acquired a half interest in Permit 257 in the following portions:

The appellant	37½%
McQueen	37½%
Ross	25 %

Between 1944 and September 24, 1948, the appellant, McQueen and Ross sold their interest in 838 acres of land covered by Permit 257.

The rent payable under the Permit was 10¢ per acre, or $416.20 per annum, for the interest acquired and retained by the appellant, McQueen and Ross.

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In 1948, one Henry Tudor approached the appellant, McQueen and Ross with a proposal that they assign their interest in Permit 257 to a company which he was incorporating, Yankee Princess Oils Ltd., for cash and stock. Yankee Princess Oils Ltd. was incorporated on September 24, 1948, with an authorized capital of 150,000 shares.

The appellant, McQueen and Ross transferred their interest to Yankee Princess Oils Ltd. for:

$20,700 cash
18,000 in promissory notes
54,000 shares in the stock of Yankee Princess Oils

The appellant's share of the proceeds of sale was:

$ 7,652.50 cash
6,750.00 in promissory notes
20,250 shares in the stock of Yankee Princess Oils

In 1950 the appellant and Ross assigned the promissory notes which had been received from Yankee Princess Oils to Ross Whittall Ltd. for 80 per cent of their face value.

In 1951 Tudor felt that there had been sufficient development in the area of the lease to justify Yankee Princess Oils in acquiring further property. As a first step to this end, the authorized capital of Yankee Princess Oils was increased to 3,000,000 shares.

Subsequently, the various holders of the promissory notes became entitled to surrender their notes to Yankee Princess Oils in return for shares of that company at the rate of $7\frac{1}{2}¢$ per share. The shares were purchased by Ross Whittall Ltd. which, in turn, sold to the appellant 65,000 shares at $8¢$ per share.

On December 21, 1951, Yankee Princess Oils acquired from the North West Syndicate (a syndicate of which the appellant was a member) 25 Crown Petroleum and Natural Gas Leases for the sum of $38,000. The North West Syndicate, on the sale of the leases to Yankee Princess Oils, gave an undertaking that $30,000 of the $38,000 purchase price would be used to purchase treasury shares of Yankee Princess Oils at $7¢$ per share. The result was that the appellant received $3,800 of which $3,000 was used to purchase 40,000 shares of Yankee Princess Oils.

The circumstances surrounding the formation of the North West Syndicate and the appellant's interest in it are as follows:

(a) In March 1951, the appellant had acquired at a cost of $800.00, 40 per cent of a 25 per cent interest in 25 Crown Petroleum and Natural Gas Leases.

(b) His son, Richard Whittall, had acquired 40 per cent of the 25 per cent interest in the leases and McGee had acquired 20 per cent of the 25 per cent interest in the leases.

(c) On December 21, 1951, the registered owners of the leases formed a syndicate known as the North West Syndicate wherein

(i) all of the leases were declared to be held in trust for the members of the syndicate;

(ii) Richard Whittall, the appellant's son, was appointed as manager for a period of one year;

(iii) Richard Whittall was authorized to sell the leases to Yankee Princess Oils for $38,000; and

(iv) the proceeds from any sales were to be paid to Ross Whittall Ltd. as trustee and after the payment of expenses were to be disbursed to the members of the syndicate.

On January 2, 1952, Yankee Princess Oils acquired from Atlantic Oil Company (which company later changed its name to Canadian Atlantic Oil Company) a farm out agreement wherein Yankee Princess Oils agreed to drill on lands owned by Atlantic Oil Company at no cost to that company in consideration for acquiring a 50 per cent interest in an oil lease held by Atlantic Oil Company. The appellant was an officer of both Atlantic Oil Company and Yankee Princess Oils. This farm out agreement had been negotiated by Richard Whittall who at that time was a director of Yankee Princess Oils Ltd.

On January 8, 1952, at an extraordinary general meeting of the shareholders of Yankee Princess Oils, a resolution was passed converting it to a public company.

In the early part of January 1952, drilling rigs moved on to the farm out and commenced drilling. The stock of

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Yankee Princess Oils appreciated very substantially on the strength of the rumour that drilling was going to take place.

On January 29, 1952, shares of Yankee Princess Oils were being traded on the unlisted market at 58¢ per share notwithstanding that no results had been obtained from the drilling on the Canadian Atlantic farm out. One of the reasons for the high price was that on nearby property a well had been brought into production, and there was "a very wild oil market." The appellant, on January 29, 1952, sold 5,000 shares of Yankee Princess Oils at 58¢ per share.

The appellant on January 31, 1952, purchased a further 500 shares of Yankee Princess Oils at 75¢ per share.

By an agreement dated January 31, 1952, and executed in early February, Ross Whittall Ltd. agreed to underwrite the issue of certain shares of Yankee Princess Oils. Under the underwriting agreement:

(a) Yankee Princess Oils agreed to file a prospectus with the appropriate Government authorities before February 9, 1952;

(b) Yankee Princess Oils granted to Ross Whittall Ltd. an option to purchase prior to February 9, 1952, 350,000 shares at 48¢ per share, which were to be offered to the public at 60¢ per share;

(c) in the event that Ross Whittall Ltd. exercised the option referred to in subparagraph (b), Yankee Princess Oils granted a further option to Ross Whittall Ltd. to purchase within sixty days from the filing of the prospectus a further 650,000 shares at the price of 48¢.

All of this stock was spoken for before Ross Whittall Ltd. offered it to the public.

The appellant, on February 1, 1952, sold 40,000 shares of Yankee Princess Oils at 85¢ per share.

By February 5, 1952, Ross Whittall Ltd. had sold to the public the 1,000,000 shares which it had agreed to underwrite at 60¢ per share and immediately thereafter the price went to 85¢ per share.

The appellant, on February 5, 1952, sold 250 shares of Yankee Princess Oils for 60¢ per share.

On February 7, 1952, the appellant was advised that the well which Yankee Princess Oils was drilling under the farm out agreement was a successful well, and he sold 20,000 shares of Yankee Princess Oils at 95¢ per share.

During the months of March and April, the appellant sold 41,500 shares of Yankee Princess Oils at the following prices per share:

	Number	*Price Per Share*
5 March	2,000	1.07
10 March	3,000	1.16/1.20
19 March	1,500	1.12
1 April	5,000	1.29/1.30
7 April	15,000	1.20/1.21/1.40
21 April	15,000	1.48/1.55
	41,500	

The appellant, on May 9, 1952, purchased a further 2,500 shares of Yankee Princess Oils at $1.42 per share.

Ross Whittall Ltd., on May 12, 1952, underwrote a further 100,000 shares of Yankee Princess Oils which were issued for $1 per share and offered for sale to the public at $1.40 per share.

By May of 1952 three more wells had been brought into production on the land subject to the farm out agreement with Atlantic Oil.

During the months of May, September and October, the appellant purchased a further 19,500 shares of Yankee Princess Oils at prices ranging from a high of $1.42 to a low of 80¢ per share.

During the months of February and March 1953, the appellant sold a further 17,000 shares of Yankee Princess Oils.

During 1953, it became obvious that the four wells which Yankee Princess Oils had drilled were not going to produce as much oil as was anticipated and the market for the shares of Yankee Princess Oils declined.

On October 9, 1953, the appellant bought a further 5,000 shares at 40¢ a share, and on October 13, 1953, he sold these shares at from 51¢ to 53¢ per share.

The gain realized by the appellant in 1952 upon the disposition by him of 106,750 shares of Yankee Princess Oils was $104,113.03.

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III THE ACQUISITION AND SALE OF SHARES IN CANADIAN COLLIERIES (DUNSMUIR) LTD.

The third question for detrmination is whether there is to be included in the appellant's income the following gains. The re-assessment is as follows:

for 1953

Proceeds of sale of shares of Canadian Collieries (Dunsmuir) Ltd. purchased from Sunray Oils 14,650 shares	$93,203.75	
Less cost @ $3.50 per share	51,275.00	
	41,928.75	
Less reduction agreed on by respondent in the notification	1,786.75	
		$40,142.00

for 1954

Proceeds of sale of shares of Canadian Collieries (Dunsmuir) Ltd. purchased from Sunray Oils 10,350 shares	$89,446.85	
Less cost @ $3.50 per share	36,225.00	
		$53,221.88

The 25,000 shares in Canadian Collieries (Dunsmuir) Ltd. material to this appeal were acquired by the appellant on November 26, 1953, in the following circumstances:

Canadian Collieries (Dunsmuir) Ltd. had originally been in the business of mining and selling coal; the appellant had been the president and a shareholder of the company since 1945.

In 1952, Canadian Collieries having found the coal business to be declining and unprofitable, decided to acquire an interest in oil; to this end, in midsummer of 1952, it acquired the greater portion of the interests which Sunray Oil Corporation had in certain oil and natural gas leases in the Province of Alberta in exchange for issuing to Sunray Oil Corporation 243,000 of its treasury shares.

In August 1952, Ross Whittall Ltd. underwrote a sale to the public of 88,828 shares in Canadian Collieries, acquired at $3.60 per share.

In November 1953, a first well had been drilled on land covered by the company's permits, though it proved to be a disappointment.

On November 20, 1953, Sunray Oil Corporation offered to sell to the appellant a block of 100,000 shares of Canadian Collieries at $3.50 per share. The appellant was unable to purchase the whole block, but by November 26 the appellant contacted the following persons who agreed to acquire the following shares:

Ross Whittall Ltd.	20,000 shares
Richard Whittall	2,500 shares
W. K. McGee	2,500 shares
Frank and George McMahon	50,000 shares

The appellant personally acquired 25,000 shares.

During the months of December 1953, and January 1954, the price of the shares of Canadian Collieries "appreciated quickly". This was because a second well had come in and had proved to be a commercial well.

During 1953, the appellant acquired 28,000 shares and sold 24,000 shares of Canadian Collieries (Dunsmuir) Ltd. During 1954, he acquired 19,200 shares and sold 36,200 shares of Canadian Collieries (Dunsmuir) Ltd. During 1955 he bought 5,000 shares and sold 26,600 shares of Canadian Collieries (Dunsmuir) Ltd.

The gain realized by the appellant upon the disposition, in 1953 and 1954, of 25,000 shares of Canadian Collieries (Dunsmuir) Ltd. was $93,363.88.

The learned trial judge stated the issue before him in the following terms:

> The issue to be decided on these facts is whether or not all or any of these securities (the profit on the realization of which was taxed by the Minister as income of the appellant in the relevant years) were ordinary investments within the meaning of the jurisprudence in respect to the same, or whether the transactions entered into by the appellant in the acquisition, exchanging and realization of them were entered into as a scheme for profit making so that the profit gained, received, or derived therefrom by the appellant was profit gained, received or derived from a trade or business of the appellant constituting income within the meaning of sections 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

The paragraph in the statute to which he last refers provides:

> (*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.

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He reached the following conclusions:

On the facts of this case, however, and irrespective of the fiduciary relationships to which I will refer, I am compelled to hold that this appellant in respect to the acquisition of all these securities was endeavouring to make a profit by a trade or business, and was actually engaged in this business at all material times and the profitable sales and exchanges of securities were not in law a substitution of one form of investment for another. During all the material times the appellant assisted materially in the marketing of these securities, which brought substantial gain to himself. The turning of these investments into profit was not merely incidental but instead was the essential feature of his personal trading operations or business speculations.

These investments, the realization of which produced the profit, in my opinion, were not "ordinary" investments within the meaning of the *Irrigation Industries case,* (1962) S.C.R. 346, and the *Californian Copper Syndicate* case, (1904) 5 T.C. 159.

In addition, I am also of opinion that one of the outstanding facts which distinguishes this case from all the cases cited in support of the appellant's submission is the fact that the appellant was in a fiduciary relationship as a director, and in some cases also as an officer, of various companies at the material times as, e.g., Pacific Petroleums Ltd., Atlantic Oil Co. Ltd., Peace River Natural Gas Co. Ltd., Westcoast Transmission Co. Ltd., St. John Oil & Gas Co. Ltd., Yankee Princess Oils, Ltd., Inland Natural Gas Co. Ltd., Canadian Northern Oil & Gas Co. Ltd., Canadian Collieries (Dunsmuir) Ltd., and Ross Whittall Ltd.; and because of this fiduciary relationship was in a position to and did avail himself of the opportunity to make these trading profits.

It is basic equity law that directors are creatures of statute and occupy a position similar in varying respects to those of agents, trustees and managing partners, and their position is clearly of a fiduciary character. They are trustees of the powers which they possess as directors, as for example, the power of issuing and allotting shares. In accepting office as such, directors place themselves in a fiduciary position towards the company and its shareholders. And a director of two companies which deal with each other owes a fiduciary duty to each of them and to their respective shareholders. As directors they may not exercise their powers as directors in such a way as to benefit themselves at the expense of the remaining shareholders. They are precluded from dealing legally on behalf of the company with themselves when there is a personal conflicting interest. Directors may only take up shares in a company of which they are directors on the same terms as the general public.

These are only a few of the consequences in equity which flow from occupying the position of director of a company when various transactions are being completed; and they are all relevant in the various circumstances which obtained in the transactions under review in this appeal.

In this case, because of the various fiduciary relationships in which the appellant was at the material times, and the conflicts of interest which resulted, on this ground alone I am of opinion that none of these investments of the appellant (the acquisition and realization of which resulted in a profit) were "ordinary" investments within the meaning of the *Irrigation Industries* case (supra).

Dealing first with the second, or additional ground stated, there is no evidence that, in any of the transactions in

which he engaged, the appellant was in breach of the duty which he owed to the various companies of which he was a director. There is no suggestion that in any of the transactions under consideration he obtained for himself a personal profit at the expense of any of such companies, or that he had placed himself in a position where he should account for such profits as a trustee. That issue is not before the Court in this case.

The sole issue here is whether he, personally, was engaged in the business of trading in oil and gas rights and in corporate shares. The information which was available to him, qua director, and the actions which he took in the light of that information are relevant to that issue to the extent that they are of assistance in determining the intentions of the appellant in relation to the various rights and shares which he acquired and sold.

I am of the opinion that there was ample evidence to support the conclusion reached by the learned trial judge in the first paragraph of the passage from his reasons quoted above. Counsel for the appellant took issue with the statement that "the appellant assisted materially in the marketing of these securities", contending that it was the investment company which had done the marketing and not the appellant. But the learned trial judge uses the word "assisted", and the appellant was, at the material times, the majority shareholder, a director and officer of Ross Whittall Ltd. and the president of its successor. Undoubtedly he assisted in the marketing operations mentioned.

In my opinion, the appellant's personal transactions under review come within the latter part of the frequently cited statement of Lord Justice Clerk in *Californian Copper Syndicate v. Harris*[2], which case is cited by the learned trial judge:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the *Income Tax Act* of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case

[2] (1905), 5 T.C. 159 at 165-6.

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is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits.

In respect of the transactions involved in this case, there was sufficient evidence on which the learned trial judge could properly find that the appellant was engaged in the business of buying and selling rights to land and securities, and that he was not in the position of an owner of an "ordinary" investment choosing to realize it.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Russell & Dumoulin, Vancouver.

Solicitor for the respondent: D. S. Maxwell, Ottawa.