1966

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Supreme Court of Canada
Cour Suprême du Canada

Editors—Arrêtistes
FRANÇOIS des RIVIÈRES, C.R.
MILLS SHIPLEY, B.A., LL.B., B.L.S.

PUBLISHED PURSUANT TO THE STATUTE BY
KENNETH J. MATHESON, Q.C., Registrar of the Court

PUBLIÉ CONFORMÉMENT À LA LOI PAR
KENNETH J. MATHESON, C.R., Registraire de la Cour

ROGER DUHAMEL, F.R.S.C.
Queen's Printer and
Controller of Stationery

ROGER DUHAMEL, M.S.R.C.
Imprimeur de la Reine et
Contrôleur de la Papeterie

Ottawa, 1967

92709—1

JUDGES

OF THE

SUPREME COURT OF CANADA

The Honourable ROBERT TASCHEREAU, P.C., *Chief Justice of Canada.*

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

The Honourable EMMETT MATTHEW HALL.

The Honourable WISHART FLETT SPENCE.

ATTORNEY GENERAL OF CANADA

The Honourable LUCIEN CARDIN, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable L. T. PENNELL, Q.C.

JUGES

DE LA

COUR SUPRÊME DU CANADA

L'honorable ROBERT TASCHEREAU, C.P., *juge en chef du Canada.*

L'honorable JOHN ROBERT CARTWRIGHT.

L'honorable GÉRALD FAUTEUX.

L'honorable DOUGLAS CHARLES ABBOTT, C.P.

L'honorable RONALD MARTLAND.

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L'honorable L. T. PENNELL, C.R.

92709—1½

ERRATA
in—dans le
volume 1966

Page 3, line 3 of English Caption. Read "Code" instead of "law".

Page 86, line 2 from bottom. Read "Hurly" instead of "Hurley".

Page 111, line 4 of the French headnote should read: «dépenses de prospection, d'exploration et de mise en valeur faites par . . .»

Page 111, line 20 of the French headnote should read: «dépenses étaient couvertes par les dispositions de l'art. 83A(7)(c), et en . . .»

Page 370, footnote 1. Read "[1955] S.C.R." instead of "[1965] S.C.R.".

Page 3, ligne 3 de l'en-tête anglais. Lire "Code" au lieu de "law".

Page 86, ligne 2 au bas de la page. Lire "Hurly" au lieu de "Hurley".

Page 111, ligne 4 du jugé français doit se lire: «dépenses de prospection, d'exploration et de mise en valeur faites par . . .»

Page 111, ligne 20 du jugé français doit se lire: «dépenses étaient couvertes par les dispositions de l'art. 83A(7)(c), et en . . .»

Page 370, renvoi 1 Lire "[1955] S.C.R." au lieu de "[1965] S.C.R.".

UNREPORTED JUDGMENTS—JUGEMENTS NON RAPPORTÉS

The following judgments rendered during the year will not be reported

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Les jugements suivants rendus durant l'année ne seront pas rapportés

Association Internationale des Débardeurs, Local 375 et al. v. Lelièvre (Que.), [1966] Que. Q.B. 155, appeal dismissed with costs, February 10, 1966.

Bannerman v. The Queen (Man.), 55 W.W.R. 257, appeal dismissed, November 30, 1966.

Baron v. Adat Development Corpn. (Que.), [1964] Que. Q.B. 812, appeal quashed with costs of a motion to quash, February 9, 1966.

Campbell v. The Queen (Ont.), [1964] 2 O.R. 487, appeal dismissed, January 31, 1966.

Druckman v. Stand Built Upholstery Corpn. (Que.), [1965] Que. Q.B. 615, appeal dismissed with costs, February 8, 1966.

Foot v. Minister of National Revenue (Exch.), [1965] 1 Ex. C.R. 657, appeal dismissed with costs, February 2, 1966.

Hawrelak v. The Queen (Alta.), 53 W.W.R. 257, appeal dismissed with costs, January 27, 1966.

Kovacs v. Registrar of Motor Vehicles (Ont.), appeal allowed with costs throughout, October 14, 1966.

Kuzyk v. The Queen (B.C.), appeal dismissed, November 1, 1966.

Kyriacopoulos v. Bouchet (Exch.), 27 Fox Pat. C. 91, appeal dismissed with costs, June 1, 1966.

Lemay Construction Ltée v. Poirier (Que.), [1965] Que. Q.B. 565, appeal dismissed with costs, June 6, 1966.

Lyding v. The Queen (Alta.), 55 W.W.R. 488, appeal dismissed, January 26, 1966.

Oakville, Town of v. Ontario Natural Gas Storage and Pipelines Ltd. (Ont.), appeal dismissed with costs, February 18, 1966.

Pearce v. Warden of Manitoba Penitentiary (Man.), 54 W.W.R. 720, appeal dismissed, May 24, 1966.

Queen, The v. Black and Mackie (Ont.), [1966] 1 O.R. 683, appeal quashed, February 3, 1966.

Queen, The v. Kanester (B.C.), 55 W.W.R. 705, appeal allowed, conviction and sentence restored, November 23, 1966.

Turner v. The Queen (B.C.), appeal dismissed, November 1, 1966.

Watkins (Thomas C.) Ltd v. Cambridge Leaseholds Ltd. et al. (Ont.), appeal allowed with costs, June 10, 1966.

Whyte v. The Queen (Ont.), appeal dismissed, February 16, 1966.

MOTIONS—REQUÊTES

Applications for leave to appeal granted are not included in this list.

Cette liste ne comprend pas les requêtes pour permission d'appeler qui ont été accordées.

Bagi v. The Queen (Ont.), leave to appeal refused, April 26, 1966.

Bailey v. The Queen (Ont.), motion for habeas corpus refused, June 27, 1966.

Baker v. The Queen (Ont.), motion for habeas corpus refused, June 27, 1966.

Ball et al. v. The Queen (Ont.), leave to appeal refused, April 26, 1966.

Bannerman v. The Queen (Man.), 55 W.W.R. 257, leave to appeal refused, June 6, 1966.

Bayview Steel Co. v. York Steel (Ont.), motion to reinstate appeal refused with costs, February 28, 1966.

Bédard v. The Queen (Que.), leave to appeal refused, December 5, 1966.

Bennett v. Jones (B.C.), 57 W.W.R. 56, leave to appeal refused with costs, November 10, 1966.

Bintner v. Board of Trustees for the Regina Public School Trustees (Sask.), 55 D.L.R. (2d) 646, leave to appeal refused with costs, March 14, 1966.

Boulanger Inc. v. Nadeau & Lachance (Que.), [1966] Que. Q.B. 298, leave to appeal refused with costs, February 7, 1966.

Bunt v. The Queen (B.C.), leave to appeal refused, June 27, 1966.

Brymer v. The Queen (Ont.), leave to appeal refused, May 30, 1966.

Canadian General Insurance Co. et al. v. G. A. Baert Construction (1960) Ltd. (Man.), [1965] I.L.R. 134, leave to appeal refused with costs, October 31, 1966.

Canadian National Railway Co. v. Workmen's Compensation Board (Nfld), leave to appeal refused with costs, April 26, 1966.

Clark et al. v. Attorney General for Ontario (Ont.), leave to appeal refused, November 7, 1966.

Clemes v. The Queen (Ont.), leave to appeal refused, November 21, 1966.

Cosgrave v. Busk (Ont.), leave to appeal refused with costs, December 12, 1966.

Cowan v. Canadian Broadcasting Corpn. (Ont.), [1966] 2 O.R. 309, leave to appeal refused with costs, June 13, 1966.

D'Earmo v. The Queen (Ont.), leave to appeal refused, June 27, 1966.

Deputy Minister of National Revenue for Customs and Excise v. Consolidated Denison Mines et al. (Exch.), [1966] S.C.R. 8, motion to vary judgment granted, June 6, 1966.

Duncan v. The Queen (Ont.), leave to appeal refused, June 27, 1966.

Falconbridge Nickel Mines Ltd. v. Minister of National Revenue (Exch.), [1966] S.C.R. 110, motion to vary judgment granted, June 6, 1966.

Gardner et al. v. The Queen (B.C.), leave to appeal refused, April 27, 1966.

Ghirardosi v. The Queen (B.C.), [1966] S.C.R. 367, motion to vary judgment refused without costs, October 4, 1966.

Gillis v. The Queen (Sask.), leave to appeal refused, June 13, 1966.

Goodfellow et al. v. Toronto Stock Exchange (Ont.), leave to appeal refused with costs, April 27, 1966.

Grekin v. Tanguay (Que.), leave to appeal refused, December 5, 1966.

Handler v. Rine (Ont.), leave to appeal refused with costs, October 31, 1966.

International Pediatric Products et al. v. Lambert et al. (B.C.), leave to appeal refused with costs, May 30, 1966.

Jacob v. The Queen (Ont.), leave to appeal refused, June 28, 1966.

Jerome v. Saskatchewan Power Corpn. (Sask.), leave to appeal refused with costs, April 27, 1966.

Kimmerly v. Barber et al. (B.C.), 54 W.W.R. 629, leave to appeal refused with costs, May 9, 1966.

Kipnes v. The Queen (Alta.), 56 W.W.R. 474, leave to appeal refused, October 31, 1966.

Korcsmaros v. The Queen (Ont.), leave to appeal refused, October 31, 1966.

Lafleur v. Minister of National Revenue (Que.), leave to appeal refused, December 12, 1966.

Langstaff v. Campbell (Ont.), motion to quash granted with costs, February 28, 1966.

Langstaff v. Gotfrid et al. (Ont.), motion to quash granted with costs, April 26, 1966.

Lyding v. The Queen (Alta.), 55 W.W.R. 488, motion to adduce new evidence refused, January 26, 1966.

McKenzie & Thériault v. The Queen (Ont.), leave to appeal refused, June 28, 1966.

McLaughlin et al. v. Trottier et al. (Que.), [1966] Que. Q.B. 263, leave to appeal refused without costs, January 25, 1966.

McNiven v. The Queen (Ont.), leave to appeal refused, June 27, 1966.

Malton, Board of Trustees of v. Butt et al. (Ont.), leave to appeal refused without costs, October 4, 1966.

Mandybura v. Crawford et al. (Man.), motion to quash granted with costs, October 28, 1966.

Minister of National Revenue v. Mainwaring (B.C.), motion for consent judgment granted, November 21, 1966.

Nadeau v. The Queen (Man.), leave to appeal refused, May 9, 1966.

Ogdensburg Bridge & Port Authority v. Township of Edwardsburg (Ont.), leave to appeal refused with costs, October 4, 1966.

Oschipok v. The Queen (Sask.), motion for habeas corpus refused, March 14, 1966.

Parkland Chapel v. Edmonton Broadcasting et al. (Alta.), leave to appeal refused with costs, May 2, 1966.

Pedditt v. The Queen (Ont.), leave to appeal refused, October 4, 1966.

Périard v. The Queen (Ont.), leave to appeal refused, June 27, 1966.

Peters v. The Queen (B.C.), motion for habeas corpus refused, March 7, 1966.

Pilo et al. v. Giuliani (Ont.), leave to appeal refused with costs, January 25, 1966.

Queen, The v. Black and Mackie (Ont.), [1966] 1 O.R. 683, motion to quash granted, February 3, 1966.

Queen, The v. Morris (B.C.), 50 W.W.R. 576, leave to appeal refused, February 14, 1966.

Queen, The v. Ross & Gill (B.C.), 54 W.W.R. 698, leave to appeal refused, February 14, 1966.

Reine, La v. Henrichon (Que.), [1966] Que. Q.B. 285, leave to appeal refused, February 2, 1966.

Reine, La v. Paradis (Que.), leave to appeal refused, February 21, 1966.

Riendeau v. The Queen (Que.), leave to appeal refused, December 5, 1966.

Rochon v. Castonguay (Que.), [1966] Que. Q.B. 291, leave to appeal refused, May 9, 1966.

Sherron v. The Queen (Ont.), leave to appeal and to adduce new evidence refused, November 23, 1966.

Skeavington v. The Queen (Man.), leave to appeal refused, November 21, 1966.

Smiley v. The Queen (Alta.), leave to appeal refused, June 13, 1966.

Smith v. Winnipeg General Hospital et al. (Man.), leave to appeal refused with costs, October 17, 1966.

Stanley et al. v. Brown et al. (Que.), leave to appeal refused with costs, May 9, 1966.

Stolove v. The Queen (Ont.), leave to appeal refused, October 4, 1966.

Swait v. Board of Trustees of the Maritime Transportation Unions et al. (Que.), leave to appeal refused with costs, October 17, 1966.

Thorel v. Thorel and Duke (Ont.), leave to appeal refused, December 12, 1966.

Tremblay v. The Queen (Que.), [1966] Que. Q.B. 408, leave to appeal refused, March 14, 1966.

Turner v. The Queen (B.C.), motion to adduce new evidence refused, November 1, 1966.

Wakefield v. Rockwood (Man.), leave to appeal refused with costs, October 24, 1966.

Watson v. Watson (Ont.), leave to appeal refused, February 7, 1966.

West & Dubros v. The Queen (Man.), leave to appeal refused, May 17, 1966.

Whitney v. The Queen (Ont.), leave to appeal refused, April 26, 1966.

Windle v. Windle (Ont.), leave to appeal refused with costs, March 7, 1966.

Wyne v. The Queen (Alta.), leave to appeal refused, April 27, 1966.

TABLE OF JUDGMENTS AND MOTIONS

TABLE DES JUGEMENTS ET MOTIONS

A

PAGE

A & R Farms Ltd. *et al.*, Gilchrist v... 122
Adat Development Corpn., Baron v.. v
Adelaide Motors Ltd. v. Byrne..... 158
Algoma Central and Hudson Bay Ry. Co. *et al.* v. Manitoba Pool Elevators Ltd. *et al*..... 359
Aqua-Land Exploration Ltd., Guarantee Company of North America *et al.* v..... 133
Association Internationale des Débardeurs, Local 375 *et al.* v. Lelièvre... v
Attorney General for Ontario, Clark *et al.* v..... vii
Attorney General of Quebec *et al.*, Kredl v..... 320

B

B.C. Pea Growers Ltd., City of Portage La Prairie v..... 150
Baert (G.A.) Construction (1960) Ltd., Canadian General Insurance Co. *et al.* v..... vii
Bagi v. The Queen..... vii
Bailey v. The Queen..... vii
Baker v. The Queen..... vii
Bakery and Confectionery Workers International Union of America, Local No. 468 *et al.* v. White Lunch Ltd. *et al*..... 282
Ball *et al.* v. The Queen..... vii
Bank of Nova Scotia, Hoon v..... 405
Bank of Nova Scotia *et al.*, Hurly *et al.* v..... 83
Bannerman v. The Queen..... vii
Bannerman v. The Queen..... v
Barber *et al.*, Kimmerly v..... viii
Baron v. Adat Development Corpn... v
Bayview Steel Co. v. York Steel..... vii
Bédard v. The Queen..... vii
Bédard v. Saskatchewan Government Insurance Office..... 548
Bell-Craig Pharmaceuticals, Division of L D. Craig Ltd., Hoffman LaRoche Ltd. v..... 313

B—Concluded—fin

PAGE

Bell Telephone Company of Canada, Commission du Salaire Minimum v. 767
Belle-Isle v. Ministre du Revenu National..... 354
Belle-Isle Lumber Co., Craft Finance Corpn. v..... 661
Bennett v. Jones..... vii
Bickle *et al.*, Minister of National Revenue v..... 479
Bintner v. Board of Trustees for the Regina Public School Trustees.... vii
Black and Mackie, The Queen v..... v
Black and Mackie, The Queen v..... ix
Board of Trustees of the Maritime Transportation Unions *et al.*, Swait v. ix
Board of Trustees for the Regina Public School Trustees, Bintner v..... vii
Borowsky, Lazarenko v..... 556
Bouchet, Kyriacopoulos v..... v
Boulanger Inc. v. Nadeau & Lachance vii
Brown *et al.*, Stanley *et al.* v..... ix
Brymer v. The Queen..... vii
Bunt v. The Queen..... vii
Busk, Cosgrave v..... vii
Butt *et al.*, Board of Trustees of Malton v..... viii
Byrne, Adelaide Motors Ltd. v..... 158

C

Cambridge Leaseholds Ltd. *et al.*, Thomas C. Watkins Ltd. v..... v
Campbell, Langstaff v..... viii
Campbell v. The Queen..... v
Canadian Bank of Commerce *et al.*, Clarkson Co. Ltd. v..... 513
Canadian Broadcasting Corpn., Cowan v..... vii
Canadian General Insurance Co. *et al.* v. G. A. Baert Construction (1960) Ltd..... vii
Canadian Home Assurance Co. v. Gauthier..... 305
Canadian National Railway Co. v. Workmen's Compensation Board... vii

C—Concluded—Fin

PAGE

Canadian Western Natural Gas Co. v. Central Gas Utilities Ltd. 630
Castonguay, Rochon v. ix
Central Gas Utilities Ltd., Canadian Western Natural Gas Co. v. 630
Centrale d'Immeubles Ste-Foye Inc., Jolicoeur v. 755
Cheerio Toys and Games Ltd. v. Dubiner 206
Clark *et al.* v. Attorney General for Ontario vii
Clarkson Co. Ltd. v. Canadian Bank of Commerce *et al.* 513
Clemes v. The Queen vii
Commissaires d'École pour St-Bernard de Lacolle, Dupré v. 642
Commission du Salaire Minimum v. Bell Telephone Company of Canada 767
Commissioner of Patents, Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning v. 604
Consolidated Denison Mines Ltd. and Rio Tinto Mining Co. of Canada, Deputy Minister of National Revenue (Customs and Excise) v. 8
Consolidated Denison Mines Ltd. and Rio Tinto Mining Co. of Canada, Deputy Minister of National Revenue (Customs and Excise) v. vii
Cosgrave v. Busk vii
Cowan v. Canadian Broadcasting Corpn. vii
Craft Finance Corpn. v. Belle-Isle Lumber Co. 661
Crawford *et al.*, Mandybura v. viii
Cropper, Peso Silver Mines Ltd. v. 673

D

D'Earmo v. The Queen vii
Deputy Minister of National Revenue (Customs and Excise) v. Consolidated Denison Mines Ltd. and Rio Tinto Mining Co. of Canada 8
Deputy Minister of National Revenue (Customs and Excise) v. Consolidated Denison Mines Ltd. and Rio Tinto Mining Co. of Canada vii
Deputy Minister of National Revenue, Customs and Excise, *et al* v. Saint John Shipbuilding and Dry Dock Co. Ltd. 196
Dobieco Ltd. v. Minister of National Revenue 95

D—Concluded—Fin

PAGE

Druckman v. Stand Built Upholstery Corpn. v
Dubiner, Cheerio Toys and Games Ltd. v. 206
Duncan v. The Queen vii
Dupré v. Commissaires d'École pour St-Bernard de Lacolle 642

E

Edmonton Broadcasting *et al.*, Parkland Chapel v. viii
Edwardsburg, Township of, Ogdensburg Bridge & Port Authority v. ... viii

F

Falconbridge Nickel Mines Ltd. v. Minister of National Revenue 110
Falconbridge Nickel Mines Ltd. v. Minister of National Revenue vii
Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning v. Commissioner of Patents 604
Foot v. Minister of National Revenue
Frederick v. The Queen 257
Fulton v. The Queen 402

G

Gaby *et al.*, Gordon *et al.* v. 527
Gagnon v. Ministre du Revenu National 352
Gardner *et al.* v. The Queen viii
Gauthier, Canadian Home Assurance Co. v. 305
Gauthier, R. C. Stevenson v. 305
George, The Queen v. 267
Ghirardosi v. Minister of Highways for British Columbia 367
Ghirardosi v. The Queen viii
Gilbert and Company *et al.*, Hoechst Pharmaceuticals of Canada Ltd. *et al.* v. 189
Gilchrist v. A & R Farms Ltd. *et al.* .. 122
Gillis v. The Queen viii
Giuliani, Pilo *et al.* v. viii
Goodfellow *et al.* v. Toronto Stock Exchange viii
Gordon *et al.* v. Gaby *et al.* 527
Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. *et al.* 13
Gorn, Stroll's Inc. v. 653
Gotfrid *et al.*, Langstaff v. viii

G—Concluded—Fin

PAGE

Grekin v. Tanguay viii
Guarantee Company of North America *et al.* v. Aqua-Land Exploration Ltd. 133

H

Handler v. Rine viii
Harris v. Minister of National Revenue 489
Hawrelak v. The Queen v
Henrichon, La Reine v. ix
Hertz Drive Yourself Stations of Ontario Ltd *et al.*, Gorman v. 13
Hertz Drive Yourself Stations of Ontario Ltd. *et al.*, Hossack *et al.* v. 28
Highway Sawmills Limited v. Minister of National Revenue 384
Hoechst Pharmaceuticals of Canada Ltd. *et al.* v. Gilbert and Company *et al.* 189
Hoffman LaRoche Ltd. v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd 313
Hoon v. Bank of Nova Scotia 405
Hossack *et al.* v. Hertz Drive Yourself Stations of Ontario Ltd. *et al.* ... 28
Hurly *et al.* v. Bank of Nova Scotia *et al.* 83

I

International Pediatric Products *et al.* v. Lambert *et al.* viii
Irving Oil Co. Ltd., City of Saint John v. 581

J

Jacob v. The Queen viii
Jennings *et al.*, The Queen v. 532
Jerome v. Saskatchewan Power Corpn. viii
Jolicœur v. Centrale d'Immeubles Ste Foye Inc. 755
Jones, Bennett v. vii
Jutras v. Ministre de la Voirie de Québec *et al.* 732

K

Kanester, The Queen v. v
Kimmerly v. Barber *et al.* viii
Kingcome Navigation Co. Ltd. v. Perdia 51
Kipness v. The Queen viii
Korcsmaros v. The Queen viii

K—Concluded—Fin

PAGE

Kovack v. Registrar of Motor Vehicles v
Kredl v Attorney General of Quebec *et al.* 320
Kuzyk v. The Queen v
Kyriacopoulos v. Bouchet v

L

Labour Relations Board of B.C., Zeballos District Mine & Mill Workers Union, Local 851 v. 465
Lade, Minister of National Revenue v. 89
Lafleur v. Minister of National Revenue viii
Lamb v. Manitoba Hydro-Electric Board 229
Lambert *et al.*, International Pediatric Products *et al.* v. viii
Langstaff v. Campbell viii
Langstaff v. Gotfrid *et al.* viii
Lazarenko v. Borowsky 556
Lechter, Minister of National Revenue v. 655
Lemay Construction Ltée v. Poirier .. v
Lelièvre, Association Internationale des Débardeurs, Local 375 *et al.* v. .. v
Lépine, Monckton v. 561
Lépine, University Hospital Board v. 561
Lotzkar v. Southin and The Montreal Trust Co. *et al.* 69
Lyding v. The Queen v
Lyding v. The Queen viii

M

Mailhot, O'Brien v. 171
Mainwaring, Minister of National Revenue v. viii
Malton, Board of Trustees of v. Butt *et al.* viii
Mandybura v. Crawford *et al.* viii
Manitoba Hydro-Electric Board, Lamb v. 229
Manitoba Penitentiary, Warden of, Pearce v. v
Manitoba Pool Elevators Ltd. *et al*, Algoma Central and Hudson Bay Ry. Co. v. 359
Mann v. The Queen 238
Mannix Ltd., N. M. Paterson and Sons Ltd. v. 180
Martineau v. La Reine 103

M—Concluded—Fin

PAGE

Mead Johnson of Canada Ltd., The Queen v. ... 457
Metalliflex Ltd., Rodi & Wienenberger Aktiengesellschaft v. ... 593
Meunier, La Reine v. ... 399
Minister of Highways for British Columbia, Ghirardosi v. ... 367
Minister of National Revenue v. Bickle *et al.* ... 479
Minister of National Revenue, Dobieco Ltd. v. ... 95
Minister of National Revenue, Falconbridge Nickel Mines Ltd. v. ... 110
Minister of National Revenue, Falconbridge Nickel Mines Ltd. v. ... vii
Minister of National Revenue, Foot v. v
Minister of National Revenue, Harris v. ... 489
Minister of National Revenue, Highway Sawmills Limited v. ... 384
Minister of National Revenue v. Lade 89
Minister of National Revenue, Lafleur v. ... viii
Minister of National Revenue v. Lechter ... 655
Minister of National Revenue v. Mainwaring ... viii
Minister of National Revenue, Premium Iron Ores Ltd. v. ... 685
Minister of National Revenue, Vincent v ... 374
Ministre du Revenu National, Belle-Isle v. ... 354
Ministre du Revenu National, Gagnon v. ... 352
Ministre de la Voirie de Québec *et al.*, Jutras v. ... 732
Monckton v. Lépine ... 561
Morin *et al.*, Provincial Hardwoods Inc *et al.* v. ... 58
Morris, The Queen v. ... ix
Morrison v. The Queen ... 356
Munro v. National Capital Commission 663

Mc

MacDonald *et al.*, The Queen v. ... 3
McIver v. The Queen ... 254
McKenzie & Thériault v. The Queen ... viii
McLaughlin *et al.* v. Trottier *et al.* ... viii
McNiven v. The Queen ... viii
McTavish *et al.*, Pre-Cam Exploration & Development Ltd. *et al.* v. ... 551

N

PAGE

Nadeau v. The Queen ... viii
Nadeau & Lachance, Boulanger Inc. v. viii
National Capital Commission, Munro v. ... 663

O

Oakville, Town of v. Ontario Natural Gas Storage and Pipelines Ltd. ... v
O'Brien v. Mailhot ... 171
O'Connor v. The Queen ... 619
Ogdensburg Bridge & Port Authority v. Township of Edwardsburg ... viii
Olafson *et al.* v. Twilight Cariboo Lodge Ltd. ... 726
Ontario Natural Gas Storage and Pipelines Ltd., Town of Oakville v. ... v
Oschipok v. The Queen ... viii

P

Paradis, La Reine v. ... ix
Parkinson *et al.* v. Reid ... 162
Parkland Chapel v. Edmonton Broadcasting *et al.* ... viii
Paterson (N.M.) and Sons Ltd. v. Mannix Ltd. ... 180
Pearce v. Warden of Manitoba Penitentiary ... v
Pedditt v. The Queen ... viii
Perdia, Kingcome Navigation Co. Ltd. v. ... 51
Périard v. The Queen ... viii
Peso Silver Mines Ltd. v. Cropper ... 673
Peters v. The Queen ... viii
Pfizer Corporation *et al.* v. The Queen 449
Philco Corporation (Delaware), Radio Corporation of America v. ... 296
Pilo *et al.* v. Giuliani ... viii
Poirier, Lemay Construction Ltée v. ... v
Portage La Prairie, City of, v. B.C. Pea Growers Ltd. ... 150
Pre-Cam Exploration & Development Ltd. *et al.* v. McTavish *et al.* ... 551
Premium Iron Ores Ltd. v. Minister of National Revenue ... 685
Provincial Hardwoods Inc. *et al.* v. Morin *et al.* ... 58

Q

Queen, The, Bagi v. ... vii
Queen, The, Bailey v. ... vii

Q—Continued—Suite

PAGE

Queen, The, Baker v..... vii
Queen, The, Ball *et al.* v..... vii
Queen, The, Bannerman v..... v
Queen, The, Bannerman v..... vii
Queen, The, Bédard v..... vii
Queen, The v. Black and Mackie..... v
Queen, The v. Black and Mackie..... ix
Queen, The, Brymer v..... vii
Queen, The, Bunt v..... vii
Queen, The, Campbell v..... v
Queen, The, Clemes v..... vii
Queen, The, D'Earmo v..... vii
Queen, The, Duncan v..... vii
Queen, The, Frederick v..... 257
Queen, The, Fulton v..... 402
Queen, The, Gardner *et al.* v..... vii
Queen, The v. George..... 267
Queen, The, Ghirardosi v..... viii
Queen, The, Gillis v..... viii
Queen, The, Hawrelak v..... v
Queen, The, Jacob v..... viii
Queen, The v. Jennings *et al.*..... 532
Queen, The v. Kanester..... v
Queen, The, Kipness v..... viii
Queen, The, Korcsmaros v..... viii
Queen, The, Kuzyk v..... v
Queen, The, Lyding v..... v
Queen, The, Lyding v..... viii
Queen, The, Mann v..... 238
Queen, The v. MacDonald *et al.*..... 3
Queen, The, McIver v..... 254
Queen, The, McKenzie & Thériault v.. viii
Queen, The, McNiven v..... viii
Queen, The v. Mead Johnson of Canada Ltd..... 457
Queen, The v. Morris..... ix
Queen, The, Morrison v..... 356
Queen, The, Nadeau v..... viii
Queen, The, O'Connor v..... 619
Queen, The, Oschipok v..... viii
Queen, The, Pedditt v..... viii
Queen, The, Périard v..... viii
Queen, The, Peters v..... viii
Queen, The, Pfizer Corporation *et al.* v. 449
Queen, The v. Randolph *et al.*..... 260
Queen, The, Riendeau v..... ix
Queen, The v. Ross & Gill..... ix
Queen, The, Sherron v..... ix
Queen, The, Sigeareak El-53 v..... 645

Q—Concluded—Fin

PAGE

Queen, The, Skeavington v..... ix
Queen, The, Smiley v..... ix
Queen, The, Stolove v..... ix
Queen, The, Tokar v..... 194
Queen, The, Tremblay v..... ix
Queen, The, Turner v..... v
Queen, The, Turner v..... ix
Queen, The, West & Dubros v..... ix
Queen, The, Whyte v..... v
Queen, The, Whitney v..... ix
Queen, The, Wyne v..... ix

R

Radio Corporation of America v. Philco Corporation (Delaware).... 296
Randolph *et al.*, The Queen v..... 260
Registrar of Motor Vehicles, Kovacks v..... v
Reid, Parkinson *et al.* v..... 162
Reine, La v. Henrichon..... ix
Reine, La, Martineau v..... 103
Reine, La v. Meunier..... 399
Reine, La v. Paradis..... ix
Reine, La, Talbot v..... 49
Remer Bros. Investment Corporation v. Robin..... 506
Riendeau v. The Queen..... ix
Rine, Handler v..... viii
Robin, Remer Bros. Investment Corporation v..... 506
Rochon v. Castonguay..... ix
Rockwood, Wakefield v..... ix
Rodi & Wienenberger Aktiengesellschaft v. Metalliflex Ltd..... 593
Ross & Gill, The Queen v..... ix
Rowell, S & S. Industries Inc. v..... 419

S

S. & S. Industries Inc. v. Rowell..... 419
Saint John, City of v. Irving Oil Co. Ltd..... 581
Saint John Shipbuilding and Dry Dock Co. Ltd., Deputy Minister of National Revenue, Customs and Excise, *et al.* v 196
Saskatchewan Government Insurance Office, Bédard v 548
Saskatchewan Power Corpn , Jerome v..... viii
Sherron v. The Queen..... ix

S—Concluded—Fin

PAGE

Sigeareak El-53 v. The Queen..... 645
Skeavington v. The Queen..... ix
Smiley v. The Queen..... ix
Smith v. Winnipeg General Hospital *et al.*..... ix
Southin and The Montreal Trust Co. *et al.*, Lotzkar v..... 69
Stand Built Upholstery Corpn., Druckman v..... v
Stanley *et al.* v. Brown *et al.*..... ix
Stanton v. Taylor, Pearson & Carson (B.C.) Ltd. *et al.*..... 641
Steel Company of Canada Ltd. v. Willand Management Ltd..... 746
Stevenson (R.C.) v. Gauthier..... 305
Stolove v. The Queen..... ix
Stroll's Inc. v. Gorn..... 653
Swait v. Board of Trustees of the Maritime Transportation Unions *et al.*..... ix
Syndicat National des Employés de l'Aluminum d'Arvida Inc. *et al.*, J. R. Théberge Ltée v..... 378

T

Talbot v. La Reine..... 49
Tanguay, Grekin v..... viii
Taylor, Pearson & Carson (B.C.) Ltd. *et al.*, Stanton v..... 641
Théberge (J.R.) Ltée v. Syndicat National des Employés de l'Aluminum d'Arvida Inc. *et al.*..... 378
Thorel v. Thorel and Duke..... ix
Tokar v. The Queen..... 194
Toronto, City of v. W.H. Hotel Ltd... 434
Toronto Stock Exchange, Goodfellow *et al.* v..... viii
Tremblay v. The Queen..... ix
Trottier *et al.*. McLaughlin *et al.* v.... viii
Turner v. The Queen..... v
Turner v. The Queen..... ix
Twilight Cariboo Lodge Ltd., Olafson *et al.* v..... 726

U

PAGE

University Hospital Board v. Lépine.. 561

V

Vincent v. Minister of National Revenue..... 374

W

W.H. Hotel Ltd., City of Toronto v... 434
Wakefield v. Rockwood..... ix
Watkins (Thomas C.) Ltd. v. Cambridge Leaseholds Ltd. *et al.*..... v
Watson v. Watson..... ix
West & Dubros v. The Queen..... ix
White Lunch Ltd., Bakery and Confectionery Workers International Union of America Local No. 468 *et al.* v..... 282
Whitney v. The Queen..... ix
Whyte v. The Queen..... v
Willand Management Ltd., Steel Company of Canada v..... 746
Windle v. Windle..... ix
Winnipeg General Hospital *et al.*, Smith v..... ix
Winnipeg, Metropolitan Corporation of Greater, Winnipeg Supply & Fuel Co. Ltd. v..... 336
Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg..... 336
Workmen's Compensation Board, Canadian National Railway Co. v..... vii
Wyne v. The Queen..... ix

Y

York Steel, Bayview Steel Co. v..... vii

Z

Zeballos District Mine & Mill Workers Union, Local 851 v. Labour Relations Board of B.C..... 465

TABLE OF CASES CITED

TABLE DES CAUSES CITÉES

A

NAME OF CASE INTITULÉ DE LA CAUSE	WHERE REPORTED RENVOI	PAGE
Allhusen v. Whittell	L.R. 4 Eq. 295	71
Anna Salen, The	[1954] 1 Lloyd's Rep. 475	57
Atty. Gen. for Alta. v. Atty. Gen. for Can.	[1943] A C. 356	670
Atty. Gen. of Man. v. Man. Licence Holders' Assn.	[1902] A.C. 73	247
Atty. Gen. for Ont. v. Winner	[1954] A.C. 541	772
Atty. Gen. for Que. v. Begin	[1955] S.C.R. 593	628
Atty. Gen. for Sask. v. Atty. Gen. for Can.	[1949] A.C. 110	671
Auld v. Scales	[1947] S.C.R. 543	504

B

Bakery and Confectionery Workers Internat. Union of America v. White Lunch Ltd.	[1966] S.C.R. 282	473
Bank of England v. Vagliano Bros.	[1891] A.C. 107	425
Barnardo v. Commrs. for Special Purposes of the Income Tax Acts	[1921] 2 A.C. 1	484, 488
Bartlett, Re; Winnipeg Electric Ry. Co. v. Cdn. Northern Ry. Co.	59 S.C.R. 352	125, 132
Bayer Co. v. American Druggists' Syndicate Ltd.	[1924] S.C.R. 558	227
Billingham v. Hughes	[1949] 1 K.B. 643	543
Birmingham, Corpn. of v. Barnes	19 T.C. 195	117
Boehringer (C.H.) SOHN v. Bell-Craig Ltd.	[1963] S.C.R. 410	193, 608
Bolton v. Stone	[1951] A.C. 850	130
Bonanza Creek Gold Mining Co. v. R.	[1916] 1 A.C. 566	511
Bozzo v. Moffat	11 Que. R.L. 41	186
B.C. Electric Ry. Co. v. M.N.R.	[1958] S.C.R. 133	700, 711
British Transport Comm. v. Gourley	[1956] A.C. 185	27, 47, 543

C

Caine Lumber Co. v. M.N.R.	[1959] S.C.R. 556	389
Can. Temperance Federation case	[1946] A.C. 193	670
Cdn. Acceptance Corpn. v. Fisher	[1958] S.C.R. 546	246
Cdn. Nat. Steamships v. Bayliss	[1937] S.C.R. 261	188
C.P.R. v. Albin	59 S.C.R. 151	246
C.P.R. v. Notre Dame de Bonsecours	[1899] A.C. 367	775
Cdn. Transport Co. v. Court Line Ld.	[1940] A.C. 934	184
Cannon v. Villers	8 Ch. D. 415	694
Cedar Rapids Mfg. and Power Co. v. Lacoste	47 Que. K.B. 271	744
Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.	92 L.J.P.C. 163	587
Cheerio Toys and Games Ltd. v. Dubiner and Cheerio YO-YO and BO-LO Co.	[1965] 1 Ex. C.R. 579	224
Citizens Ins. Co. of Can. v. Parsons	7 App. Cas. 96	247
Clackamas Ship v. Schooner Cape d'Or	[1926] S.C.R. 331	57
Clark v. Scottish Imperial Ins. Co.	4 S.C.R. 192	141
Commr. of Patents v. Ciba	[1959] S.C.R. 378	191, 607

92709—2

C—Concluded—Fin

NAME OF CASE INTITULÉ DE LA CAUSE	WHERE REPORTED RENVOI	PAGE
Commr. of Patents v. Winthrop Chemical Co.	[1948] S.C.R. 46	194, 608
Confederation Coal and Coke Ltd. and Bermingham, Re	[1939] O.R. 157	586
Coulson, Re	[1959] O.R. 156	77

D

Darby, Re, Russell v. MacGregor	[1939] 1 Ch. 905	78
Diederichsen v. Farquharson Bros.	[1898] 1 Q.B. 150	440
Dimes v. Proprietors of the Grand Junction Canal.	3 H.L. Cas. 759	373
Dominion of Can. v. Prov. of Ont.	[1910] A.C. 637	271
Doyle v. Saint John	44 D.L.R. (2d) 378	584
Dumais v. Laurentian Ins. Co.	49 Que. K.B. 413	311
Duncan (Donald F.) Inc. v. Royal Tops Mfg. Co.	343 F. 2nd 655	221, 226

E

Evans v. M.N.R.	[1960] S.C.R. 391	698, 703, 723

F

Fagnan v. Ure	[1958] S.C.R. 377	19, 39
Fonthill Lumber Ltd. v. Bank of Montreal	[1959] O.R. 451	518, 525
Ford v. Foster	7 Ch. App. 611	227
Franklin Hocking and Co. v. Franklin Hocking	4 R.P.C. 255	220
Frobisher Ltd. v. Cdn. Pipe-Lines and Petroleums Ltd.	[1960] S.C.R. 126	498

G

General Radio Co. v. Allen B. DuMont Laboratories Inc.	129 F. 2d 608	614
Glasgow Corpn. v. Muir	[1943] A.C. 448	125, 579
Glen Falls Ins. Co. v. Adams	54 S.C.R. 88	139
Gold Seal Ltd. v. Dominion Express Co. and Atty. Gen. for Alta.	62 S.C.R. 424	671
Goodyear Tire and Rubber Co. of Can. v. T. Eaton Co.	[1956] S.C.R. 610	460
Grace v. Osler	19 W.L.R. 109	753
Grey v. Pearson	26 L.J. Ch. 473	440

H

Halsall v. Brizell	[1957] Ch. 169	169
Halsey v. Brotherhood	15 Ch. D. 514, 19 Ch. D. 386.	423, 426
Hanes v. Kennedy	[1941] S.C.R. 384	17, 33, 37
Hatschek's Patents	26 R.P.C. 228	598
Hodge, Re	2 Lewin C.C. 227	50
Hoffman-Laroche Ltd. v. Delmar Chemical Ltd.	[1965] S.C.R. 575	316
Hours of Labour, Re Legislative Jurisdiction	[1925] S.C.R. 505	774
Hudson's Bay Co. v. M.N.R.	[1947] Ex. C.R. 130	712
Hughes v. Lord Advocate	[1963] A.C. 837	125, 132
Hutchins Car Roofing Co. and Frame v. Burnett	16 Ex. C.R. 391	303
Hutton v. Watling	[1948] Ch. 26	498

I

NAME OF CASE INTITULÉ DE LA CAUSE	WHERE REPORTED RENVOI	PAGE
Ice Supply Co. v. Guardian Assur. Co.	58 Que. K.B. 335	311
Income Tax Commrs. v. Singh	[1942] 1 All E.R. 362	720
Industrial Relations and Disputes Act, Reference.	[1955] S.C.R. 529	772, 777
Inland Revenue Commrs. v. Dowdell O'Mahoney & Co.	[1952] 1 All E.R. 531	699, 706

J

Jennings v. Cronsberry	[1965] 2 O.R. 285	27, 47
Johannesson v. Rural Munic. of West St. Paul	[1952] 1 S.C.R. 292	670
Johnston v. Buckland	[1937] R.C.S. 86	64
Jones v. R.	7 S.C.R. 570	753
Jones & Co. v. Thomas P. Beal	A.M.C. 438	187

K

Kain v. Norfolk	[1949] 1 All E.R. 176	171
Kennedy v. Beaucage Mines Ltd.	[1959] O.R. 625	498
King, The—See "R"		

L

Labour Relations Bd. v. Oliver Co-Op. Growers Exchange	[1963] S.C.R. 7	293, 473, 477
Lang v. Pollard	[1957] S.C.R. 858	17, 33, 37
Laporte v. C.P.R.	[1924] R.C.S. 278	644
Lehnert v. Stein	[1963] S.C.R. 38	17, 33, 37
Loiselle v. R.	17 C.R. 323	245
London Passenger Transport Bd. v. Upson	[1949] A.C. 155	179
London and South Western Ry Co v Gomm	20 Ch D 562	501
Lovibond v Governor General of Can	[1930] A.C. 717	382

M

Macaura v. Northern Assur. Co.	[1925] A.C. 619	145
Mahn v. Harwood	112 U.S. 354	613
Manitoba Free Press Co. v. Nagy	39 S.C.R. 340	429
May & Baker Ltd. and Ciba Ltd., Re	65 R.P.C. 255	191, 618
Metalliflex Ltd. v. Rodi & Wienenberger Aktiengesellschaft	[1961] S.C.R. 117	601
Midcon Oil & Gas Ltd. v. New British Dominion Oil Co.	[1958] S.C.R. 314	780
Minimum Wage Act of Sask., Reference	[1948] S.C.R. 248	776
M.N.R. v. L.D. Caulk Co.	[1954] S.C.R. 55	722
M.N.R. v. Dominion Natural Gas Co.	[1941] S.C.R. 19	703
M.N.R. v. Goldsmith Bros.	[1954] S.C.R. 55	722
M.N.R. v. Kellogg Co. of Can.	[1943] S.C.R. 58	703, 718
Minneapolis-Honeywell Regulator Co. v. Empire Brass Mfg. Co.	[1955] S.C.R. 694	522
Moist Cold Refrigerator Co. v. Lou Johnson Co.	217 F. 2d 39	614

Mc

McCain v. Saint John	50 M.P.R. 363	592
McKechnie case	51 R.P.C. 461	598
MacKnight Flintic Stone Co. v. Mayor, Alderman and Commonalty of the City of New York	160 N.Y. 72	751

N

Name of Case / Intitulé de la cause	Where Reported / Renvoi	Page
North Vancouver (Dist. of) v. McKenzie Barge & Marine Ways Ltd.	[1965] S.C.R. 377	155
Northern Electric Co. v. Photo Sound Corpn.	[1936] S.C.R. 649	614

O

O'Grady v. Sparling	[1960] S.C.R. 804	243, 248, 251
Okalta Oils Ltd. v. M.N.R.	[1955] Ex. C.R. 66	116
Orpen v. Roberts	[1925] S.C.R. 364	246

P

Parke, Davis & Co. v. Fine Chemicals of Can. Ltd.	[1959] S.C.R. 219	316
Pfizer Corpn. v. The Queen	[1965] C.T.C. 394	459
Phipps v. Boardman	[1965] 1 All E.R. 849	683
Polemis and Furness, Withy & Co., Re	[1921] 3 K.B. 560	132
Pomfret v. Ricroft	1 Wms. Saund. 321	168
Pratt v. Beaman	[1930] S.C.R. 284	17, 33, 37
Proprietary Articles Trade Assn v. Atty. Gen. of Can.	[1931] A.C. 310	250
Provincial Secretary of P.E.I. v. Egan	[1941] S.C.R. 396	249
Prudential Trust Co. v. Forseth	[1960] S.C.R. 210	499

Q

Qualcast (Wolverhampton) Ltd. v. Haynes	[1959] A.C. 743	131
Queen, The—See "R"		

R

Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam	[1939] A.C. 302	235
Ramage v. Vancouver	20 W.W.R. 157	587
Reddy v. Strople	44 S C.R. 246	440
Reference Whether "Indians" includes "Eskimos".	[1939] S.C.R. 104	650
Regal (Hastings) Ltd. v. Gulliver et al	[1942] 1 All E.R. 378	679
Regal Oil & Refining Co. v. Campbell	[1936] S.C.R. 309	130
R. v. B.C. Labour Relations Bd., Ex p. White Lunch Ltd.	51 D.L.R. 72	477
R. v. C.P.R.	36 C.R. 355	627, 629
R. v. Irving Air Chute Inc.	[1949] S.C.R. 613	316
R. v. Jeffers	45 C.R. 177	246
R. v. Kallooar	50 W.W.R. 602	648
R. v. Kogogolak	28 W.W.R. 376	649
R. v. Nat Bell Liquors Ltd.	[1922] 2 A.C. 128	294
R. v. Steeves	[1964] 1 C.C.C. 266	625
R. v. Whitaker	[1914] 3 K.B. 1283	107
R. v. Yolles	[1959] O.R. 206	253
Regulation and Control of Radio Communication in Can., Re	[1932] A.C. 304	670, 772
Reliable Plastics Ltd. v. Louis Marx & Co.	17 Fox Pat. C. 184	428
Rider v. Smith	3 T R 766	168
River Wear Commrs. v. Adamson	2 A.C. 743	694
Rolland Paper Co. v. M.N.R.	[1960] Ex. C.R. 334	722
Ross v. Dunstall	62 S.C.R. 393	33
Royal Baking Powder Co. v. Wright, Crossley & Co.	18 R.P.C. 95	423

R—Concluded—Fin

Name of Case / Intitulé de la cause	Where Reported / Renvoi	Page
Royal Bank of Canada v. Fleming	[1933] O.R. 601	413, 418
Royal Bank of Canada v. Mills	[1932] 3 W.W.R. 283	413
Royal Bank of Canada v. Salvatori	[1928] 3 W.W.R. 501	411, 418
Rushden Heel Co. v. Inland Revenue Commrs.	[1948] 2 All E.R. 378	697
Russell v. MacGregor, Re Darby	[1939] 1 Ch. 905	78

S

St. Saviour's Southwark (Churchwardens), Re	10 Co. Rep. 366	279
Sansan Floor Co. v. Forst's Ltd.	[1942] 1 D.L.R. 451	753
Scotia Construction Co. v. Halifax	[1935] S.C.R. 124	586
Sellar v. Highland Ry. Co.	[1918] S.C. 838, [1919] S.C. (H.L.) 19	372
Shearman v. Folland	[1950] 2 K.B. 43	542
Sikyea v. R.	[1964] S.C.R. 642	272, 281, 649
Skinner v. Perry	10 R.P.C. 1	427
Smith v. R.	[1960] S.C.R. 776	252
Smith's Potato Estates Ltd. v. Bolland (Inspector of Taxes)	[1948] 2 All E.R. 367	697, 705, 707
Sontag Chain Stores Co. v. National Nut Co. of California	310 U.S. 281	614
South Eastern Ry. Co. v. Assoc. Portland Cement Mfgs. Ltd.	[1910] 1 Ch. 12	498
Stadhard v. Lee	3 B. & S. 364	753
Staffordshire and Worcestershire Canal Navigation v. Bradley	[1912] 1 Ch. 91	220
Strong & Co. v. Woodifield	[1906] A.C. 448	698, 707
Studer v. Cowper	[1951] S.C.R. 450	246
Sudelay v. Atty. Gen.	[1897] A.C. 11	484, 488
Sumner v. Barnhill	12 N.S.R. 501	370
Sun Ins. Office of London, England v. Roy	[1927] S.C.R. 8	311
Szilard v. Szasz	[1955] S.C.R. 3	370

T

Tata Hydro-Electric Agencies v. Commr. of Income Tax	[1937] A.C. 685	715
Thibault Automobile Ltd. (Trustees of) v. Thibault	33 D.L.R. (2d) 317, [1963] S.C.R. 312	730
Thorn v. Mayor and Commonalty of London	L.R. 1 A.C. 120	753
Thorpe v. Brumfitt	8 Ch. App. 650	171

U

Upper Egypt Produce Exporters v. Santamana	14 Ll. L. Rep. 159	185

V

Validity of s. 92(4) of the Vehicle Act 1957 (Sask.), Re	[1958] S.C.R. 608	628
Vancouver v. Brandram-Henderson of B.C. Ltd.	[1960] S.C.R. 539	585
Vancouver General Hospital v. McDaniel	[1934] 4 D.L.R. 593	570

W

NAME OF CASE INTITULÉ DE LA CAUSE	WHERE REPORTED RENVOI	PAGE
Walford, Baker & Co. v. Macfie & Sons	84 L.J.K.B. 2221	589
Walton v. Lavater	8 C.B.N.S. 162	220
Waters and Water-Powers, Reference	[1929] S.C.R. 200	775
West (H.) & Son Ltd. v. Shephard	[1964] A.C. 326	542
West Suffolk County Council v. W. Rought Ltd.	[1957] A.C. 403	547
White Lunch Ltd., Ex p., R. v. B.C. Labour Relations Bd	51 D L R 72	477
Widrig v Strazer	[1964] S C R 376	18, 37
Wills, Re, Wills v Hamilton	[1915] 1 Ch. 769	77
Wills v. Hamilton, Re Wills	[1915] 1 Ch. 769	77
Winnipeg Electric Ry. Co. v. Cdn. Northern Ry. Co., Re Bartlett	59 S.C.R. 352	125, 132
Wise v. Kaye	[1962] 1 Q.B. 638	542
Workmen's Compensation Bd. v. C.P.R. Co.	[1920] A.C. 184	773
Wren v. Weild	L.R. 4 Q.B. 730	423

Y

Young v. Bristol Aeroplane Co.	[1944] K.B. 718	278

Z

Zwicker v. Stanbury	[1953] 2 S.C.R. 438	679

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ARRÊTS

DE LA

COUR SUPRÊME DU CANADA

SUR

APPEL DE DÉCISIONS

DES

TRIBUNAUX FÉDÉRAUX ET PROVINCIAUX

92701—1

HER MAJESTY THE QUEEN ..... APPELLANT;

AND

ELMER R. MacDONALD and MOUNT PLEASANT (BRITISH COLUMBIA No. 177) BRANCH OF THE ROYAL CANADIAN LEGION ..... RESPONDENTS.

1965
*June 16
Oct.14

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Common gaming house—Premises occupied by branch of Canadian Legion—Bingo—Whether bona fide social club—Criminal law, 1953-54 (Can.), c. 51, ss. 168 (2) (a) (i), (ii), 176.

The respondents, an incorporated branch of the Canadian Legion and its secretary, were convicted on a charge of keeping a common gaming house, contrary to s. 176 of the *Criminal Code*. They operated bingo games afternoons and evenings, six days per week, at which the daily attendance averaged 1,800 persons. The games were open to the public. The participants had to pay an admission fee of 50 cents, and if they wished to share in the prize money (and everybody did), they had to pay a further 50 cents. The respondents retained only the 50 cents admission fee; all other moneys received were returned on the same day as prizes to successful participants. The respondents were acquitted by the Court of Appeal. The Crown was granted leave to appeal to this Court on the question as to whether the premises were used by an incorporated *bona fide* social club within the meaning of s. 168(2)(*a*) of the Code.

Held: The appeal should be allowed and the convictions restored.

The premises in question were not being used as a *bona fide* social club. Their use for bingo on such a wide-spread scale contradicted any possible inference of their use as a *bona fide* social club. The whole or a portion of the bets on or proceeds from the games were directly or indirectly paid to the keeper. The significant feature of subs. (2)(*a*)(i) of s. 168 is not the ultimate disposition of the moneys received by the keeper but the simple fact of payment to the keeper. It was also apparent that the respondents failed to qualify for the exemption under subs. (2)(*a*)(ii). It was impossible to break down what the participants paid into a 50 cents charge for admission and a further charge for the cards for the purpose of paying lip service to the requirements of that subsection. The word "persons" in subs. (2)(*a*)(ii) means persons who play bingo in premises while used by a social club in a *bona fide* manner in keeping with the objects for which it was incorporated.

Droit criminel—Maison de jeu—Local occupé par une branche de la Légion canadienne—Bingo—S'agit-il d'un club social authentique—Code criminel, 1953-1954 (Can.), c. 51, arts. 168(2)(a)(i), (ii), 176.

Les intimés, une branche de la Légion canadienne constituée en corporation et son secrétaire, ont été trouvés coupables sur une accusation d'avoir

* PRESENT: Taschereau C.J. and Fauteux, Martland, Judson and Hall JJ.

1965

THE QUEEN
v.
MACDONALD
et al.

tenu une maison de jeu, contrairement à l'art. 176 du *Code criminel*. Ils exploitaient des jeux de bingo l'après-midi et le soir, six jours par semaine, et auxquels 1,800 personnes assistaient en moyenne chaque jour. Les jeux étaient accessibles au public. Les joueurs devaient payer une cotisation d'admission de 50 sous, et s'ils désiraient obtenir des prix, ils devaient payer une autre somme de 50 sous, ce que tous les joueurs faisaient. Les intimés gardaient seulement le 50 sous de cotisation d'admission; tous les autres argents reçus étaient remis le même jour comme prix aux joueurs gagnants. Le verdict de culpabilité fut renversé par la Cour d'Appel. La Couronne a obtenu la permission d'en appeler devant cette Cour sur la question de savoir si le local en question était utilisé par un club social authentique constitué en corporation selon le sens de l'art. 168(2)(*a*) du Code.

Arrêt: L'appel doit être maintenu et le verdict de culpabilité rétabli.

Le local en question n'était pas utilisé comme club social authentique. Son usage pour des jeux de bingo sur une échelle aussi étendue contredisait toute inférence possible qu'il pouvait être utilisé comme club social authentique. La totalité ou une partie des paris sur les jeux ou des recettes de ces jeux était directement ou indirectement payée au tenancier. La caractéristique significative du sous-para. (2)(*a*)(i) de l'art. 168 n'est pas la disposition finale des argents reçus par le tenancier mais le simple fait du paiement au tenancier. Il était évident de plus que les intimés n'avaient pas réussi à se qualifier sous l'exemption du sous-para. (2)(*a*)(ii). Il était impossible de répartir ce que les joueurs avaient payé entre une cotisation pour admission de 50 sous et une charge additionnelle pour les cartes dans le but de satisfaire seulement des lèvres les exigences du sous-paragraphe. Le mot «personnes» dans le sous-para. (2)(*a*)(ii) signifie les personnes qui jouent le bingo dans le local alors qu'il est utilisé par un club social d'une manière authentique selon les objets pour lesquels il avait été incorporé.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique, renversant un verdict de culpabilité. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for British Columbia, reversing a conviction. Appeal allowed.

W. G. Burke-Robertson, Q.C., for the appellant.

W. J. Wallace, for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—The respondents were charged under s. 176 of the *Criminal Code* with keeping a common gaming house. The issue in the appeal is whether the case is covered by the exception contained in s. 168(2)(*a*) of the *Criminal Code*, which reads:

(2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (*d*) of subsection (1)

(a) while it is occupied and used by an incorporated *bona fide* social club or branch thereof if

(i) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof, and

(ii) no fee in excess of ten cents an hour or fifty cents a day is charged to persons for the right or privilege of participating in the games played therein; . . .

The accused were convicted by the magistrate but acquitted on appeal. Leave to appeal was granted to this Court on the following question of law:

Was the place No. 2655 Main Street, Vancouver, in the circumstances of the charge, used by an incorporated *bona fide* social club within the meaning of Section 168, Subsection (2)(a) of the Criminal Code of Canada?

The facts are not in dispute. The respondent, Branch 177 of the Royal Canadian Legion, is an incorporated branch of the Royal Canadian Legion. The respondent Elmer MacDonald is the secretary-manager of Branch 177. The premises occupied by Branch 177 are at 2655 Main Street, Vancouver, a building constructed and owned by Mount Pleasant War Memorial Community Co-operative Association, which was organized by and operated by Legion members. This building consists of four floors, including the basement. The basement is leased to persons who run a bowling alley. The other three floors are leased to Branch 177 for an annual rental of approximately $75,000. The first floor is used for bingo games afternoons and evenings, six days per week, at which the daily attendance has averaged 1,800 persons.

Members of the public wishing to play bingo were admitted upon payment of a fifty cent admission fee. In order to participate in prize money, a further fifty cents was then paid. Although it was possible to play bingo without payment of a further fifty cents, and without, therefore, the right to participate in prize money, no one did so. The evidence of the respondent MacDonald was that this rule came into effect in 1962 but that no one availed himself of the opportunity although nearly half a million persons played bingo in this establishment in the year 1963 alone.

The opportunity to share in the prize money came from the sale of cards at fifty cents and a dollar each. Branch 177

1965

THE QUEEN v. MACDONALD et al.

Judson J.

retained only the fifty cent admission fee; all other moneys received were returned on the same day as prizes to successful participants.

On these undisputed facts, the prosecution succeeds on the ground that 2655 Main Street was not being used as a *bona fide* social club. It was a place open to the public without discrimination and in daily use as a centre of public gambling. Nothing turns in this case upon s. 168(3), which places the onus on the accused of proving that a place is not a common gaming house. The undisputed facts speak for themselves. The public was admitted on payment of a fifty cent admission fee. Then, if they wished, they could all participate in gambling, and they all did. This is not occupation and use by a *bona fide* social club. It is unnecessary to go into the objects of the Canadian Legion or its incorporated Branch 177. The use of these premises for bingo on such a widespread scale contradicts any possible inference of the use as a *bona fide* social club.

The whole or a portion of the bets on or proceeds from the games played at 2655 Main Street were directly or indirectly paid to the keeper. The respondents were required to show under s. 168(3) that this was not so in order to come within the exception. Again, nothing turns upon presumptions or onus of proof. The evidence is clear that the admission fees collected at the door plus all further moneys received from players were paid to cashiers and persons selling cards and tickets who were assisting and acting on behalf of Branch 177. These persons and Branch 177 were keepers within the meaning of the section. All the moneys were paid to the keeper directly and the keeper then retained all admission fees and disbursed the other moneys paid by players in the form of prizes for those who won. The significant feature of subs. (2) (*a*) (i) is not the ultimate disposition of the moneys received by the keeper but the simple fact of payment to the keeper. This alone is sufficient to take the respondents outside the operation of subs. (2)(*a*)(i).

On the above facts it is also apparent that the respondents failed to qualify for the exemption under subs. (2)(*a*)(ii). More than fifty cents per day was charged to persons for the right or privilege of participating in the games. Again, it is clear on the evidence that all those who went to the premises, went for the purpose of participating in the game in the hope of winning a prize. All bingo players

during the period covered by the charge and as far back as 1962 paid more than fifty cents per day. It is impossible to break down what they paid into a fifty cent charge for admission and a further charge for the cards for the purpose of paying lip service to the requirements of subs. (2)(*a*)(ii).

Both the learned magistrate and the Court of Appeal felt that it was necessary to put an interpretation on the word "persons" in subs. (2)(*a*)(ii). The magistrate held that the word meant persons who were members of the club or guests of the members of the club. The Court of Appeal was of the contrary opinion and held that the word was completely general in its scope. One must, however, read the section as a whole. There are only two exceptions to the general definition of "common gaming house". These are social clubs and charitable or religious organizations. We are not concerned with the latter in this case. They may hold an occasional bingo if the proceeds go to charity. The other exception is "use or occupation by an incorporated *bona fide* social club" on certain conditions. In this context the word "persons" in subs. (2)(*a*)(ii) means persons who play bingo in premises while used by a social club in a *bona fide* manner in keeping with the objects for which it was incorporated. It does not mean the public at large who played bingo in the circumstances of the charge, because the social club, assuming that it was one, was not being operated in a *bona fide* manner.

I would answer the question on which leave was granted in the negative and restore the conviction of both respondents.

Appeal allowed.

Solicitor for the appellant: S. M. Toy, Vancouver.

Solicitor for the respondent: W. J. Wallace, Vancouver.

1965
*June 7, 8
Oct. 14

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANT;

AND

CONSOLIDATED DENISON MINES LIMITED and RIO TINTO MINING COMPANY OF CANADA LIMITED . RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Exemption—Rock bolts used in mining for support of ceilings and walls—Whether exempt from sales tax as safety devices—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, Schedule III.

In the operation of their mines the respondents utilized "rock bolts" for retaining in position the walls and ceilings of shafts or tunnels so as to permit the ore to be removed therefrom. The Tariff Board found that these rock bolts were not exempt from sales tax under Schedule III of the *Excise Tax Act*, R.S.C. 1952, c. 100, as "safety devices and equipment for the prevention of accidents in the manufacturing or production of goods". The Exchequer Court reversed this finding and ruled that the bolts were exempt from sales tax. The Crown appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Abbott, Ritchie and Spence JJ.: The purpose for which the rock bolts were designed and used was the retention of the contour of the underground cavity and, therefore, the making possible of mining. Devices designed to accomplish that purpose are not devices or equipment "for the prevention of accidents in the manufacturing or production of goods" but are simply devices to permit the manufacture or production of goods. These rock bolts were essentially structural devices and not safety devices and, consequently, not exempt from sales tax.

Per Cartwright J., *dissenting:* As rightly found by the Exchequer Court, the rock bolts were covered by the exemption in Schedule III of the *Excise Tax Act*.

Revenu—Taxe de vente—Exemption—Boulons utilisés dans les opérations minières pour supporter les plafonds et les murs—Sont-ils exempts de la taxe de vente comme étant des dispositifs de sécurité—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 30, 32, Annexe III.

Les intimés utilisaient des boulons (rock bolts) dans leur opérations minières pour retenir en position les murs et les plafonds des puits ou des galeries de façon à permettre l'extraction du minerai. La Commission du Tarif a jugé que ces boulons n'étaient pas exempts de

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* PRESENT: Taschereau C.J. and Cartwright, Abbott, Ritchie and Spence JJ.

la taxe de vente en vertu de l'annexe III de la *Loi sur la taxe d'accise*, S.R.C. 1952, c. 100, comme étant «des dispositifs et matériel de sécurité pour prévenir les accidents dans la fabrication ou production de marchandises». La Cour de l'Échiquier a renversé ce jugement et a adjugé que les boulons étaient exempts de la taxe de vente. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Cartwright étant dissident.

Le Juge en Chef Taschereau et les Juges Abbott, Ritchie et Spence: Le but pour lequel ces boulons étaient fabriqués et utilisés était de retenir le contour de la cavité souterraine et, par conséquent, de rendre possible l'opération minière. Des dispositifs fabriqués pour accomplir ce but ne sont pas des dispositifs ou équipement «pour la prévention des accidents dans la fabrication ou production de marchandises», mais sont simplement des dispositifs pour permettre la fabrication ou production de marchandises. Ces boulons étaient essentiellement des dispositifs de construction et non de sécurité et, en conséquence, n'étaient pas exempts de la taxe de vente.

Le Juge Cartwright, *dissident*: La Cour de l'Échiquier a bien jugé lorsqu'elle a décidé que les boulons étaient couverts par l'exemption de l'annexe III de la *Loi sur la taxe d'accise*.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], renversant un appel de la Commission du Tarif. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], reversing a decision of the Tariff Board. Appeal allowed, Cartwright J. dissenting.

G. W. Ainslie and *D. G. H. Bowman*, for the appellant.

G. F. Henderson, Q.C., and *J. D. Richard*, for the respondent Consolidated Denison Mines Ltd.

Stewart Thom, Q.C., and *J. D. Goodwin*, for the respondent Rio Tinto Mining Co.

The judgment of Taschereau C.J. and of Abbott, Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the Deputy Minister from the decision of Noël J. in the Exchequer Court[1] in which he found that an item known as a "rock bolt" was covered by the exemption in Schedule 3 of the *Excise Tax Act* and, therefore, not liable for consumption or sales tax.

[1] [1964] Ex. C.R. 100, 63, D.T.C. 1191.

1965

DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE) v. CONSOLIDATED DENISON MINES LTD. AND RIO TINTO MINING CO. OF CANADA

Spence J.

For this purpose, it is sufficient to quote Schedule 3 as it appears in the reasons for judgment of the Tariff Board:

PROCESSING MATERIALS

Materials consumed or expended directly in the process of manufacture or production of goods.

Secondly:

MACHINERY AND APPARATUS TO BE USED IN MANUFACTURE OR PRODUCTION

Machinery and apparatus that, in the opinion of the Minister, are to be used directly in the process of manufacture or production of goods, and the following machinery or apparatus:

* * *

Safety devices and equipment for the prevention of accidents in the manufacturing or production of goods.

I deal first with the submission of counsel for the appellant, the Deputy Minister, that a "rock bolt" is not "machinery or apparatus" and that it is not a "device". I adopt the reasons of Noël J. that the rock bolt is a piece of "apparatus" and is a "device" and I find it unnecessary to decide whether it is a piece of "machinery". Therefore, there remains to be determined whether the rock bolt is a "safety device and equipment for the prevention of accidents in the manufacturing or production of goods" (the underlining is to indicate the questions left to be considered). Noël J. said:

It seems to me that the proper way to interpret this exemption clause is to take it, not piece-meal, but in its entirety and when that is done it appears that the safety device or equipment which must also be either machinery or apparatus, is directed at those accidental happenings which are peculiar to the industry or manufacture involved due to the existence of some distinctive important hazard particular to the process of manufacture or production involved.

It was urged upon this Court that the approach used by the learned Exchequer Court Judge was the one which should be adopted in order to reach the proper interpretation of the words for the determination of the exemption in question. I adopt that submission and turn to consider the "happenings which are peculiar to the industry or manufacture involved".

To simplify a description of mining, and certainly the simplification would shock those engaged in the industry, it is the delving of a hole in the ground until an ore body is reached and then the removal of that ore or other substance, such as salt, from the hole so delved. It is, of course, as has been stressed in both the declaration of the Tariff Board and

the reasons of Noël J., a fact of nature that a hole will not continue to be a hole unless protected and that nature operates to close all holes under its surface. Therefore, there can be no mine, no removal of ore, and even no hole from which to remove it unless the limits of the hole are in some manner efficiently retained. For many centuries, that end was attained by the use of some kind of wooden timber and the words "pit props" were ordinary in the language. Later, the science of mining developed so that other means were used for the same end, and we have had reference to steel framing or arching, cement retaining structures, and rock bolts. All of those means are utilized for retaining in position the walls of a shaft or tunnel and so permitting the ore to be removed therefrom. Now, of course, this entails the protection of those persons who are carrying on the mining, and the retaining of the walls and roofs of the shafts and tunnels protects them in a fashion which makes their labour possible. But even if no human ever entered the shaft or the tunnel there would still have to be some method of retaining such shaft or tunnel in its position in order to remove the ore. Devices which are designed to accomplish that purpose are not devices or equipment "*for* the prevention of accidents in the manufacturing or production of goods" but are simply devices to permit the manufacture or production of goods. I am, therefore, of the opinion that the definition was not intended by Parliament to include such devices. The word "safety" together with the words "for (*i.e.* with the purpose of) the prevention of accidents in the manufacturing or production of goods" imply that the purpose for which the device is designed and used is to prevent such accidents, while the purpose for which the rock bolt is designed and used is the retention of the contour of the underground cavity and, therefore, the making possible of mining which, of course, can only be possible if the formation of the cavity is retained and men can work safely therein. Therefore, I agree with the finding of the Tariff Board that these rock bolts were "essentially structural devices and not safety devices".

I would allow the appeal with costs.

CARTWRIGHT J. (*dissenting*):—The questions to be decided in this appeal are stated in the reasons of my brother Spence.

1965

DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE) v. CONSOLIDATED DENISON MINES LTD. AND RIO TINTO MINING CO. OF CANADA

Cartwright J.

After a consideration of the record in the light of the full and helpful arguments of counsel I find myself so fully in agreement with the reasons and conclusion of Noël J. that I am content simply to adopt them. At the risk of repeating what he has already said, I am of opinion that, in view of the findings of fact made by the Tariff Board and accepted by Noël J., the submission of the appellant as to the proper construction of the relevant words of the exempting clause necessitates the addition to that clause of words which it does not contain. It is sought to construe it as if it read:

> Safety devices and equipment *used solely* for the prevention of accidents in the manufacturing or production of goods.

The words which I have italicized do not appear in the exempting clause and for the reasons given by Noël J. I agree that this is not a case in which the Court can add those words or words similar thereto.

I would dismiss the appeal with costs.

Appeal allowed with costs, CARTWRIGHT J. *dissenting.*

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

Solicitors for the respondent, Consolidated Denison Mines Ltd.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent, Rio Tinto Mining Co.: Osler, Hoskin & Harcourt, Toronto.

MARJORIE GORMAN (*Plaintiff*) .....APPELLANT;

AND

HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LIMITED (otherwise known as HERTZ RENT-A-CAR) and MARGARET FLORENCE ATHRON (*Defendants*) ..... RESPONDENTS.

1965

*June 9, 10, 11

Oct. 14

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Motor vehicle accident—Award by trial judge reduced by Court of Appeal—Appeal against quantum of damages as varied by Court of Appeal—Appeal successful—Applicable principles.

In an action arising out of an automobile collision between a vehicle driven by the plaintiff G and one driven by H, the trial judge found that the collision occurred solely through the negligence of the defendant A who was driving an automobile owned by the defendant car-rental company. Although there was an appeal from that finding, such appeal was dismissed and the only issue on the appeal to this Court was that of the quantum of damages as varied by the Court of Appeal.

Prior to the accident, the plaintiff, a woman of 60 years of age, was active, drove her car constantly and engaged in sports such as golf and curling. She suffered a number of different injuries of varying severity and importance and as a result was permanently crippled. The trial judge awarded her $35,000 in general damages which with other damages resulted in judgment in her favour for $42,451.18. The Court of Appeal was of the opinion that the trial judge's assessment of general damages was "so excessive that it cannot be upheld" and reduced same to $22,500.

Held (Judson J. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

Per Cartwright, Martland and Ritchie JJ.: The Court of Appeal had not erred in stating the principles by which it should be guided but had erred in holding that the amount at which damages were assessed was so excessive as to warrant its interference. On this view of the matter the duty of this Court was as declared in s. 46 of the *Supreme Court Act* to "give the judgment . . . that the Court, whose decision is appealed against should have given". That Court should have dismissed the appeal.

Putting the matter in another way, where the court of first instance had not erred in principle, it was error in principle for the court of appeal to reduce damages unless they were so excessive as to constitute a wholly erroneous estimate and the question of whether or not they were so excessive must be decided by the second appellate court from a perusal of the evidence.

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

1965

GORMAN
v.
HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Per Martland, Ritchie and Spence JJ.: This Court would not vary damages adjudged by the court of appeal in a province which had varied those assessed by the trial judge "except in the most exceptional circumstances", and the so-called exceptional circumstances were those where this Court was of the opinion that the court of appeal had committed an error in principle. Before a court of appeal could properly intervene, it must be satisfied that the trial judge applied a wrong principle of law or, short of that, that the amount awarded by the trial judge was so inordinately high or so inordinately low as to be a wholly erroneous estimate of the damage.

In the present case counsel for the defendants failed to demonstrate that the trial judge, acting, as was suggested, upon the submission of counsel for the plaintiff, separately assessed damages for each injury and then totalled them in order to arrive at his award. But even if such an inept formula had been used, no authority was cited to show that it was wrong in principle.

On a perusal of the evidence, it was determined that the trial judge could have arrived at a figure of $35,000 for general damages without the award being such as to earn the description as being "so inordinately high as to be a wholly erroneous estimate of damages".

Pratt v. Beaman, [1930] S.C.R. 284; *Hanes v. Kennedy,* [1941] S.C.R. 384; *Lang et al. v. Pollard et al.,* [1957] S.C.R. 858; *Lehnert v. Stein,* [1963] S.C.R. 38; *Widrig v. Strazer et al.,* [1964] S.C.R. 376; *Fagnan v. Ure et al.,* [1958] S.C.R. 377; *Nance v. British Columbia Electric Railway Co. Ltd.,* [1951] A.C. 601, referred to.

Per Judson J., *dissenting:* The judgment of the Court of Appeal was correct. This case was within their power of review and this Court should not interfere with their judgment.

APPEAL from a judgment of the Court of Appeal for Ontario, reducing the amount of damages awarded by Moorhouse J. after a trial without a jury. Appeal allowed, Judson J. dissenting.

E. J. Houston, Q.C., and *A. R. M. O'Connor, Q.C.,* for the plaintiff, appellant.

J. D. Arnup, Q.C., and *S. Sadinsky,* for the defendants, respondents.

Martland J. concurred with the judgment delivered by

CARTWRIGHT J.:—The relevant facts and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence. I agree with his conclusion that this appeal should be allowed and there is little that I wish to add.

For the reasons given by my brother Spence I agree with him that it has not been shewn that the learned trial judge made any error in principle in arriving at the amount of

general damages. On the other hand, I find it difficult to say that the Court of Appeal dealt with the matter on any wrong principle. The ground on which that Court proceeded was that the learned trial judge's assessment of general damages was "so excessive that it cannot be upheld". In my opinion that phrase was used in the reasons of Schroeder J.A. as the equivalent of the one adopted by Viscount Simon in *Nance's* case, "so inordinately high that it must be a wholly erroneous estimate of the damage", and of the similar expressions in other cases also quoted by my brother Spence, with all of which the learned justice of appeal was, of course, familiar.

After a perusal of all the relevant evidence I agree with the conclusion of my brother Spence that the award made by the learned trial Judge was not "so inordinately high as to be a wholly erroneous estimate of damages"; indeed, with the greatest respect for those who think otherwise, the amount does not seem to me to be excessive. This is the sort of question on which there may well be differences of judicial opinion.

It results from this that, in my opinion, the Court of Appeal has not erred in stating the principles by which it should be guided but has erred in holding that the amount at which the damages were assessed was so excessive as to warrant its interference. On this view of the matter what is the duty of this Court? I do not think that we are bound to dismiss the appeal merely because no error in principle on the part of the Court of Appeal has been demonstrated. Having reached the conclusion that the amount awarded by the learned trial judge was such that the Court of Appeal ought not to have varied it, it appears to me that our duty is as declared in s. 46 of the *Supreme Court Act,* to "give the judgment . . . that the Court, whose decision is appealed against, should have given". In my opinion, that Court should have dismissed the appeal.

It may be that the matter is merely one of words and that a simpler method of expression, which would be in accordance with those used in the cases collected in the reasons of my brother Spence, would be to say that, where the court of first instance has not erred in principle, it is error in principle for the court of appeal to reduce damages unless they are so excessive as to constitute a wholly erroneous estimate and that the question whether or not they are so

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

excessive must be decided by the second appellate court from a perusal of the evidence. Whichever way the matter is put I am satisfied that in the case at bar the award of the learned trial judge ought not to have been varied.

I would dispose of the appeal as proposed by my brother Spence.

Cartwright J.

JUDSON J. (*dissenting*):—I agree with the judgment of the Court of Appeal. I think that this case was within their power of review and that this Court should not interfere with their judgment.

I would dismiss the appeal with costs.

RITCHIE J.:—I agree with my brothers Cartwright and Spence that the award of the learned trial judge ought not to have been varied and I would dispose of the appeal as proposed by my brother Spence.

With respect to the Gorman appeal, Martland J. concurred with the judgment delivered by

SPENCE J.:—These are two appeals against the judgments of the Court of Appeal for Ontario. Both judgments in that Court reduced amounts awarded by the learned trial judge after a trial without a jury.

The actions arose as a result of an automobile collision which occurred on Highway 17 near the City of Ottawa, between a vehicle driven by the appellant Marjorie Gorman and one driven by the late Dr. William Hossack in which his wife, the late Mary Ann Hossack, and his infant son, Brian Hossack, were passengers. Dr. Hossack and Mrs. Hossack were killed. Mrs. Gorman and Brian Hossack were injured.

The learned trial judge found that the collision occurred solely through the negligence of the defendant Margaret Florence Athron who was driving an automobile owned by the defendant Hertz Drive Yourself Stations of Ontario Ltd. Although there was an appeal from that finding, such appeal was dismissed and the only issue in this appeal is that of the quantum of damages as varied by the Court of Appeal for Ontario.

After trial, the learned trial judge, Moorhouse J., awarded to the plaintiff Marjorie Gorman the sum of $35,000 in general damages which with other damages resulted in judgment in her favour for $42,451.18, and awarded to the

appellants in the second action who sued under the provisions of *The Fatal Accidents Act*, R.S.O. 1960, c. 138, as executors of both the late Dr. William Hossack and his wife Mary Ann Hossack, the sum of $94,000 general damages which, with other damages, resulted in judgment in their favour in the sum of $95,632.60.

Whether this Court is justified in varying the judgment of the court of appeal, which in turn had varied the damages awarded by the trial judge, has been dealt with in a considerable number of decisions of this Court and it may be taken that the jurisprudence has been established here. In *Pratt v. Beaman*[1], Anglin J. said at p. 287:

> The second ground of appeal is that damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. *It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.*

(The italics are my own.)

In *Hanes v. Kennedy*[2], Kerwin J. said at pp. 387-8:

> Where general damages fixed by a trial judge sitting without a jury have been reduced by a Court of Appeal under circumstances such as we find here, this Court, as a general rule, will not interfere: *Ross v. Dunstall* (1921), 62 Can. S.C.R. 393; *Pratt v. Beaman*, [1930] S.C.R. 284. Mr. Cartwright referred to *McHugh v. Union Bank of Canada*, [1913] A.C. 299 at 309 . . . *no error in principle was made by the Court of Appeal in this case, and the cross-appeal should, therefore, be dismissed, with costs.*

(The italics are my own.)

And again, in *Lang et al. v. Pollard et al.*[3], Kerwin J. said at p. 859:

> . . . the same principle is applicable and that is, particularly in Canada where estimates of damages may differ in various Provinces, that this Court will not, *except in very exceptional circumstances,* interfere with the amounts fixed by the Court of Appeal where they differ from the damages assessed by trial judge.

(The italics are my own.)

In *Lehnert v. Stein*[4], Cartwright J. said at p. 45:

> As to the quantum of damages, this Court is slow to interfere with the amount fixed by a Provincial Appellate Court which has varied the assessment made by a trial judge. It is sufficient on this point to refer to the

[1] [1930] S.C.R. 284.
[2] [1941] S.C.R. 384.
[3] [1957] S.C.R. 858.
[4] [1963] S.C.R. 38.

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

case of *Lang et al. v. Pollard et al.*, [1957] S.C.R. 858. In the case at bar a perusal of the evidence brings me to the conclusion that the amount fixed by the Court of Appeal is not excessive.

The final authority to which I shall refer is *Widrig v. Strazer et al.*[1], where Hall J., giving the judgment of the Court, said at pp. 388-9:

> The Court of Appeal reduced the trial judge's award of $40,000 to $12,000. The right of the Court of Appeal to review a trial judge's award is governed by well-settled principles as stated by Viscount Simon in *Nance v. British Columbia Electric Railway Company Ltd.*, [1951] A.C. 601 at 613, as follows:
>
> > Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
>
> Unless there was error of principle on the part of the Court of Appeal, this Court will not interfere with an amount allowed for damages by the court of last resort in a province. I adopt what Cartwright J., speaking for himself and Taschereau J. (as he then was) said in *Lang and Joseph v. Pollard and Murphy*, [1957] S.C.R. 858 at 862:
>
> > Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was, giving the unanimous judgment of the Court, in *Pratt v. Beaman* [1930] S.C.R. 284 at 287:
>
> (see *supra*).
>
> > This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.*, [1941] S.C.R. 384 at 387.
> >
> > The principle appears to me to be equally applicable whether the first appellate court has increased or decreased the general damages awarded at the trial.
>
> In my view there were errors of principle on the part of the Court of Appeal in reducing the amount of the damages. . . .

I have avoided citing the cases in which the court of appeal in the province had varied damages awarded by a jury. To summarize the jurisprudence established by this Court, this Court will not vary damages adjudged by the court of appeal in a province which had varied those assessed by the trial judge "except in the most exceptional

[1] [1964] S.C.R. 376.

circumstances", and it would further appear that the so-called exceptional circumstances are those where this Court is of the opinion that the court of appeal had committed an error in principle.

Therefore, I turn to examining the problem of whether the Court of Appeal in the present case did commit any errors in principle. The basis upon which a court of appeal is justified in varying the damages awarded by a trial judge, as the Court of Appeal for Ontario did in these cases, again, in my view, has been authoritatively decided by this Court. In *Fagnan v. Ure et al.*[1], Locke J. said at p. 385:

> The findings of the learned trial judge as to the compensation to be awarded to the respondents have been approved by the unanimous judgment of the Appellate Division (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.
>
> The rule applicable when the matter was before that Court is as it is stated by Greer L.J. in *Flint v. Lovell,* [1935] K.B. 354 at 360, in the following terms:
>
> > In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.
>
> That statement was approved by the House of Lords in *Davies et al. v. Powell Duffryn Associated Collieries, Limited,* [1942] A.C. 601 at 617, [1942] 1 All E.R. 657, and by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited,* [1951] A.C. 601 at 613, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

In the latter case, Viscount Simon, delivering the judgment of the Judicial Committee, said at p. 613:

> In those circumstances two distinct questions arise:— (1) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case. (2) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.
>
> (1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it

[1] [1958] S.C.R. 377.

1965

GORMAN
v.
HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ld.*, [1942] A.C. 601). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (per Lord Wright, *Davies v. Powell Duffryn Associated Collieries, Ld.*, [1942] A.C. 601, 616.)

Therefore, it must be determined whether the trial judge in the present case applied a wrong principle of law or, short of that, that the amounts awarded by the trial judge were so inordinately high as to be a wholly erroneous estimate of the damage. Since the trial was before a judge without a jury I do not seek to apply the "out of all proportion" test of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ld., supra.*

THE GORMAN ACTION

Schroeder J.A., giving the judgment of the Court of Appeal, said:

> We have also come to the decision that the learned trial Judge's assessment of general damages in favour of the Respondent Marjorie Gorman is so excessive that it cannot be upheld. We reject the contention of her counsel that a separate assessment should be made in respect of each individual injury sustained by this Respondent. Viewing her injuries as a whole, we consider that an award of $22,500 for general damages would constitute reasonable compensation under that head. To that extent the appeal should be allowed and the judgment varied by substituting for the award of $35,000 for general damages the sum of $22,500.

It would appear, therefore, that the learned justice in appeal may well have considered (1) that the trial judge committed an error in principle in that he, acting upon the submission of counsel for the plaintiff Gorman, separately assessed damages for each injury and then totalled them, and (2) that in any event the award of $35,000 general damages was "so inordinately high as to be a wholly erroneous estimate of the damages".

To deal with the first question, counsel for the plaintiff Gorman at trial appeared before this Court as counsel for her as appellant, and agreed that at trial in argument he had cited separate possible amounts of damages for each of his client's injuries as being appropriate if each of those injuries had been suffered by different individuals but he denied that

he had urged the trial judge to total those individual amounts. Counsel, on the other hand, reported that he had urged the trial judge to take into account that all of the injuries had been suffered by one person and award a lump sum considering those injuries and the well recognized elements of future expenses, pain and suffering up to the trial and prospective pain and suffering thereafter, well-nigh total elimination of his client in the enjoyment of life, and the fact that a lady of 60 years of age would not be able to readjust herself to her infirmities as would a younger person.

The learned trial judge delivered reasons at the end of the trial in which he determined the issue of liability and reserved for further consideration the quantum of damages, then some weeks later endorsed the record with the amounts of his assessment. However, on delivering judgment at trial, he said:

> Mrs. Gorman was an active woman and has been permanently crippled. She enjoyed driving about in her car, golfing, curling, and playing the piano. She feels that her ability to do these things has been completely taken away from her, and that her piano playing has been very seriously and permanently affected. In short, her enjoyment of life has been materially affected by this accident. I feel that it has.
>
> Some of the injuries which she received consisted of: Lacerations of the lower lip; bruises of the forehead; deep laceration of both knees into the joint; a comminuted fracture of the left patella; a chip fracture of the left femur near the joint; and her right ankle was almost severed. Swelling of the right hand, and there was a fracture of the metacarpal, near the wrist joint, and there was a fracture of the first left and the fourth matatarsal of the left foot; a fracture of the lower mandible; and numerous bruises and contusions. There were operations under general anaesthesia, and she had a cast from the groin to the foot, of both legs, and her jaws were wired because of the fractures, and she was obliged to take food through a tube. She had long and continuing physiotherapy.
>
> The medical evidence is that at some time, the right ankle will require to be locked. It has been advised, but this Plaintiff has postponed that for as long as she thinks that she can. However, she will again have to undergo surgery, and be for some few weeks in the hospital. The evidence is that the arthritic condition will be affected; she has had a large amount of dental work, and has undergone pain and suffering. These are factors, all of which have been mentioned by counsel, and if there are any that I have omitted, I simply have taken those from my notes of the evidence, and they will be considered when I endorse the record as to the amount of damages in her case, Mr. Houston.

I find nothing in that statement to indicate that the learned trial judge was intending to or did total the individual amounts suggested by counsel in order to arrive at his award. The fact that the amounts suggested by counsel for the individual injuries do total approximately that

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

awarded by the trial judge I regard as a mere coincidence and no conclusive indication that such a formula was used. Moreover, counsel for the respondent in this Court admitted that he was unable to cite any authority that such an "adding machine approach" to the assessment of damages was incorrect in principle. It would certainly be inept but even if it had been used by the trial judge, and I am of the opinion that has not been demonstrated, I cannot say that it would be wrong in principle.

I turn next to the consideration of whether the award of $35,000 general damages was "so inordinately high as to be a wholly erroneous estimate of the damages". I have already cited the learned trial judge's reference to the injuries. Counsel for the appellant in his factum has listed 16 different injuries of varying severity and importance. It seems certain that the appellant who, prior to the accident, was a lady of 60 years of age, one who drove her car constantly and engaged in active sports such as golf and curling, is now a permanently crippled person with, at any rate, a degree of fixity of both legs and with every indication that arthritis resulting from the injuries has already advanced to a considerable degree. The trial judge, called upon to consider these facts in the light of the elements of damages which I have already cited as having been submitted to him by the counsel for the appellant at trial could, in my view, have arrived at a figure of $35,000 for general damages without the award being such as to earn the description as being "so inordinately high as to be a wholly erroneous estimate of damages". As Cartwright J. pointed out in *Lehnart v. Stein, supra*, one might only come to the determination of whether an award is "so inordinately high" by perusal of the evidence and I have summarized my perusal of that evidence in expressing the opinion above.

THE HOSSACK ACTION

Schroeder J.A., giving the judgment of the Court of Appeal, said:

> I propose to deal first with the assessment of damages in the action brought under *The Fatal Accidents Act*. An Appellate Court does not readily interfere with an assessment of damages made by a trial Judge unless it is satisfied that the damages awarded are clearly unreasonable and unsupported by the evidence or that they are so excessively high as to be clearly erroneous. In our respectful view the award of $94,000 is so

excessively high as to reflect an attempt to award an amount approaching a perfect compensation. There are numerous contingencies to be taken into account in assessing damages in these cases by reason whereof expectations of pecuniary benefit disappointed by a death caused by the act of a wrongdoer must be adequately discounted. The learned Judge failed, in our respectful opinion, to give full and proper effect to those contingencies. It is perfectly obvious that the actuarial evidence of Mr. Lang, based on the estimated savings of the deceased William Ross Hossack, did not take account of the fact that if the Respondents optimistic estimate of the accumulated savings were well founded, they would reach the hands of the beneficiaries subject to provincial succession duties tax and federal estate tax which would be substantial in an estate of half a million dollars. There are also many contingencies as, e.g., if the wife were to predecease the husband, and he were to remarry, or if the husband were to predecease the wife and she were to remarry, further that the wife might have been compelled to live on the husband's estate, in which event the question would arise as to how much of the said estate would remain on the wife's death. These and many other contingencies which need not be denominated exist in this case and must be given due effect.

We have had the benefit of very able, comprehensive and helpful arguments of counsel in the course of which the evidence was exhaustively reviewed. Upon full consideration we have attained to the conclusion that a proper award in favour of the infant under the provisions of *The Fatal Accidents Act* would be $65,000.00. To that extent the appeal should be allowed and the judgment in appeal varied by substituting for the sum of $94,000.00 the sum of $65,000.00.

It would appear, therefore, that the learned justice in appeal felt that the Court of Appeal was justified in varying the judgment of the learned trial judge for these reasons: (1) that the damages allowed reflected an attempt to award an amount approaching a perfect compensation, (2) that numerous contingencies to be taken into account in assessing damages in a fatal accidents case had not been taken into account, and (3) that the damages awarded were "so inordinately high as to be a wholly erroneous estimate of damages".

One contingency to which the learned justice in appeal refers was that the actuary's estimate of the total estate which would have been left by the late Dr. William Ross Hossack had he lived out his life in a normal fashion would only have gone to his son after provincial succession duties and federal estate taxes had been deducted therefrom. A further contingency which the learned justice in appeal felt the trial judge had failed to consider was the possibility of Mrs. Hossack predeceasing her husband and he remarrying, or Dr. Hossack predeceasing his wife and she being forced during the balance of her lifetime to live on the estate of her late husband which had accumulated up to the

1965

GORMAN
v.
HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

date of his death, and so reduce the amount available for the infant son of the late Dr. and Mrs. Hossack and, therefore, the pecuniary benefit of which he was deprived by their untimely death. I think the second contingency may be dealt with very briefly. The fact is that Mrs. Hossack died in the accident which gave rise to this cause of action. The pecuniary benefit to her son, in whose interest the action is taken, as the result of any estate which she might have left had she lived out her ordinary life was slight and, therefore, what was in essence the trial judge's task was to determine the pecuniary benefit of which the son was deprived by the death in the accident of his father. The fact is that his father, the late Dr. Hossack, did not leave a widow who might live on the late Dr. Hossack's estate had he predeceased her at some future time. It might well be that the late Dr. Hossack, had he lived, might have remarried, but the effect of such remarriage on the pecuniary benefit which his son would receive on the date of his father's death, had it occurred under normal circumstances, and at a normal time, is altogether conjecture and I do not see how it could be allowed for with any intelligence in the affixing of the damages.

I therefore find no error in principle in the learned trial judge's failure to consider this contingency, if he did so fail to consider it, and there is nothing in his reasons for judgment or in the endorsement of the record which indicated that he did fail to consider any proper element. It must be remembered that the learned trial judge said:

> I shall read the cases referred to by counsel and shall take into consideration all these factors required to be so taken into consideration and will endorse the record as to the amount of damages accordingly.

The question of the effect on the pecuniary benefit of which Brian Hossack was deprived by the untimely death of his parents, of the estate taxes, provincial and federal, is a matter of some importance. It would appear from a perusal of the evidence of Mr. Lang, the actuary, who gave evidence on behalf of the plaintiffs at trial, that this witness found a probable gross estate which would come to the son upon the death of Dr. Hossack had it occurred under ordinary circumstances of $503,000. After estate duties, federal and provincial, were deducted therefrom at their present rates, it would leave only a net estate of $364,500. Using the same calculation as Mr. Lang, that would have a present value of

$81,885 rather than the present value of $113,000 which Mr. Lang calculated as being the present value of an estate of $503,000. However, it was counsel's submission that the learned trial judge appears to have made up his award of $94,000 by the addition of three amounts,

(*a*) the present value of the probable future estate that Brian Hossack would have received upon the eventual passing of his father and mother under ordinary circumstances ..... $50,000.

(*b*) the cost of food, clothing, shelter and education for a 20-year period which the infant Brian would have received from his parents if they had lived .. $32,000.

(*c*) the substantial loss suffered by the infant in losing the intellectual, moral and physical guidance and training which only a mother and father could give him ..... $12,000.

On that basis, the trial judge reduced the $113,000 present value figure to which I have referred to $50,000 to allow for the many contingencies which might have interfered with the late Dr. Hossack leaving an estate as large as Mr. Lang calculated. That represents a reduction of 55.7 per cent. Had the present value been considered at $81,885, the reduction to $50,000 would only have represented a reduction to allow for the said contingencies of about 40 per cent. Had the reduction factor of approximately 56 per cent been used on the present value after such estate duties, then figure (*a*) in the calculation would have amounted to about $45,000 to $46,000 and added to figures (*b*) and (*c*) would have given a total damage award of about $90,000.

I am unable to say that an award of $94,000 as damages under *The Fatal Accidents Act* is so inordinately higher than an award of $90,000 that it is a wholly erroneous estimate of the damages. There has been very considerable argument as to the propriety of both the $32,000 allowance under head (*b*) and the $12,000 allowance under (*c*) above. I am of the opinion that those objections constitute merely an attempt to supplant the estimate made by the trial judge with the estimate by the Court of Appeal or by counsel before this Court and that no matter of principle is involved.

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

There is, however, an additional factor which must be considered and it is the factor which deals with the establishment of a gross value of the estate of the late Dr. Hossack, had he lived his ordinary life, at $503,000. That amount was arrived at by the witness Lang by assuming that the late Dr. Hossack would have saved one-third of his net income and that those savings accumulated with interest for the 38 years of his normal life would have amounted at his death at the end of those 38 years to $503,000. The estimate that the late Dr. Hossack had saved one-third of his income was made by finding that those so-called savings amounted to $16,319 and that his total net income after deduction of taxes was $44,994. The $16,319 was a total which included a valuation of household goods, furniture and jewellery at $2,642, and two automobiles at $1,120, a total of $3,782. Certainly, it is difficult to understand how those items could be included under the heading of "savings" so that their capitalization at 4 per cent interest would build up into a gross estate in 38 years of $503,000. This would lead us to the conclusion that the actuary was incorrect in taking as the basis for his calculation that the late Dr. Hossack was saving one-third of his net income. In fact, usual living expenses, i.e., the purchase of furniture, household goods, jewellery and automobiles were erroneously included in that so-called saving of one-third of his net income. The capitalization of these amounts would appear to make inaccurate the calculated gross estate of the late Dr. Hossack, at normal death, of $503,000, and it would appear more accurate to say that the late Dr. Hossack saved only about 28 per cent of his net income. His total savings therefore would not have been the $212,292 calculated by Mr. Lang but about $178,000 and that total saving capitalized on the 4 per cent basis used by Mr. Lang would have yielded a gross estate at the time of death of about $422,000. This estate, after the allowance of estate duties, federal and provincial, would amount to approximately $305,803.

The present value of $503,000 is $113,000 and the present value of $305,803, therefore, would be about $68,500. If you allow about 56 per cent of that as being a proper figure to allow for contingencies you would reach an amount not of the $50,000 as apparently allowed by the learned trial judge but rather about $38,360 and if to that amount, as being the proper amount for category (*a*) *supra,* you add the same

amounts for category (*b*)—$32,000, and category (*c*)—$12,000, you arrive at $82,360.

Therefore, in my judgment, the proper allowance for damages under *The Fatal Accidents Act* should have been $82,360. In arriving at that figure, I believe that I have used the method of calculation adopted by the appellants and to which no objection was taken by counsel for the respondents, but I have based my calculation of the gross estate which the late Dr. Hossack might have expected to leave, had he died at a normal time and under normal circumstances, upon a more realistic estimate of his accumulated savings, and I have made allowance for the effect of estate duties, federal and provincial, which it would appear the learned trial judge, if he adopted the calculations made by Mr. Lang, failed to allow. In short, I have attempted to correct the two matters of principle upon which the trial judge seems to have fallen in error.

In doing so, I do not purport to deal with the question discussed in *British Transport Commission v. Gourley*[1], or in *Jennings v. Cronsberry*[2], as to whether or not deductions should be made in damage awards to a person who had been injured and thereby prevented from earning his living for, at any rate, a period of time to allow for tax on income which he would otherwise have earned. What must be determined in an action under *The Fatal Accidents Act* is the pecuniary benefit of which the person for whom the action has been instituted is deprived by the untimely death of the deceased. That pecuniary benefit, in my view, must be considered in the light of what such person will actually receive. What he actually will receive is the net estate after the deduction of estate duties and, therefore, an allowance must be made for the death duties in calculating the damages.

I am, therefore, of the opinion that this Court should allow the appeal in the Gorman action and restore the judgment of the trial judge. Since the appellant in the Gorman action was successful throughout, the appellant should have costs at trial, in the Court of Appeal, and in this Court.

This Court, by virtue of s. 46 of the *Supreme Court Act*, may "give the judgment and award the process or other

[1] [1956] A.C. 185.

[2] [1965] 2 O.R. 285 (CA.).

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

proceedings that the Court whose decision is appealed against, should have given or awarded".

I would allow the appeal in the Hossack action to the extent of varying the general damages from the sum of $65,000, as fixed in the Court of Appeal, to $82,360 which with other damages of $1,632.60 allowed at trial will result in a judgment in favour of the plaintiffs in that action for $83,992.60. Since the appellant in the Hossack action did not succeed in having restored the judgment at trial, I would leave in effect the disposition of costs made in the Court of Appeal, and I would allow no costs in this Court.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.

Solicitors for the defendants, respondents: Walker, Milton, Rice & Ellis, Toronto.

1965

*June 9, 10, 11 Oct. 14

FLORENCE ELVENA HOSSACK and GORDON SCARBOROUGH PAUL, Executors of the Last Will and Testament of William Ross Hossack, deceased, and the said FLORENCE ELVENA HOSSACK and the said GORDON SCARBOROUGH PAUL, Executors of the Last Will and Testament of Mary Ann Hossack, deceased. (*Plaintiffs*) .... APPELLANTS;

AND

HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. and MARGARET FLORENCE ATHRON and ROGER LEMOYNE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Fatal accident—Award by trial judge reduced by Court of Appeal—Appeal against quantum of damages as varied by Court of Appeal—Failure of appeal—Applicable principles.

An automobile collision between a motor vehicle driven by G and one driven by WH in which his wife MH and his infant son BH were

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

passengers resulted in the father and mother being killed and the child being injured. In an action brought by the executors of WH and MH under the provisions of *The Fatal Accidents Act*, R.S.O. 1960, c. 138, the trial judge found that the collision occurred solely through the negligence of the defendant A who was driving an automobile owned by the defendant car-rental company. Although there was an appeal from that finding, such appeal was dismissed and the only issue on the appeal to this Court was as to the quantum of general damages awarded to the infant son. These damages were assessed by the trial judge at $94,000 and this figure was reduced by the Court of Appeal to $65,000.

At the time of the accident WH and MH were in their early thirties and their son was almost 6 years old. WH was a consulting engineer engaged in progressively prosperous employment and had accumulated an estate computed by the trial judge at $31,556.39.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright J.: No error in principle was found in the reasons of either of the Courts below. The task of the trial judge was to view the whole of the relevant evidence as a properly instructed jury would do and to fix the figure, not susceptible of precise arithmetical calculation, which would represent compensation for the amount of actual pecuniary benefit which the son might reasonably have expected to enjoy had his parents not been killed. Once the Court of Appeal had decided that the amount fixed by the trial judge was so high as to require interference its duty was the same as that of the trial judge.

As a result of the death of his parents the son inherited in round figures the sum of $35,000. When to this was added the sum of $65,000 awarded by the Court of Appeal, he was entitled to a total fund of $100,000. Considering all the relevant evidence, an award which brought the total received by the son up to $100,000 could not be said to be an inadequate compensation for the loss of the pecuniary benefits which he might reasonably have expected to receive had his parents not been killed.

Per Martland J.: In the circumstances of this case, this Court should not interfere with the amount of the damages awarded by the Court of Appeal.

Per Judson J.: This was not a case where this Court should interfere. There was no error in principle in the Court of Appeal when it reduced the general damages so as to constitute reversible error. The Court of Appeal was mindful of the principle that an appellate court does not readily interfere with an assessment of damages made by a trial judge unless it is satisfied that the award is clearly unreasonable and unsupported by the evidence or that it is so excessively high as to be clearly erroneous. They were unanimously of the opinion that this case fell within these principles of review.

Per Ritchie J.: Notwithstanding the provisions of s. 46 of the *Supreme Court Act*, this Court was not justified in substituting a figure of its own for that awarded by the Court of Appeal except upon the ground that that Court appeared to have applied some wrong principle of law in assessing the damages or that its award was so inordinately high or so inordinately low as to be wholly erroneous. In the circumstances of this case there was no such ground for interfering with the award made by the Court of Appeal.

1965

HOSSACK *et al.* *v.* HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Per Spence J., *dissenting*: This Court would not vary damages adjudged by the court of appeal in a province which had varied those assessed by the trial judge "except in the most exceptional circumstances", and the so-called exceptional circumstances were those where this Court was of the opinion that the court of appeal had committed an error in principle. Before a court of appeal could properly intervene, it must be satisfied that the trial judge applied a wrong principle of law or, short of that, that the amount awarded by the trial judge was so inordinately high or so inordinately low as to be a wholly erroneous estimate of the damage.

In the present case the proper allowance for damages under *The Fatal Accidents Act* should have been $82,360. This figure was arrived at by attempting to correct two matters of principle upon which the trial judge seemed to have fallen in error. The calculation of the gross estate which WH might have expected to leave, had he died at a normal time and under normal circumstances, should have been based upon a more realistic estimate of his accumulated savings, and an allowance should have been made for the effect of estate duties, federal and provincial, which it appeared the trial judge failed to allow.

By virtue of s. 46 of the *Supreme Court Act,* this Court may "give the judgment and award the process or other proceeding that the Court whose decision is appealed against, should have given or awarded". Accordingly, the appeal should be allowed and the judgment of the Court of Appeal varied.

APPEAL from a judgment of the Court of Appeal for Ontario, reducing the amount of damages awarded by Moorhouse J. after a trial without a jury. Appeal dismissed, Spence J. dissenting.

C. F. MacMillan, Q.C., for the plaintiffs, appellants.

J. D. Arnup, Q.C., and *S. Sadinsky*, for the defendants, respondents.

CARTWRIGHT J.:—The facts out of which this appeal arises are set out in the reasons of my brother Spence, and I shall endeavour to avoid repetition.

The only question is as to the quantum of the general damages awarded to Brian Paul Hossack the infant son of the late William Ross Hossack and Mary Ann Hossack. These damages were assessed by the learned trial judge at $94,000 and this figure was reduced by the Court of Appeal to $65,000.

At the conclusion of the trial the learned trial judge gave oral reasons for judgment determining all questions of liability and these are no longer in dispute. He reserved his

judgment as to the quantum of damages. His findings relevant to the question now in issue are expressed as follows:

William Ross Hossack was born on the 9th of August, 1927. Mary Ann Hossack was born on the 21st of November 1929. They were married on the 16th of April 1953. Their son, Brian, was born on the 2nd of November 1955. On the evidence it is unlikely there would have been further issue, although I do not overlook the possibility of adoption.

Mary Ann Hossack was a well-educated woman, and a musician of recognized ability, who, I infer, devoted her time to her home and family. There was no evidence of her recent employment out of her home.

William Ross Hossack was a man of very high academic standing, and most favourably spoken of by his employer. He was a musician of standing; a man whose writings on professional subjects were purchased by magazines, a man who had acquired his Doctorate in Astro-Physics, and at the time of his death was employed by the firm of Stevenson and Kellogg, consulting engineers. It is not disputed that he had a very bright future. Evidence of his earnings and savings was given before me.

From evidence given, I compute his estate at $31,556.39. It includes an item of $6,869.84 benefit to be received from the Charles Ross estate.

The estate of his wife Mary Ann Hossack I compute at $6,310, subject to possible reduction in the amount of $2,828.57, the amount of a government annuity.

I shall read the cases referred to by counsel, and shall take into consideration all these factors required to be so taken into consideration, and will endorse the record as to the amount of damages accordingly.

The reasons of Schroeder J.A., who gave the unanimous judgment of the Court of Appeal, in so far as they deal with the question of damages are set out in the reasons of my brother Spence and I will not repeat them.

I find myself unable to hold that the learned trial judge proceeded on any wrong principle. It is not possible to say that he did not take into account the fact that whatever estate either of the deceased would have left would be subject to succession duty and estate tax. We do not know what contingencies he considered; he may have considered all those enumerated and suggested in the reasons of Schroeder J.A.

On the other hand I can find no error in principle in the reasons of the Court of Appeal. Having reached the conclusion that the award was so high as to require alteration, that Court "upon full consideration" has fixed the figure which it finds to be appropriate. Once again we do not know the details of the calculations by which the amount is arrived at. I can see no objection to the course taken by either of the Courts below. The task of the learned trial judge was to view the whole of the relevant evidence as a properly

1965

HOSSACK *et al.* v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Cartwright J.

instructed jury would do and to fix the figure, not susceptible of precise arithmetical calculation, which would represent compensation for the amount of actual pecuniary benefit which the son might reasonably have expected to enjoy had his parents not been killed. Once the Court of Appeal had decided that the amount fixed by the learned trial judge was so high as to require interference its duty was the same as that of the learned trial judge.

As a result of the death of his parents the son inherits in round figures the sum of $35,000. When to this is added the sum of $65,000 awarded by the Court of Appeal, he becomes entitled to a total fund of $100,000. The income from such a fund will be amply sufficient to provide him with an excellent education without the need of encroaching upon capital. On a consideration of all the relevant evidence it appears to me that an award which brings the total received by the son up to $100,000 cannot be said to be an inadequate compensation for the loss of the pecuniary benefits which he might reasonably have expected to receive had his parents not been killed.

In my opinion, this is a case in which the Court of Appeal was justified in altering the assessment made by the learned trial judge and we ought not to interfere with the amount which that Court has fixed.

I would dismiss the appeal with costs.

MARTLAND J.:—In my opinion, in the circumstances of this case, this Court should not interfere with the amount of the damages awarded by the Court of Appeal. Accordingly I would dismiss this appeal with costs.

JUDSON J.:—The Court of Appeal has reduced an award of damages under *The Fatal Accidents Act* from $94,000 to $65,000. The action was brought on behalf of Brian Hossack, an infant, who, at the time of the accident, was almost six years old. I say at once that in my opinion this is not a case where this Court should interfere. There was no error in principle in the Court of Appeal when it reduced these general damages so as to constitute reversible error. The Court of Appeal was mindful of the principle that an appellate court does not readily interfere with an assessment of damages made by a trial judge unless it is satisfied that the award is clearly unreasonable and unsupported by the evidence or that it is so excessively high as to be clearly

erroneous. They were unanimously of the opinion that this case fell within these principles of review and I agree with their judgment.

This appeal raises no new problem in this Court. It was argued on behalf of the appellant that this was not a case which should have been reviewed by the Court of Appeal. It was said that these damages were not so inordinately high as to justify any interference. When the problem of review comes up in this Court, this kind of adjectival condemnation of what the Court of Appeal has done offers little or no guidance and it would be better to abandon its use. I refer particularly to the reasons of Rand J. in *Lang et al. v. Pollard et al.*[1] at pp. 862-3 on this point. I think the Court of Appeal is justified in interfering when it comes to the conclusion that the award is unreasonable. This is a better guide than the form of words that has been in common use.

The fact is that in this Court two rules have been applied depending naturally upon what the Court thinks of the amount of the award. If this Court thinks the award at trial was within reasonable limits, it says that the Court of Appeal should not have interfered. If, on the other hand, this Court thinks that the award at trial was not within reasonable limits and, consequently, reviewable by the Court of Appeal, it says that whether or not it would have made the same variation in amount as the Court of Appeal, there is no ground for interference.

In spite of the formula that has been used in attempting to define the limits on the power of review of the Court of Appeal, that Court has, I think, always proceeded on the basis that it would review when convinced of the unreasonable nature of the award. There is more to be gained by looking at what the Court of Appeal and this Court have actually done in the leading cases that have come here and by ignoring the adjectival description of the function. I will take as examples five leading cases in this Court. They are:

1. *Lehnert v. Stein*[2];
2. *Lang et al. v. Pollard et al.*[1];
3. *Hanes et al. v. Kennedy et al.*[3];
4. *Pratt v. Beaman*[4];
5. *Ross v. Dunstall*[5].

[1] [1957] S.C.R. 858.
[2] [1963] S.C.R. 38 at 45.
[3] [1941] S.C.R. 384.
[4] [1930] S.C.R. 284.
[5] (1921), 62 S.C.R. 393.

1965

HOSSACK *et al.* v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Judson J.

This is what happened in these cases, taking them in the order in which they are listed above:

	Assessment at Trial	*Assessment in Court of Appeal*	*Result in this Court*
1.	$ 12,000	$ 18,000	affirmed
2.	7,000	15,000	affirmed
	1,200	3,000	
3.	10,000	5,000	affirmed
4.	7,500	2,075	affirmed
5.	11,060	8,560	
	10,000	5,482	affirmed

It is highly desirable that this power of review of reasonably wide scope should exist in the Court of Appeal and that this Court, if it recognizes that the case is one for review, should be slow to interfere. Everyone concerned is aware of the difficulties that surround an assessment of damages and its review in the Court of Appeal, and the volume of litigation in personal injury cases and under *The Fatal Accidents Act* demonstrates the need for an experienced reviewing tribunal with reasonably wide powers. The Court of Appeal has this experience. They know better than anyone else what an award should be both in the interests of justice to the particular litigants and interest of some principle of uniformity, to the extent that this is attainable. Any further reviewing tribunal should be slow to interfere unless it is convinced that there is error in principle.

In this particular case the Court of Appeal thought that the award was too high by approximately one-third. There is no principle of law involved in the formulation of this opinion. The trial judge awarded a round sum of $94,000; the Court of Appeal a round sum of $65,000. There is no suggestion anywhere that the Court of Appeal did not take into account all the items that go to make up "reasonable prospect of pecuniary loss" in a case of this kind. They differed from the trial judge in their translation of monetary claims into an award. This is a matter of the weight they give to the claims and the supporting evidence. It is, to me, impossible to assign error when they say that considering the case as a whole they think the award should be $65,000

instead of $94,000. I have no doubt that to some extent they reached this result by discounting the claim for loss of prospective inheritance.

The facts were fully before them. Without attempting in detail to go into the circumstances of this family, it may be said that the boy's prospects and those of the family were bright. The boy was an only child. The father was in progressively prosperous employment. The award takes into account maintenance and education until graduation from the university. The evidence of an actuary predicted that this boy, when his father died forty-five years hence, would come into an estate of half a million dollars. This may look all right according to the actuary's figures and his assumptions, but I doubt whether any jury would have assessed a prospective inheritance at that figure in these uncertain days. It was a figure that the Court of Appeal had the power to review in arriving at their total award. We do not know in precise figures by how much they discounted this element in the trial judge's assessment, but that is no justification for a further review here.

I would affirm their judgment and dismiss the appeal with costs.

RITCHIE J.:—The circumstances giving rise to this appeal have been fully described in the reasons for judgment of my brother Spence and it is unnecessary for me to repeat them at any length.

The only question is as to the adequacy of the award of $65,000 which the Court of Appeal substituted for an award of $94,000 made by the learned trial judge in respect of the damages sustained by Brian Hossack as the result of the death of both his parents who were killed in a motor vehicle accident which was found to have occurred solely through the negligence of the respondent Margaret Florence Athron who at the time was driving an automobile owned by the defendant Hertz Drive Yourself Stations of Ontario Limited.

The Court of Appeal found that in making his award of damages the learned trial judge had left out of account the fact that the estimated accumulated savings of the deceased father, if he had lived out his life span, would have passed to his son subject to provincial succession duties and federal estate tax. This was a relevant factor as these taxes would have been substantial. The Court of Appeal was also of opinion that the award of $94,000 was inordinately high.

1965

HOSSACK *et al.* *v.* HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Ritchie J.

Notwithstanding the provisions of s. 46 of the *Supreme Court Act*, I do not think that this Court is justified in substituting a figure of its own for that awarded by the Court of Appeal except upon the ground that that Court appears to have applied some wrong principle of law in assessing the damages or that its award is so inordinately high or so inordinately low as to be wholly erroneous.

In the circumstances of this case I can see no such ground for interfering with the award made by the Court of Appeal and I would accordingly dismiss this appeal.

SPENCE J. (*dissenting*):—These are two appeals against the judgments of the Court of Appeal for Ontario. Both judgments in the Court reduced amounts awarded by the learned trial judge after a trial without a jury.

The actions arose as a result of an automobile collision which occurred on Highway 17 near the City of Ottawa, between a vehicle driven by the appellant Marjorie Gorman and one driven by the late Dr. William Hossack in which his wife, the late Mary Ann Hossack, and his infant son, Brian Hossack, were passengers. Dr. Hossack and Mrs. Hossack were killed. Mrs. Gorman and Brian Hossack were injured.

The learned trial judge found that the collision occurred solely through the negligence of the defendant Margaret Florence Athron who was driving an automobile owned by the defendant Hertz Drive Yourself Stations of Ontario Ltd. Although there was an appeal from that finding, such appeal was dismissed and the only issue in this appeal is that of the quantum of damages as varied by the Court of Appeal for Ontario.

After trial, the learned trial judge, Moorhouse J., awarded to the plaintiff Marjorie Gorman the sum of $35,000 in general damages which with other damages resulted in judgment in her favour for $42,451.18, and awarded to the appellants in the second action who sued under the provisions of *The Fatal Accidents Act*, R.S.O. 1960, c. 138, as executors of both the late Dr. William Hossack and his wife Mary Ann Hossack, the sum of $94,000 general damages which, with other damages, resulted in judgment in their favour in the sum of $95,632.60.

Whether this Court is justified in varying the judgment of the Court of Appeal, which in turn had varied the damages awarded by the trial judge, has been dealt with in a

considerable number of decisions of this Court and it may be taken that the jurisprudence has been established here. In *Pratt v. Beaman*[1], Anglin J. said at p. 287:

The second ground of appeal is that damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. *It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.*

(The italics are my own.)

In *Hanes v. Kennedy*[2], Kerwin J. said at pp. 387-8:

Where general damages fixed by a trial judge sitting without a jury have been reduced by a Court of Appeal under circumstances such as we find here, this Court, as a general rule, will not interfere: *Ross v. Dunstall* (1921), 62 Can. S.C.R. 393; *Pratt v. Beaman*, [1930] S.C.R. 284. Mr. Cartwright referred to *McHugh v. Union Bank of Canada*, [1913] A.C. 299 at 309. .... *No error in principle was made by the Court of Appeal in this case, and the cross-appeal should, therefore, be dismissed, with costs.*

(The italics are my own.)

And again, in *Lang et al. v. Pollard et al.*[3], Kerwin J. said at p. 859:

. . . the same principle is applicable and that is, particularly in Canada where estimates of damages may differ in various Provinces, that this Court will not, *except in very exceptional circumstances,* interfere with the amounts fixed by the Court of Appeal where they differ from the damages assessed by the trial judge.

(The italics are my own.)

In *Lehnert v. Stein*[4], Cartwright J. said at p. 45:

As to the quantum of damages, this Court is slow to interfere with the amount fixed by a provincial Appellate Court which has varied the assessment made by a trial judge. It is sufficient on this point to refer to the case of *Lang et al. v. Pollard et al.*, [1957] S.C.R. 858. In the case at bar a perusal of the evidence brings me to the conclusion that the amount fixed by the Court of Appeal is not excessive.

The final authority to which I shall refer is *Widrig v. Strazer et al.*[5], where Hall J., giving the judgment of the Court, said at pp. 388-9:

The Court of Appeal reduced the trial judge's award of $40,000 to $12,000. The right of the Court of Appeal to review a trial judge's award is

[1] [1930] S.C.R. 284.
[2] [1941] S.C.R. 384.
[3] [1957] S.C.R. 858.
[4] [1963] S.C.R. 38.
[5] [1964] S.C.R. 376.

1965

HOSSACK *et al.* v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

governed by well-settled principles as stated by Viscount Simon in *Nance v. British Columbia Electric Railway Company Ltd.*, [1951] A.C. 601 at 613, as follows:

> Whether the assessment of damages be by a judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Unless there was error of principle on the part of the Court of Appeal, this Court will not interfere with an amount allowed for damages by the court of last resort in a province. I adopt what Cartwright J., speaking for himself and Taschereau J. (as he then was) said in *Lang and Joseph v. Pollard and Murphy*, [1957] S.C.R. 858 at 862:

> Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was, giving the unanimous judgment of the Court, in *Pratt v. Beaman* [1930] S.C.R. 284 at 287: (see *supra*).
>
> This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.*, [1941] S.C.R. 384 at 387.
>
> The principle appears to me to be equally applicable whether the first appellate court has increased or decreased the general damages awarded at the trial.

In my view there were errors of principle on the part of the Court of Appeal in reducing the amount of the damages....

I have avoided citing the cases in which the court of appeal in the province had varied damages awarded by a jury. To summarize the jurisprudence established by this Court, this Court will not vary damages adjudged by the court of appeal in a province which had varied those assessed by the trial judge "except in the most exceptional circumstances", and it would further appear that the so-called exceptional circumstances are those where this Court is of the opinion that the court of appeal had committed an error in principle.

Therefore, I turn to examining the problem of whether the Court of Appeal in the present case did commit any errors in principle. The basis upon which a court of appeal is justified in varying the damages awarded by a trial judge, as the Court of Appeal for Ontario did in these cases, again, in

my view, has been authoritatively decided by this Court. In *Fagnan v. Ure et al.*[1], Locke J. said at p. 385:

> The findings of the learned trial judge as to the compensation to be awarded to the respondents have been approved by the unanimous judgment of the Appellate Division (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.
>
> The rule applicable when the matter was before that Court is as it is stated by Greer L.J. in *Flint v. Lovall*, [1935] K.B. 354 at 360, in the following terms:
>
> > In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.
>
> That statement was approved by the House of Lords in *Davies et al. v. Powell Duffryn Associated Collieries, Limited*, [1942] A.C. 601 at 617, [1942] 1 All E.R. 657, and by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited*, [1951] A.C. 601 at 613, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

In the latter case, Viscount Simon, delivering the judgment of the Judicial Committee, said at p. 613:

> In those circumstances two distinct questions arise:— (1) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case. (2) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.
>
> (1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ld.*, [1942] A.C. 601). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (per Lord Wright, *Davies v. Powell Duffryn Associated Collieries*, Ld., [1942] A.C. 601, 616.)

[1] [1958] S.C.R. 377.

1965

HOSSACK *et al.* v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

Therefore, it must be determined whether the trial judge in the present case applied a wrong principle of law or, short of that, that the amounts awarded by the trial judge were so inordinately high as to be a wholly erroneous estimate of the damage. Since the trial was before a judge without a jury I do not seek to apply the "out of all proportion" test of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ld., supra.*

THE GORMAN ACTION

Schroeder J.A., giving the judgment of the Court of Appeal, said:

> We have also come to the decision that the learned trial Judge's assessment of general damages in favour of the Respondent Marjorie Gorman is so excessive that it cannot be upheld. We reject the contention of her counsel that a separate assessment should be made in respect of each individual injury sustained by this Respondent. Viewing her injuries as a whole, we consider that an award of $22,500 for general damages would constitute reasonable compensation under that head. To that extent the appeal should be allowed and the judgment varied by substituting for the award of $35,000 for general damages the sum of $22,500.

It would appear, therefore, that the learned justice in appeal may well have considered (1) that the trial judge committed an error in principle in that he, acting upon the submission of counsel for the plaintiff Gorman, separately assessed damages for each injury and then totalled them, and (2) that in any event the award of $35,000 general damages was "so inordinately high as to be a wholly erroneous estimate of the damages".

To deal with the first question, counsel for the plaintiff Gorman at trial appeared before this Court as counsel for her as appellant, and agreed that at trial in argument he had cited separate possible amounts of damages for each of his client's injuries as being appropriate if each of those injuries had been suffered by different individuals but he denied that he had urged the trial judge to total those individual amounts. Counsel, on the other hand, reported that he had urged the trial judge to take into account that all of the injuries had been suffered by one person and award a lump sum considering those injuries and the well recognized elements of future expenses, pain and suffering up to the trial and prospective pain and suffering thereafter, well-nigh total elimination of his client in the enjoyment of life, and

the fact that a lady of 60 years of age would not be able to readjust herself to her infirmities as would a younger person.

The learned trial judge delivered reasons at the end of the trial in which he determined the issue of liability and reserved for further consideration the quantum of damages, then some weeks later endorsed the record with the amounts of his assessment. However, on delivering judgment at trial, he said:

> Mrs. Gorman was an active woman and has been permanently crippled. She enjoyed driving about in her car, golfing, curling, and playing the piano. She feels that her ability to do these things has been completely taken away from her, and that her piano playing has been very seriously and permanently affected. In short, her enjoyment of life has been materially affected by this accident. I feel that it has.
>
> Some of the injuries which she received consisted of: Lacerations of the lower lip; bruises of the forehead; deep laceration of both knees into the joint; a comminuted fracture of the left patella; a chip fracture of the left femur near the joint; and her right ankle was almost severed. Swelling of the right hand, and there was a fracture of the metacarpal, near the wrist joint, and there was a fracture of the first left and the fourth metatarsal of the left foot; a fracture of the lower mandible; and numerous bruises and contusions. There were operations under general anaesthesia, and she had a cast from the groin to the foot, of both legs, and her jaws were wired because of the fractures, and she was obliged to take food through a tube. She had long and continuing physiotherapy.
>
> The medical evidence is that at some time, the right ankle will require to be locked. It has been advised, but this Plaintiff has postponed that for as long as she thinks that she can. However, she will again have to undergo surgery, and be for some few weeks in the hospital. The evidence is that the arthritic condition will be affected; she has had a large amount of dental work, and has undergone pain and suffering. These are factors, all of which have been mentioned by counsel, and if there are any that I have omitted, I simply have taken those from my notes of the evidence, and they will be considered when I endorse the record as to the amount of damages in her case, Mr. Houston.

I find nothing in that statement to indicate that the learned trial judge was intending to or did total the individual amounts suggested by counsel in order to arrive at his award. The fact that the amounts suggested by counsel for the individual injuries do total approximately that awarded by the trial judge I regard as a mere coincidence and no conclusive indication that such a formula was used. Moreover, counsel for the respondent in this Court admitted that he was unable to cite any authority that such an "adding machine approach" to the assessment of damages was incorrect in principle. It would certainly be inept but even if it had been used by the trial judge, and I am of the opinion that has not been demonstrated, I cannot say that it would be wrong in principle.

1965

HOSSACK *et al.* v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

I turn next to the consideration of whether the award of $35,000 general damages was "so inordinately high as to be a wholly erroneous estimate of the damages". I have already cited the learned trial judge's reference to the injuries. Counsel for the appellant in his factum has listed 16 different injuries of varying severity and importance. It seems certain that the appellant who, prior to the accident, was a lady of 60 years of age, one who drove her car constantly and engaged in active sports such as golf and curling, is now a permanently crippled person with, at any rate, a degree of fixity of both legs and with every indication that arthritis resulting from the injuries has already advanced to a considerable degree. The trial judge, called upon to consider these facts in the light of the elements of damages which I have already cited as having been submitted to him by the counsel for the appellant at trial could, in my view, have arrived at a figure of $35,000 for general damages without the award being such as to earn the description as being "so inordinately high as to be a wholly erroneous estimate of damages". As Cartwright J. pointed out in *Lehnart v. Stein, supra,* one might only come to the determination of whether an award is "so inordinately high" by perusal of the evidence and I have summarized my perusal of that evidence in expressing the opinion above.

THE HOSSACK ACTION

Schroeder J.A., giving the judgment of the Court of Appeal, said:

> I propose to deal first with the assessment of damages in the action brought under *The Fatal Accidents Act*. An Appellate Court does not readily interfere with an assessment of damages made by a trial Judge unless it is satisfied that the damages awarded are clearly unreasonable and unsupported by the evidence or that they are so excessively high as to be clearly erroneous. In our respectful view the award of $94,000.00 is so excessively high as to reflect an attempt to award an amount approaching a perfect compensation. There are numerous contingencies to be taken into account in assessing damages in these cases by reason whereof expectations of pecuniary benefit disappointed by a death caused by the act of a wrongdoer must be adequately discounted. The learned Judge failed, in our respectful opinion, to give full and proper effect to those contingencies. It is perfectly obvious that the actuarial evidence of Mr. Lang, based on the estimated savings of the deceased William Ross Hossack, did not take account of the fact that if the Respondents optimistic estimate of the accumulated savings were well founded, they would reach the hands of the

beneficiaries subject to provincial succession duties tax and federal estate tax which would be substantial in an estate of half a million dollars. There are also many contingencies as, e.g., if the wife were to predecease the husband, and he were to remarry, or if the husband were to predecease the wife and she were to remarry, further that the wife might have been compelled to live on the husband's estate, in which event the question would arise as to how much of the said estate would remain on the wife's death. These and many other contingencies which need not be denominated exist in this case and must be given due effect.

We have had the benefit of very able, comprehensive and helpful arguments of counsel in the course of which the evidence was exhaustively reviewed. Upon full consideration we have attained to the conclusion that a proper award in favour of the infant under the provisions of *The Fatal Accidents Act* would be $65,000.00. To that extent the appeal should be allowed and the judgment in appeal varied by substituting for the sum of $94,000.00 the sum of $65,000.00.

It would appear, therefore, that the learned justice in appeal felt that the Court of Appeal was justified in varying the judgment of the learned trial judge for these reasons: (1) that the damages allowed reflected an attempt to award an amount approaching a perfect compensation, (2) that numerous contingencies to be taken into account in assessing damages in a fatal accidents case had not been taken into account, and (3) that the damages awarded were "so inordinately high as to be a wholly erroneous estimate of damages".

One contingency to which the learned justice in appeal refers was that the actuary's estimate of the total estate which would have been left by the late Dr. William Ross Hossack had he lived out his life in a normal fashion would only have gone to his son after provincial succession duties and federal estate taxes had been deducted therefrom. A further contingency which the learned justice in appeal felt the trial judge had failed to consider was the possibility of Mrs. Hossack predeceasing her husband and he remarrying, or Dr. Hossack predeceasing his wife and she being forced during the balance of her lifetime to live on the estate of her late husband which had accumulated up to the date of his death, and so reduce the amount available for the infant son of the late Dr. and Mrs. Hossack and, therefore, the pecuniary benefit of which he was deprived by their untimely death. I think the second contingency may be dealt with very briefly. The fact is that Mrs. Hossack died in the accident which gave rise to this cause of action. The

1965

HOSSACK *et al.* *v.* HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

pecuniary benefit to her son, in whose interest the action is taken, as the result of any estate which she might have left had she lived out her ordinary life was slight and, therefore, what was in essence the trial judge's task was to determine the pecuniary benefit of which the son was deprived by the death in the accident of his father. The fact is that his father, the late Dr. Hossack, did not leave a widow who might live on the late Dr. Hossack's estate had he predeceased her at some future time. It might well be that the late Dr. Hossack, had he lived, might have remarried, but the effect of such remarriage on the pecuniary benefit which his son would receive on the date of his father's death, had it occurred under normal circumstances, and at a normal time, is altogether conjecture and I do not see how it could be allowed for with any intelligence in the affixing of the damages.

I therefore find no error in principle in the learned trial judge's failure to consider this contingency, if he did so fail to consider it, and there is nothing in his reasons for judgment or in the endorsement of the record which indicated that he did fail to consider any proper element. It must be remembered that the learned trial judge said:

> I shall read the cases referred to by counsel and shall take into consideration all these factors required to be so taken into consideration and will endorse the record as to the amount of damages accordingly.

The question of the effect on the pecuniary benefit of which Brian Hossack was deprived by the untimely death of his parents, of the estate taxes, provincial and federal, is a matter of some importance. It would appear from a perusal of the evidence of Mr. Lang, the actuary, who gave evidence on behalf of the plaintiffs at trial, that this witness found a probable gross estate which would come to the son upon the death of Dr. Hossack had it occurred under ordinary circumstances of $503,000. After estate duties, federal and provincial, were deducted therefrom at their present rates, it would leave only a net estate of $364,500. Using the same calculation as Mr. Lang that would have a present value of $81,885 rather than the present value of $113,000 which Mr. Lang calculated as being the present value of an estate of $503,000. However, it was counsel's submission that the learned trial judge appears to have made up his award of $94,000 by the addition of three amounts,

(*a*) the present value of the probable future estate that Brian Hossack would have received upon the eventual passing of his father and mother under ordinary circumstances ..... $50,000.

(*b*) the cost of food, clothing, shelter and education for a 20-year period which the infant Brian would have received from his parents if they had lived ..... $32,000.

(*c*) the substantial loss suffered by the infant in losing the intellectual, moral and physical guidance and training which only a mother and father could give him ..... $12,000.

On that basis, the trial judge reduced the $113,000 present value figure to which I have referred to $50,000 to allow for the many contingencies which might have interfered with the late Dr. Hossack leaving an estate as large as Mr. Lang calculated. That represents a reduction of 55.7 per cent. Had the present value been considered at $81,885, the reduction to $50,000 would only have represented a reduction to allow for the said contingencies of about 40 per cent. Had the reduction factor of approximately 56 per cent been used on the present value after such estate duties, then figure (*a*) in the calculation would have amounted to about $45,000 to $46,000 and added to figures (*b*) and (*c*) would have given a total damage award of about $90,000.

I am unable to say that an award of $94,000 as damages under *The Fatal Accidents Act* is so inordinately higher than an award of $90,000 that it is a wholly erroneous estimate of the damages. There has been very considerable argument as to the propriety of both the $32,000 allowance under head (*b*) and the $12,000 allowance under (*c*) above. I am of the opinion that those objections constitute merely an attempt to supplant the estimate made by the trial judge with the estimate by the Court of Appeal or by counsel before this Court and that no matter of principle is involved.

There is, however, an additional factor which must be considered and it is the factor which deals with the establishment of a gross value of the estate of the late Dr.

1965

HOSSACK *et al.* v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

Hossack, had he lived his ordinary life, at $503,000. That amount was arrived at by the witness Lang by assuming that the late Dr. Hossack would have saved one-third of his net income and that those savings accumulated with interest for the 38 years of his normal life would have amounted at his death at the end of those 38 years to $503,000. The estimate that the late Dr. Hossack had saved one-third of his income was made by finding that those so-called savings amounted to $16,319 and that his total net income after deduction of taxes was $44,994. The $16,319 was a total which included a valuation of household goods, furniture and jewellery at $2,642, and two automobiles at $1,120, a total of $3,782. Certainly, it is difficult to understand how those items could be included under the heading of "savings" so that their capitalization at 4 per cent interest would build up into a gross estate in 38 years of $503,000. This would lead us to the conclusion that the actuary was incorrect in taking as the basis for his calculation that the late Dr. Hossack was saving one-third of his net income. In fact, usual living expenses, i.e., the purchase of furniture, household goods, jewellery and automobiles were erroneously included in that so-called saving of one-third of his net income. The capitalization of these amounts would appear to make inaccurate the calculated gross estate of the late Dr. Hossack, at normal death, of $503,000, and it would appear more accurate to say that the late Dr. Hossack saved only about 28 per cent of his net income. His total savings therefore would not have been the $212,292 calculated by Mr. Lang but about $178,000 and that total saving capitalized on the 4 per cent basis used by Mr. Lang would have yielded a gross estate at the time of death of about $422,000. This estate, after the allowance of estate duties, federal and provincial, would amount to approximately $305,803.

The present value of $503,000 is $113,000 and the present value of $305,803, therefore, would be about $68,500. If you allow about 56 per cent of that as being a proper figure to allow for contingencies you would reach an amount not of the $50,000 as apparently allowed by the learned trial judge but rather about $38,360 and if to that amount, as being the proper amount for category (*a*) *supra,* you add the same

amounts for category (*b*)—$32,000, and category (*c*)—$12,000, you arrive at $82,360.

Therefore, in my judgment, the proper allowance for damages under *The Fatal Accidents Act* should have been $82,360. In arriving at that figure, I believe that I have used the method of calculation adopted by the appellants and to which no objection was taken by counsel for the respondents, but I have based my calculation of the gross estate which the late Dr. Hossack might have expected to leave, had he died at a normal time and under normal circumstances, upon a more realistic estimate of his accumulated savings, and I have made allowance for the effect of estate duties, federal and provincial, which it would appear the learned trial judge, if he adopted the calculations made by Mr. Lang, failed to allow. In short, I have attempted to correct the two matters of principle upon which the trial judge seems to have fallen in error.

In doing so, I do not purport to deal with the question discussed in *British Transport Commission v. Gourley*[1], or in *Jennings v. Cronsberry*[2], as to whether or not deductions should be made in damage awards to a person who had been injured and thereby prevented from earning his living for, at any rate, a period of time to allow for tax on income which he would otherwise have earned. What must be determined in an action under *The Fatal Accidents Act* is the pecuniary benefit of which the person for whom the action has been instituted is deprived by the untimely death of the deceased. That pecuniary benefit, in my view, must be considered in the light of what such person will actually receive. What he actually will receive is the net estate after the deduction of estate duties and, therefore, an allowance must be made for the death duties in calculating the damages.

I am, therefore, of the opinion that this Court should allow the appeal in the Gorman action and restore the judgment of the trial judge. Since the appellant in the Gorman action was successful throughout, the appellant should have costs at trial, in the Court of Appeal, and in this Court.

[1] [1956] A.C. 185.

[2] [1965] 2 O.R. 285 (C.A.).

1965

HOSSACK *et al.* *v.* HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

This Court, by virtue of s. 46 of the *Supreme Court Act*, may "give the judgment and award the process or other proceedings that the Court whose decision is appealed against, should have given or awarded".

I would allow the appeal in the Hossack action to the extent of varying the general damages from the sum of $65,000, as fixed in the Court of Appeal, to $82,360 which with other damages of $1,632.60 allowed at trial will result in a judgment in favour of the plaintiffs in that action for $83,992.60. Since the appellant in the Hossack action did not succeed in having restored the judgment at trial, I would leave in effect the disposition of costs made in the Court of Appeal, and I would allow no costs in this Court.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiffs, appellants: Richardson, Macmillan, Rooke & MacLennan, Toronto.

Solicitors for the defendants, respondents, Hertz Drive Yourself Stations of Ontario Ltd. and M. F. Athron: Walker, Milton, Rice & Ellis, Toronto.

Solicitors for the defendant, respondent, Roger Lemoyne: Beahen & Cooligan, Ottawa.

ANTONIO TALBOT .....REQUÉRANT;

1965
*Oct. 18
Oct. 22

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

REQUÊTE POUR PERMISSION D'APPELER

Appel—Permission d'appeler—Droit criminel—Juridiction—Question de droit—Code criminel, 1953-54 (Can.), c. 51, arts. 21, 102, 597(1)(b).

Le requérant fut trouvé coupable sur treize chefs d'accusation d'avoir directement ou indirectement, alors qu'il était fonctionnaire dans le gouvernement de la province de Québec, exigé, accepté ou offert ou convenu d'accepter d'une compagnie pour une autre personne une somme d'argent, en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou omission concernant la conclusion d'affaires avec le gouvernement de la province ou un sujet d'affaires ayant trait audit gouvernement, le tout contrairement aux dispositions des arts. 102 et 21 du *Code criminel*. Son appel fut rejeté par un jugement unanime de la Cour du banc de la reine. Il demanda la permission d'en appeler devant cette Cour.

Arrêt: La requête pour permission d'appeler doit être rejetée.

Rien au dossier ne justifie de soulever les griefs relatifs aux questions de droit invoqués au soutien de la requête, à savoir que la Cour d'Appel aurait erré en droit dans l'interprétation de l'art. 102 du Code en ce qui concerne le *mens rea* et deuxièmement, en omettant, dans l'appréciation de la preuve circonstancielle, d'appliquer la règle énoncée dans la cause de *Hodge*, 2 Lewin C.C. 227.

Appeal—Leave to appeal—Criminal law—Jurisdiction—Question of law—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 102, 597(1)(b).

The applicant was convicted of thirteen offences of having directly or indirectly, being an official of the government of the province of Quebec, demanded, accepted or offered or agreed to accept from a company for another person a sum of money as consideration for his cooperation, assistance, exercise of influence or act or omission in connection with the transaction of business with or any matter of business relating to the government of the province, contrary to the provisions of ss. 102 and 21 of the *Criminal Code*. His appeal was dismissed by a unanimous judgment of the Court of Queen's Bench. He applied for leave to appeal to this Court.

Held: The motion for leave to appeal should be dismissed.

There was nothing in the record to justify raising the grounds relating to the questions of law invoked in support of the motion, namely that the Court of Appeal erred in law in interpreting s. 102 of the Code with respect to *mens rea* and secondly, in omitting to apply, in the appreciation of the circumstancial evidence, the rule enunciated in *Hodge's* case, 2 Lewin C.C. 227.

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* CORAM: Les Juges Fauteux, Abbott et Martland.

1965

TALBOT
v.
LA REINE

APPLICATION for leave to appeal from a judgment of the Court of Queen's Bench, province of Quebec. Application dismissed.

REQUÊTE pour permission d'appeler d'un jugement de la Cour du banc de la reine, province de Québec. Requête rejetée.

Noël Dorion, c.r., pour le requérant.

Laurent E. Bélanger, c.r., pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Le 13 mai 1964, M. le Juge Thomas Tremblay, Juge en chef de la Cour des Sessions de la Paix de la Province de Québec, prononçait contre le requérant un jugement de culpabilité sur les treize chefs d'accusation logés contre lui sous les dispositions des arts. 102 et 21 du *Code Criminel*. Le requérant appela de ce jugement et son appel fut rejeté le 15 juillet 1965 par une décision unanime de la Cour du banc de la reine (juridiction d'appel). S'appuyant sur les dispositions de l'art. 597 (1) (*b*) du *Code Criminel*, il demande maintenant la permission d'appeler à cette Cour de cette décision.

Il n'est guère nécessaire de rappeler que dans la considération d'une telle requête cette Cour doit impérativement tenir compte qu'elle n'a aucune juridiction pour accorder une permission d'appeler à moins que la requête n'allègue un grief relatif à une question de droit dans le sens strict et qu'en raison de ce qui y apparaît le dossier permette de soulever le grief de droit invoqué.

Dans le présent cas, et tel que précisé à l'audition, la prétention du requérant, en somme, est que la Cour d'Appel aurait erré en droit dans l'interprétation de l'art. 102 du *Code Criminel* en ce qui concerne le *mens rea* requis pour la commission de cette offense et aurait de toute façon erré en droit en omettant, dans l'appréciation de la preuve à cet égard, d'appliquer la règle énoncée dans *Hodge*[1] relativement à la preuve de circonstance.

[1] (1838) 2 Lewin C.C. 227, 168 E.R. 1136.

1965

TALBOT
v.
LA REINE

Fauteux J.

Ayant considéré les arguments soumis à l'audition, les raisons de jugement données en Cour d'Appel, nous sommes tous d'avis que rien au dossier ne justifie de soulever les griefs relatifs aux questions de droit invoqués au soutien de la requête.

La requête pour permission d'appeler est rejetée.

Requête rejetée.

Procureur du requérant: R. Letarte, Québec.

Procureur de l'intimée: I. Migneault, Québec.

KINGCOME NAVIGATION COMPANY LIMITED (*Defendant*) .. APPELLANT;

1965

*June 3, 4
Oct. 14

AND

GEORGE PERDIA (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Shipping—Collision of ships in dense fog—Narrow channel—Liability.

The tug-boat *Ivanhoe*, owned by the defendant company, collided, as she was leaving Vancouver Harbour in a dense fog, with the inbound fishing vessel *Western Spray*, of which the plaintiff was the owner and master. The collision occurred as the ships were passing through a narrow channel. The trial judge, sitting with two assessors, fixed the liability of the *Ivanhoe* at 85 per cent and that of the *Western Spray* at 15 per cent. The defendant company appealed to this Court.

Held: The appeal should be dismissed.

The apportionment of liability should not be varied. The fault of the *Western Spray* in being too close to the mid-channel, as found by the trial judge and against which finding the plaintiff did not appeal, was in no way comparable to that of the *Ivanhoe*. The latter ship was operating in a dense fog at a speed which prevented her from slowing down or altering course effectively within the area of the prevailing visibility; she was not keeping to her proper side of mid-channel; had no look-out and was depending upon a radar which was not properly tended.

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

1965

KINGCOME NAVIGATION CO. LTD. v. PERDIA

Navigation—Collision de bateaux—Brouillard épais—Chenal étroit—Responsabilité.

En sortant du port de Vancouver sous un brouillard épais, le bateau-remorqueur *Ivanhoe,* propriété de la compagnie défenderesse, entra en collision avec le bateau de pêche *Western Spray* qui se dirigeait vers le port et dont le demandeur était le propriétaire et capitaine. La collision eut lieu alors que les bateaux naviguaient dans un chenal étroit. Le juge au procès, siégeant avec deux assesseurs, a établi la responsabilité du *Ivanhoe* à 85 pour-cent et celle du *Western Spray* à 15 pour-cent. La compagnie défenderesse en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le partage de la responsabilité ne devrait pas être modifié. La faute du *Western Spray* de s'être tenu trop près du milieu du chenal, faute retenue par le juge au procès et contre laquelle conclusion le demandeur n'a pas appelé, n'était aucunement comparable à celle du *Ivanhoe.* Ce dernier bateau était conduit sous un brouillard épais à une vitesse qui l'empêchait de ralentir ou de changer sa course effectivement dans la zone où la visibilité était prédominante; il n'était pas de son propre côté du milieu du chenal; il n'avait aucune vigie et se fiait à un radar qui n'était pas correctement opéré.

APPEL d'un jugement du Juge Norris, du District d'Amirauté de la Colombie-Britannique. Appel rejeté.

APPEAL from a judgment of Norris D.J.A., for the District of British Columbia. Appeal dismissed.

D. McK. Brown, Q.C., for the defendant, appellant.

J. I. Bird, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Norris, District Judge in Admiralty of the Admiralty District of British Columbia, sitting with two assessors, whereby he found the tugboat *Ivanhoe* to be chiefly to blame for a collision which occurred at 10 a.m. on September 20, 1962, when she was leaving Vancouver Harbour in dense fog and ran into the inbound fishing vessel *Western Spray* in Burrard Inlet just outside the First Narrows Bridge. There was no wind, the sea was flat and the learned trial judge has found that the tide was running between 2 and 3 knots against the *Ivanhoe.*

The *Ivanhoe,* owned by the appellant company, is a power tug of 185.98 gross tons with an approximate length

of 110 to 115 feet overall; she was manned by a crew of 7 and fitted with all the usual navigational aids including radio-telephone, magnetic compass and radar. The *Western Spray*, of which the respondent was the owner and master at the time of the collision, is a power-driven fishing vessel of 55.16 gross tons with an approximate length of 66 feet overall. She was manned by a crew of 6 and fitted with magnetic compass, radio-telephone and depth recorder but no radar.

There does not appear to be any dispute as to the fact that Burrard Inlet constitutes a narrow channel within the meaning of Rule 25(*a*) of the International Regulations for Preventing Collisions at Sea, (hereinafter referred to as the Regulations), which reads as follows:

> Rule 25(*a*) In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

This rule, like the other "Steering and Sailing Rules", is required to be obeyed in accordance with the preliminary paragraphs of Part C of the Regulations, the first of which provides that:

> 1. In obeying and construing these Rules, any action taken should be positive, in ample time, and with due regard to the observance of good seamanship.

In the circumstances of the present case, it was the duty of the *Ivanhoe* to keep to the north side of the channel and of the *Western Spray* to keep to the south. Mr. Justice Norris was unable to determine the exact point of collision, but it is clear from his reasons for judgment that he found it to have taken place to the south of mid channel. In this regard he says:

> On the whole of the acceptable evidence, while the point of collision cannot be fixed exactly, Perdia had navigated his vessel so as to get his vessel into the First Narrows Channel. I find that as a matter of wise precaution he should have kept more to the south of the channel in view of fog conditions, but I do not find on the evidence that he was in the north half of the channel.

I agree with this assessment of the situation.

Both the ships' masters claim to have been sounding the necessary fog signals, but neither heard nor detected the presence of the other until their stems were seen emerging

1965

KINGCOME NAVIGATION CO. LTD. v. PERDIA

Ritchie J.

from the fog by their respective crews, by which time they were approaching end on end at a distance of about fifty feet apart and the collision was virtually inevitable.

The true cause of this collision is not to be found in the actions of the tug and the fishing vessel after they had sighted each other. In seeking to attribute fault in such cases it is in my opinion necessary to examine the conduct of both vessels as they approached the area of collision in an effort to determine whether either of them could have foreseen the approaching danger and, by the exercise of reasonable care, have prevented the confrontation at close quarters from ever occurring at all.

The engineer of the *Ivanhoe*, whose evidence was believed by the learned trial judge, testified that after backing out from the ferry dock to proceed seaward her speed was set at "half ahead", amounting to 4½ to 5 knots, which was maintained until the time of collision and that, with the heavy engine running at that speed, the master's order of "full astern" given upon sighting the *Western Spray* did not become effective to take any "way" off the tug before the impact. The master also ordered the helm "hard to starboard" and as to the effect of this order he says:

> Q. Did your vessel respond to the helm change prior to the collision?
> A. Just, just, because she's a big, heavy ship.
> Q. She responds slowly, does she?
> A. Slowly.

In this regard the helmsman stated under cross-examination:

> Q. Can you recall seeing the *Western Spray* prior to the collision?
> A. Recall seeing her?
> Q. Yes, or any part of it before the collision?
> A. I remember the Captain telling me that we were going to hit, and hard to starboard, and I spun the wheel and by the time I looked up we were there.

I take it from this evidence that the tug had not fully responded to the helm order before the ships came together.

From the time of leaving the dock until the collision, the *Ivanhoe's* master appears to have been navigating by radar, although he was also able to check his position from calls received by radio-telephone from the officer on duty in the radar-equipped station on the First Narrows Bridge. No lookouts were posted.

1965

KINGCOME NAVIGATION CO. LTD. v. PERDIA

Ritchie J.

When the *Ivanhoe's* radar set was tested more than a month after the collision, the "echoes" were found to be weak but the evidence of the ship's master, who was the only person to use the set on the day in question is that "it worked perfectly". The evidence of the radar expert called on behalf of the appellant satisfies me that the steel work on the First Narrows Bridge did not offer any real interference with radar reception and I think it to be more probable than not that the explanation of the master's failure to detect any echo of the *Western Spray*, which had been almost directly in front of him for some time, is that he was not observing his set with the care which the circumstances required or that he was not operating it properly although he would, in my view, have been equally to blame for placing reliance on a radar containing a weakness which he had failed to detect.

The *Western Spray*, shortly before reaching the immediate area of the collision, had reduced her speed to 3 knots through the water. She was lighter and more easily maneuverable than the *Ivanhoe* and her engine was controlled by a throttle in the wheel house. The master says that upon sighting the *Ivanhoe* he put his engines "full astern" and that while he was running back to the galley so as to get away from the impending impact, he saw that his ship had already started moving in reverse. I agree with the learned trial judge that it is probable that before the actual impact, the reversing of the engine had already had the effect of moving the bow of the *Western Spray* to port which accounts for the fact that it was the starboard side of the vessel which was struck by the stem of the *Ivanhoe* and, notwithstanding the evidence of the helmsman and the master of the *Ivanhoe*, I am satisfied that there was little or no forward movement to the *Western Spray* at the time of the collision.

The master of the *Western Spray*, having no radar, had posted four lookouts, two in the bow and two above the wheel house and he was judging his position in the harbour by the sound signals which were coming from the First Narrows beacon on the north shore and the Prospect Point light on the south. The sounding of these signals was being reported to him by the lookouts in the bow, one of whom was stationed in the stem of the vessel and the other within hearing distance of the wheel house. According to her

1965

KINGCOME NAVIGATION CO. LTD. v. PERDIA

Ritchie J.

master, *Western Spray* was in aproximately mid channel on a course of 70 degrees magnetic, and I agree with the learned trial judge that she was too close to the center line although, as has been said, she was not in the north half of the channel.

The main fault which counsel for the appellant attributed to the *Western Spray* was that although she had no radar, the master could have communicated by radio-telephone with the officer on duty on the First Narrows Bridge, and that if he had done so he would have been made aware of the presence of the *Ivanhoe* in time to take avoiding action.

It is true that the master of the *Western Spray* did not appear to understand how to communicate with the bridge station effectively by telephone and that because he called on the wrong radio band he could not get in touch with it. I think that he was negligent in this respect, but the only effective action for him to have taken if he had received the information which the bridge officer had to give him would have been to move further to the south of the Channel and the failure to do this is the fault which has been found against the *Western Spray* by Mr. Justice Norris who says:

> . . . .the master of the *Western Spray* was at fault in proceeding in the fog too close to the center of the Channel. In other respects he was not at fault.

The respondent does not appeal from this finding.

It appears to be desirable to comment on the evidence of the officer who was on duty on the bridge who testified very definitely that according to the picture seen by him on his radar screen, the two ships were proceeding on courses which should have enabled them to pass each other in safety when the *Western Spray* suddenly turned to port at an angle of about 70 degrees directly across the path of the *Ivanhoe*. This evidence would, of course, have concluded the matter in favour of the *Ivanhoe* if it had been accepted but Mr. Justice Norris clearly rejected it and concluded that the *Western Spray* made no such turn to port as that described by this witness. I am not prepared to depart from the assessment of this evidence made by the learned trial judge.

I find that in dense fog the *Ivanhoe* was operating at a speed which prevented her from slowing down or altering course effectively within the area of the prevailing visibility; she was not keeping to her proper side of mid channel, had no lookout and was depending upon a radar which was

not being properly tended. In this latter regard I adopt the view expressed by Mr. Justice Willmer in *The Anna Salen*[1], where he said:

> These scientific installations, and particularly, radar, are potentially most valuable instruments for increasing safety at sea; but they only remain valuable if they are intelligently used, and if the officers responsible for working them work them and interpret them with intelligence. That is only another way, I think, of saying that a good look-out must be maintained. *A good look-out involves not only a visual look-out, and not only the use of ears, but it also involves the intelligent interpretation of the data received by way of these various scientific instruments.*

(The italics are my own.)

It appears to me that if the tug's radar had been constantly and intelligently observed by its master, he would have had warning of the presence of the *Western Spray* in time to take action as to both course and speed so that the two vessels would not have met as they did.

It was contended on behalf of the appellant that, taking into account the set of the tide against her, the speed at which the *Ivanhoe* was going was a moderate one within the meaning of Rule 16(*a*) of the Regulations which requires that in fog every vessel shall "go at a moderate speed having careful regard to existing circumstances and conditions".

The speed of the *Ivanhoe* could certainly not be characterized as immoderate under conditions of clear visibility but the governing consideration in the present case is that in the dense fog that speed was such that, to use the language employed by Mellish L.J.A. in *The Ship Clackamas v. The Schooner Cape d'Or*, approved in this Court[2] by Newcombe J., at page 336, the *Ivanhoe*

> was unable to avoid a collision with the vessel from which she was bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions.

This was an immoderate speed having regard to "existing circumstances and conditions". The same considerations do not apply to the *Western Spray* a lighter vessel the reversal of whose engine had become effective before the collision.

Mr. Justice Norris fixed the liability of the *Ivanhoe* at 85 per cent and that of the *Western Spray* at 15 per cent. I would not vary this apportionment as I consider that the

[1] [1954] 1 Lloyd's Rep. 475 at 488.

[2] [1926] S.C.R. 331 at 336, 1 D.L.R. 384.

1965

KINGCOME NAVIGATION CO. LTD. v. PERDIA

Ritchie J.

fault of the *Western Spray* in being too close to mid channel was in no way comparable to that of the *Ivanhoe* in proceeding on her wrong side of the channel at a speed and on a course which could not be effectively altered within the prevailing limits of visibility and in relying upon a radar which was not being properly observed or intelligently interpreted.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Russell & DuMoulin, Vancouver.

Solicitors for the plaintiff, respondent: Campney, Owen & Murphy, Vancouver.

1965

*Mai 31
*Juin 1
Oct. 14

PROVINCIAL HARDWOODS INC. et J. ALONZO MORIN (*Demandeurs*) .. APPELANTS;

ET

JACQUES MORIN, MARC ANDRÉ BLOUIN et MAR-MIC FARM INC. INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Immeubles—Vente—Action pour faire annuler—Entente verbale—Admissibilité—Prête-nom—Acheteur étant une compagnie non encore incorporée—Code civil, art. 1233, para. 7—Loi des compagnies de Québec, S.R.Q. 1941, c. 276, art. 29.

L'actif d'une compagnie en faillite et dont l'appelant Morin détenait le contrôle comprenait particulièrement deux propriétés immobilières: l'une sur laquelle se trouvait la maison familiale et l'autre, une ferme. Voulant récupérer ces deux immeubles, l'appelant Morin conçut le projet d'en faire l'acquisition par l'intermédiaire de son fils. Ce dernier, à la suite d'une entente verbale avec son père, acheta les deux immeubles du syndic à la faillite. Quelques mois plus tard, Morin fils, sans l'assentiment de son père, vendit la ferme à l'intimée Mar-Mic

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Martland.

Farm Inc., compagnie qui ne devait être incorporée que trois mois plus tard. Dans son action pour réclamer les deux propriétés, Morin père allégua qu'il fut convenu verbalement que son fils agirait comme son prête-nom, lui rétrocéderait les immeubles sur demande et serait remboursé des argents déboursés par lui aussitôt que son père pourrait le faire.

Le juge au procès fit droit à la demande de Morin père; il le déclara propriétaire de la propriété résidentielle et annula la vente de la ferme qui avait été faite à Mar-Mic Farm Inc. La Cour d'Appel déclara Morin père propriétaire de la propriété résidentielle, mais déclara que la vente de la ferme était valide. Morin père interjeta appel à cette Cour et Morin fils, dans un contre-appel, attaqua la décision déclarant son père propriétaire de la propriété résidentielle.

Arrêt: Les appels de Morin père doivent être maintenus et le contre-appel de Morin fils doit être rejeté.

La preuve testimoniale concernant la nature de l'entente verbale entre le père et le fils était admissible—il existait un commencement de preuve par écrit au sens du para. 7 de l'art. 1233 du *Code civil*—et cette preuve considérée avec tout ce que révèle le dossier établissait de façon prépondérante les prétentions de Morin père à l'effet que son fils devait agir comme son prête-nom. Morin fils n'a donc jamais été propriétaire des deux immeubles, et il s'ensuit que son père avait droit d'en obtenir la rétrocession. Il s'ensuit aussi que Morin père avait droit de demander que l'acte de vente relatif à la ferme soit déclaré inexistant parce que Mar-Mic Farm Inc., désignée comme acheteur, n'avait aucune existence juridique à la date de cet acte de vente et de son enregistrement, et que ce défaut n'était pas autrement couvert. Il n'y avait aucune preuve au dossier de la constitution d'un fidéicommis au sens et aux fins indiqués aux dispositions de l'art. 29 de la *Loi des compagnies de Québec*. Les dispositions de cet article ne pouvaient pas être étendues au cas présent. La prétention des intimés que l'action ne pouvait réussir parce que préalablement à son institution ils n'avaient pas été remboursés des argents qu'ils avaient avancés, ne peut pas être supportée. Suivant la convention verbale le fils devait sur simple demande, et sans autre condition, rétrocéder les immeubles à son père.

Immovables—Sale—Action to set aside—Verbal agreement—Admissibility—Prête-nom—Purchaser a company not yet incorporated—Civil Code, art. 1233, para. 7—Quebec Companies Act, R.S.Q. 1941, c. 276, s. 29.

The assets of a bankrupt company which had been controlled by the appellant Morin included, *inter alia*, two immovable properties: one upon which was situated the family residence and the other, a farm. Desiring to regain these two properties, the appellant Morin conceived the scheme of acquiring them through his son. The latter, following a verbal agreement with his father, bought the two properties from the trustee in bankruptcy. A few months later, the son, without the consent of his father, sold the farm to the respondent Mar-Mic Farm Inc., a company which was only incorporated some three months later. In his action claiming the two properties, the father alleged that it had been agreed verbally that his son would act as his prête-nom, would reconvey the properties upon demand and would be reimbursed of the moneys laid out by him as soon as the father could do it.

1965

PROVINCIAL HARDWOODS INC. *et al.* *v.* MORIN *et al.*

The trial judge maintained the father's action; he declared him to be the owner of the residential property and set aside the sale of the farm which had been made to Mar-Mic Farm Inc. The Court of Appeal declared that the father was the owner of the residential property, but found that the sale of the farm was valid. The father appealed to this Court, and the son cross-appealed against the decision declaring his father to be the owner of the residential property.

Held: The appeals of the father should be maintained and the cross-appeal of the son should be dismissed.

The oral proof concerning the nature of the verbal agreement between the father and the son was admissible—there being a commencement of proof in writing within the meaning of art. 1233, para. 7 of the *Civil Code*—and this oral proof, considered with all that was to be found in the record, established preponderantly the contentions of the father to the effect that his son was to act as his prête-nom. Consequently the son had never been the owner of the two properties, and it follows that the father had the right to obtain a reconveyance. It follows also that the father had the right to demand that the deed of sale concerning the farm be declared non-existent because Mar-Mic Farm Inc., designated as the purchaser, had no legal existence at the date of the deed of sale and its registration, and that this deficiency was not otherwise covered. There was no evidence in the record that a trust within the meaning and objects of the provisions of s. 29 of the *Quebec Companies Act* had been created. The provisions of that section could not therefore be extended to the present case. The respondent's contention that the action could not succeed because, before its institution, they had not been reimbursed of the moneys which they had advanced, could not succeed. According to the verbal agreement the son was obligated upon demand, and without any other condition, to reconvey the properties to his father.

APPEALS and cross-appeal from three judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming in part the judgment of Marchand J. Appeals allowed and cross-appeal dismissed.

APPELS et contre-appel de trois jugements de la Cour du banc de la reine, province de Québec[1], maintenant en partie un jugement du Juge Marchand. Appels maintenus et contre-appel rejeté.

Roland Fradette, C.R., pour les appelants.

Laurent Cossette, pour l'intimé Jacques Morin.

Pierre Côté, C.R., pour les intimés Blouin et Mar-Mic Farm Inc.

[1] [1964] B.R. 854.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—L'appelant J.-Alonzo Morin et les membres de sa famille détenaient respectivement la presque totalité et la balance des actions de la compagnie Ferme Etchemin Limitée lorsque celle-ci tomba en faillite et qu'éventuellement la vente de son actif s'avéra inéluctable. Cet actif comprenait particulièrement deux propriétés immobilières dont l'une sise au village de St-Henri de Lévis sur laquelle se trouvait la maison familiale des Morin et l'autre, une ferme située à un ou deux milles du village, désignée sous le nom de Ferme Etchemin et utilisée pour l'élevage et l'entraînement des chevaux de course. Morin père voulut naturellement récupérer ces deux immeubles qu'il considérait comme son bien. Vu les ennuis que lui faisaient les syndics à cet égard, il conçut le projet d'en faire indirectement l'acquisition par l'intermédiaire de Provincial Hardwoods Inc.,—compagnie qu'il fit incorporer à ces fins—ou par l'intermédiaire de son fils, l'intimé, Jacques Morin, récemment admis à la pratique de la médecine. A la suite de diverses tractations et en exécution d'une entente verbale entre lui et son fils Jacques, ce dernier se porta acquéreur des deux immeubles et ce par un acte de vente intervenu le 18 février 1959 entre lui et les syndics et subséquemment enregistré au Bureau d'enregistrement de la division d'enregistrement concernée. Les deux propriétés furent achetées au prix de $25,000 payés comptant, dont $5,200 contribués par Jacques Morin, ses frères et ses sœurs; $15,000, produit d'une obligation souscrite en faveur de United Loan Corporation par Jacques Morin comme débiteur principal et son père comme caution, et la balance, $4,800, ainsi que les frais encourus s'élevant à plus de $1,000, furent payés par Morin père. Quelques mois plus tard, soit le 17 novembre 1959, Morin fils, sans l'assentiment de son père, signait un acte de vente aux termes duquel il vendait la ferme à l'intimée Mar-Mic Farm Inc. et ce pour un prix de $24,300. Ce sont là les faits qui, en somme, donnèrent naissance au présent litige.

Morin père prétendant qu'il est propriétaire des deux propriétés immobilières demanda par action la reconnaissance de son droit. Suivant lui, ce qui fut verbalement convenu entre lui et son fils, préalablement à la signature de

1965

PROVINCIAL HARDWOODS INC. *et al.* *v.* MORIN *et al.*

Fauteux J.

l'acte de vente par lequel ce dernier se portait acquéreur des immeubles en question, fut que le fils agirait, dans la circonstance, comme prête-nom de son père, lui rétrocéderait ces immeubles sur demande et serait remboursé des argents déboursés par lui, ses frères et sœurs, aussitôt que le père pourrait ce faire. D'autre part et suivant le fils, tout ce dont il a convenu fut d'accorder à son père un droit de préférence de racheter les biens en question avant l'expiration de l'été 1959 en lui remboursant sans délai tout l'argent qu'il investirait, tant personnellement que pour le compte de ses frères et sœurs, et toutes les dépenses que lui entraînerait l'achat de ces biens. Ainsi donc et sur ce premier aspect du litige, la question soumise est de savoir si la preuve testimoniale concernant la nature de cette entente verbale entre père et fils est admissible et, dans l'affirmative, si elle établit les prétentions du père. S'il faut répondre affirmativement à ces deux questions, Morin fils n'a jamais été propriétaire de ces immeubles et n'avait aucun droit de vendre la ferme à qui que ce soit. Il s'ensuivrait que Morin père a droit d'être reconnu propriétaire de l'immeuble sur lequel se trouve la maison familiale et même aussi de la ferme si, comme il le prétend—et c'est là le second aspect du litige—la vente de cette ferme par Morin fils à Mar-Mic Farm Inc. doit être (i) déclarée nulle parce qu'entachée de fraude attribuable à Morin fils et à Marc-André Blouin instigateur de cette vente et de l'incorporation de Mar-Mic Farm Inc. ou (ii) déclarée inexistante parce qu'au 17 novembre 1959, date de cet acte de vente, Mar-Mic Farm Inc. qui y apparaît comme acheteur, n'avait aucune existence juridique n'ayant, en fait, été incorporée que le 23 février 1960.

Dans un jugement très élaboré comportant, outre une appréciation défavorable concernant la crédibilité de Jacques Morin et les agissements de Marc-André Blouin, une analyse minutieuse de toutes les circonstances révélées par le dossier, la preuve écrite et testimoniale, M. le Juge Marchand, de la Cour supérieure, accepta comme bien fondées les prétentions de Morin père, accueillit sa demande, rejeta les contestations de Morin fils et de Marc-André Blouin ainsi que l'intervention de Mar-Mic Farm Inc. Il n'est pas nécessaire de rapporter ici au complet le dispositif du jugement lequel a pour objet différents sujets d'ordre

1965

PROVINCIAL HARDWOODS INC. *et al.* *v.* MORIN *et al.*

Fauteux J.

plutôt accessoire au sujet principal; il suffit de dire que Morin père est déclaré propriétaire de la propriété résidentielle, que l'acte de vente du 17 novembre 1959 consenti par Jacques Morin à Mar-Mic Farm Inc. en ce qui concerne la ferme est déclaré nul parce qu'entaché de fraude et inexistant en raison de l'inexistence légale de l'acquéreur; et il est ordonné à Morin père de payer à Morin fils par versements et à des dates déterminées, la somme de $4,900 représentant la balance due sur le produit de la cotisation faite entre Morin fils et ses frères et sœurs.

Morin fils, Marc-André Blouin et Mar-Mic Farm Inc. appelèrent de ce jugement. Ces trois appels séparés furent entendus simultanément et décidés subséquemment le même jour. Les Juges de la Cour du banc de la reine[1] se divisèrent. Alors que M. le Juge Casey les aurait tous maintenus avec dépens, M. le Juge Rivard les aurait tous rejetés, sans frais, tout en modifiant le jugement de la Cour supérieure en retranchant l'ordonnance relative au remboursement de la balance due sur la cotisation pour réserver à Jacques Morin les droits et recours qu'il pouvait avoir à ce sujet. Pour leur part, M. le Juge en chef et MM. les Juges Choquette et Montgomery (i) maintiennent l'appel (N° 6118) de Jacques Morin contre son père et Provincial Hardwoods Inc. et procédant à rendre le jugement qui, à leur avis, aurait dû être rendu en Cour supérieure, ils déclarent Morin père propriétaire de la propriété résidentielle à compter de la date de l'institution de l'action, et ce pour des motifs autres que ceux retenus en Cour supérieure, sans frais; (ii) ils maintiennent l'appel (N° 6119) de Marc-André Blouin et (iii) l'appel (N° 6117) de Mar-Mic Farm Inc. logés contre Morin père et Provincial Hardwoods Inc., avec dépens.

Morin père et Provincial Hardwoods Inc. ont interjeté appel à cette Cour à l'encontre de ces trois jugements et, dans un contre-appel, Jacques Morin attaque la décision suivant laquelle son père fut déclaré propriétaire de la propriété résidentielle.

Sur le premier aspect du litige, soit la question de l'admissibilité et valeur probante de la preuve testimoniale concer-

[1] [1964] B.R. 854.

1965

PROVINCIAL HARDWOODS INC. *et al.* *v.* MORIN *et al.*

Fauteux J.

nant la nature de la convention verbale entre Morin père et Morin fils relativement à la vente des deux propriétés immobilières, je dirais, en toute déférence pour ceux qui entretiennent l'opinion contraire, que pour les raisons ci-après indiquées, je partage les vues de M. le Juge Rivard de la Cour d'Appel, qui lui-même confirme l'opinion du Juge de première instance tant sur l'admissibilité de la preuve testimoniale que sur le fait que cette preuve considérée avec tout ce que révèle le dossier établit de façon prépondérante les prétentions de Morin père sur la nature de cette convention verbale.

Sur l'admissibilité. Il ne s'agit pas ici de contredire ou changer les termes de cet acte de vente des syndics à la faillite de Ferme Etchemin Limitée à Jacques Morin. Il s'agit de déterminer la nature d'une convention qui—de l'aveu même de l'intimé Jacques Morin—est une convention verbale distincte de l'acte de vente des syndics à Jacques Morin, tant en raison de l'objet propre à cette convention verbale qu'en raison des parties entre lesquelles elle est intervenue, et ce antérieurement et aux fins de l'acte de vente en question. Ce n'est donc pas l'art. 1234 du *Code Civil* qui s'applique ici mais les dispositions du para. 7 de l'art. 1233 du *Code Civil* qui permettent la preuve testimoniale lorsqu'il y a un commencement de preuve par écrit. Dans *Johnston v. Buckland*[1], le Juge en chef Rinfret, parlant au nom de cette Cour, a précisé aux *pages* 102 *et seq.* ce qu'il faut entendre par «commencement de preuve par écrit». Il a noté particulièrement les dispositions de l'art. 316 du *Code de Procédure Civile* qui autorise la recherche de ce commencement de preuve par écrit dans le témoignage même de la partie contre laquelle on cherche à faire la preuve testimoniale et il a rappelé que cette recherche étant du domaine du Juge du fond, les tribunaux d'appel ne doivent pas intervenir dans cette question laissée à l'arbitrage du Juge de première instance sauf dans le cas d'une erreur évidente. En l'espèce, ce commencement de preuve par écrit, M. le Juge Rivard, de la Cour d'Appel, qui a fait une analyse très détaillée du dossier, l'a trouvé, à l'instar du Juge de

[1] [1937] R.C.S. 86, 2 D.L.R. 433.

première instance, dans cet ensemble formé (i) de certains aveux faits par Jacques Morin aux plaidoiries et dans son témoignage, (ii) de l'appréciation de son témoignage au sujet duquel le Juge de première instance déclara: «Ses réponses ne viennent qu'après de longues et laborieuses hésitations puis, lorsque les questions pouvaient provoquer une réponse de portée juridique défavorable à sa cause, presque invariablement il déclare qu'il ne se souvient pas, sans oser toutefois nier les propos substantiels rapportés par les témoins» et enfin (iii) des multiples circonstances révélées par une preuve écrite et verbale dont la validité n'est pas en question. Il n'a pas été démontré que la conclusion à laquelle en est arrivé le Juge au procès sur la question, opinion que partage entièrement M. le Juge Rivard, soit entachée d'erreur évidente. Il n'y a donc pas lieu d'intervenir et il n'apparaît d'ailleurs aucune raison de ce faire.

Sur la force probante. Je ne crois pas qu'il soit nécessaire de reproduire ici l'analyse minutieuse de toute la preuve, analyse qui apparaît aux notes de M. le Juge Rivard aussi bien qu'à celles du Juge de première instance. Il suffit de dire que la version de Morin père sur la nature de cette entente verbale est supportée par les faits révélés au dossier et que suivant cette entente Morin fils devait agir comme prête-nom de son père et lui rétrocéder, à sa demande, les deux propriétés, Morin père devant de son côté et aussitôt qu'il le pourrait rembourser à son fils les argents déboursés par celui-ci, ses frères et ses sœurs.

Morin fils n'a donc jamais été propriétaire des deux immeubles en litige. Il s'ensuit que son père a droit d'en obtenir la rétrocession, ce à quoi il n'y a aucun obstacle en ce qui concerne la propriété résidentielle dont le fils n'a pas disposé.

Il s'ensuit aussi que Morin père a droit de demander—et c'est là le second aspect du litige—que l'acte de vente relatif à la ferme, intervenu le 17 novembre 1959, entre son fils et Mar-Mic Farm Inc. soit déclaré (i) nul, si entaché de fraude attribuable à Morin fils et à Marc-André Blouin ou (ii) inexistant, si Mar-Mic Farm Inc. désignée comme acheteur n'avait aucune existence juridique à la date de cet acte de

1965

PROVINCIAL HARDWOODS INC. *et al.* *v.* MORIN *et al.*

Fauteux J.

vente et de son enregistrement et que ce défaut n'est pas autrement couvert en l'espèce.

Le second de ces moyens étant, à mon avis, bien fondé et décisif de ce second aspect du litige il suffira de ne considérer que ce moyen.

Il est indéniable que la date de cet acte de vente entre Jacques Morin et Mar-Mic Farm Inc. est le 17 novembre 1959 alors que la date des lettres patentes accordées à cette dernière est le 23 février 1960. N'ayant aucune existence légale à la date de cet acte de vente aussi bien qu'à celle de l'enregistrement d'icelui, Mar-Mic Farm Inc. ne peut réclamer les bénéfices de la priorité d'enregistrement à moins qu'elle ne puisse utilement invoquer, comme en a jugé la majorité en Cour d'Appel, certaines dispositions de l'art. 29 de la *Loi des Compagnies de Québec,* S.R.Q. 1941, c. 276. Ces dispositions particulières statuent que dès la date de ses lettres patentes une compagnie est saisie de tous les biens possédés ou détenus pour elle jusqu'à cette date en vertu d'un fidéicommis créé en vue de sa constitution en corporation. Pour entrer dans le cadre de ces dispositions Mar-Mic Farm Inc devait alléguer et prouver qu'antérieurement à son incorporation, la ferme en question était possédée ou détenue pour elle jusqu'à la date de ses lettres patentes en vertu d'un fidéicommis créé en vue de sa constitution en corporation. En d'autres termes, il lui fallait alléguer et prouver qu'une personne physique ou morale avait acquis un titre légal à cette ferme en qualité de fiduciaire et la détenait à ce titre pour la lui céder dès qu'elle aurait acquis une existence légale. Il n'y a aucune preuve au dossier de la constitution d'un fidéicommis au sens et aux fins indiqués à ces dispositions de l'art. 29 de la *Loi des Compagnies de Québec.* Selon ces termes, l'acte du 17 novembre 1959 n'est pas un acte de vente intervenu entre Morin fils et une personne agissant ès-qualité de fiduciaire pour le bénéfice de Mar-Mic Farm Inc. mais un acte de vente intervenu entre Morin fils et un acheteur désigné comme étant Mar-Mic Farm Inc. représentée par Jean-Guy Blouin—et non Marc-André Blouin—agissant non pas personnellement ou ès-qualité de fiduciaire mais à titre de secrétaire de la compa-

gnie Mar-Mic Farm Inc. Il est de l'essence d'un fidéicommis qu'un titre légal à des biens passe d'une personne à un fiduciaire qui le détient pour l'avantage du bénéficiaire du fidéicommis. Ni Jean-Guy Blouin ni Marc-André Blouin n'apparaissent à l'acte comme ayant acquis eux-mêmes et à quelque titre que ce soit un droit à la ferme. En somme et comme M. le Juge Rivard je suis d'avis que les dispositions de l'art. 29 de la *Loi des Compagnies de Québec* ne peuvent être étendues au cas qui nous occupe. Ne pouvant invoquer utilement ces dispositions je ne vois pas comment Mar-Mic Farm Inc. pourrait profiter de ce prétendu contrat fait de sa part avant même qu'elle ne soit incorporée. Je ne vois davantage comment, après son incorporation, elle pourrait, par adoption ou ratification, valider rétroactivement à la date qu'il porte, cet acte de vente dont elle n'avait pas au jour où il fut signé la capacité d'autoriser l'exécution.

Reste à considérer la prétention de Jacques Morin voulant que même si les vues ci-dessus exprimées sont bien fondées et que c'est en qualité de prête-nom de son père, qu'il s'est porté acquéreur des immeubles en litige, les appelants ne peuvent réussir sur leur action parce que préalablement à son institution ils ne l'ont pas remboursé de $4,900, balance due sur la somme de $5,200 avancée par lui et ses frères et sœurs et parce qu'ils n'ont pas vu à le faire libérer des obligations qu'il avait contractées avec la United Loan Corporation. Pour disposer de cette prétention, il suffit, je crois, de rappeler que suivant la convention verbale intervenue entre Morin père et Morin fils antérieurement et aux fins du contrat par lequel ce dernier se portait acquéreur des deux immeubles en litige, Morin fils devait sur simple demande, et sans autre condition, rétrocéder ces immeubles à son père; sans doute le père s'était-il engagé à rembourser le fils des argents avancés par lui, et ses frères et sœurs, mais suivant la convention le père ne devait rembourser que lorsque la chose lui serait possible. Ainsi donc et en raison de cette entente le droit de Morin père à la rétrocession des immeubles n'est assujetti à aucune condition et le fils devait y procéder dès la demande de son père. On peut ajouter, sans que la chose soit nécessaire, qu'en outre des argents contri-

1965

PROVINCIAL HARDWOODS INC. *et al.* *v.* MORIN *et al.*

Fauteux J.

bués par lui en paiement du prix de vente fixé par les syndics c'est Morin père qui à la suite de cette vente a vu au paiement des primes d'assurance, des taxes aussi bien que des versements exigés en vertu de l'obligation consentie à la United Loan Corporation.

Pour ces raisons, qui sont en substance celles de M. le Juge Rivard, de la Cour d'Appel, et de M. le Juge Marchand, de la Cour de première instance, je maintiendrais les trois appels et rejetterais le contre-appel, avec dépens en cette Cour; j'infirmerais les jugements prononcés en Cour d'Appel dans les causes portant les numéros 6117, 6118 et 6119 et rétablirais le jugement de première instance avec les modifications indiquées aux raisons de jugement de M. le Juge Rivard.

Appels maintenus et contre-appel rejeté.

Procureurs des appelants: Fradette, Bergeron & Cain, Chicoutimi.

Procureurs de l'intimé Jacques Morin: Lafrenière, Cossette, Loubier & Boudreau, Québec.

Procureurs des intimés Blouin et Mar-Mic Farm Inc.: Pratte, Côté & Tremblay, Québec.

ETTA LOTZKAR ..... APPELLANT;

1965
*May 9
Oct. 14

AND

MARY SOUTHIN representing the issue born or unborn of the residuary beneficiaries under the Will of the late Benjamin Lotzkar ..... RESPONDENT;

AND

THE MONTREAL TRUST COMPANY, LEON LOTZKAR, EVA GOLDBERG, BRANNA JAMES, RUTH BECKER, HELEN LAMER, DOLLY VAN HOLTUM and CECIL SLANZ ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Executors and administrators—Payment of debts and succession duties—Whether rule in Allhusen v. Whittell applicable so as to require apportionment of liability between life tenant and those entitled ultimately to the capital—Expressed intention of testator.

The issue involved in the present appeal was as to whether or not the rule in *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295, was applicable in respect of the estate of B L, deceased, so as to require, in respect of the obligations of the estate, including debts, income taxes owed by the deceased, succession duties, interest upon such taxes and duties, and administration expenses, an apportionment of liability as between E L, the widow of the deceased, who became entitled to the income of the estate until her death or remarriage, and those persons who would be entitled ultimately to the capital of the estate. On motion for the construction of the will of B L the trial judge held that the wording of para. (*e*) thereof excluded the application of the rule to the payment of succession duties. He did apply it, as from the date of death, to debts and expenses. In the case of income tax and interest thereon, he applied the rule as from April 30, 1954, this being the month in which sales of the deceased's stock-in-trade were completed. In the case of administration expenses, he applied the rule as from the date the expenses became payable. In each case the rate of interest used in the application of the rule was the rate actually earned by the estate.

On appeal, by a majority of two to one, the Court of Appeal held that the rule applied to all of the above categories of estate liabilities, including succession duties, the determination to be made as from the date of death in each case. It was also held that the amount of duties and taxes, for the purpose of applying the rule, should include the interest and penalties paid thereon. From the judgment of the Court of Appeal E L appealed to this Court.

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

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. et al.

Held: (Cartwright J. dissenting): The appeal should be allowed.

Per Martland, Judson, Ritchie and Hall: The will was construed as indicating the intention of the testator that all his debts and the succession duties should be paid by his executors, not out of the general residue of his estate, but out of the ready money of which he was possessed at the time of his death and the cash proceeds of the sale of a limited part of the residue, constituting a part of the capital of the estate. The rule in *Allhusen v. Whittell* was not applicable because, in view of the provisions contained in this will, the testator did not intend that it should apply. He designated a specified capital fund for the payment of debts and succession duties. The terms of the will displaced the application of the rule. *In re Wills, Wills v. Hamilton,* [1915] 1 Ch. 769; *Re Coulson,* [1959] O.R. 156, referred to; *Re Darby, Russell v. MacGregor,* [1939] 1 Ch. 905, statement of Sir Wilfrid Greene M.R., at p. 916, adopted.

Per Cartwright J., *dissenting:* For the reasons given in the judgment of the majority in the Court of Appeal the appeal should be dismissed. By the terms of the will it was the income from what remained after excluding the testator's "just debts, funeral and testamentary expenses and all probate and succession duties" that was given to the widow. There was no gift to her of the income derived from the moneys required to make payment of these items.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal and allowing a cross-appeal from a judgment of Verchere J. Appeal allowed, Cartwright J. dissenting.

Allan D. McEachern, for the appellant.

Kenneth C. Binks, Q.C., for the respondent Mary Southin.

Brian Crane, for the respondent Montreal Trust Company.

CARTWRIGHT J. (*dissenting*):—The questions to be decided on this appeal, the facts, and the terms of the will of the late Benjamin Lotzkar which are relevant are set out in the reasons of my brother Martland and need not be repeated.

I have reached the conclusion that the appeal fails. I find myself so fully in agreement with the reasons of Davey J.A. who gave the judgment of the majority in the Court of Appeal that I propose to add only a few words.

The gift to the appellant with which we are concerned is contained in cl. (*f*) of the will which is quoted in full in the

[1] (1965), 50 D.L.R. (2d) 338.

reasons of my brother Martland. It is a gift of the net income from "the *residue* of the moneys realized from said sale or sales, calling-in or conversion, and any ready money ... together with the income from any property which from time to time may remain unsold or unconverted".

To ascertain what is meant by the word "residue" which I have italicized, it is necessary to refer to cl. (*e*) which directs the trustees to sell, call in and convert into money all the remainder of the testator's estate not consisting of money and to pay out of the moneys so realized from such sale and conversion and any ready money that he may be possessed of his "just debts, funeral and testamentary expenses and all probate and succession duties". It is the income from what remains after excluding these items that is given to the widow. There is no gift to her of the income derived from the moneys required to make payment of the items specified. The trustees have however paid the income from the whole estate to the widow. I agree with Davey J.A. that the trustees were in error in so doing and also with his direction as to the method of taking the accounts to correct this error.

Having already indicated my full agreement with the reasons of Davey J.A. it follows that I would dismiss the appeal, but, in view of the differences of opinion in the Courts below and in this Court, this appears to me to be a proper case in which to direct that the costs as between solicitor and client of all parties who appeared on the appeal in this Court be paid out of the capital of the estate, and I would so order.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

MARTLAND J.:—The issue involved in this appeal is as to whether or not the rule in *Allhusen v. Whittell*[1], is applicable in respect of the estate of Benjamin Lotzkar, deceased, so as to require, in respect of the obligations of the estate, including debts, income taxes owed by the deceased, succession duties, interest upon such taxes and duties, and administration expenses, an apportionment of liability as between Etta Lotzkar, the widow of the deceased, who became entitled to the income of the estate until her death

[1] (1867), L.R. 4 Eq. 295.

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. *et al.*

Martland J.

or remarriage, and those persons who would be entitled ultimately to the capital of the estate.

Benjamin Lotzkar, hereinafter referred to as "the testator", carried on business in the City of Vancouver, as a dealer in junk. His business was still in operation at the time of his death on July 7, 1951. He was married, and had six daughters, of whom, at the time of his death, the two eldest were married, and the three youngest were infants, the youngest then being aged eleven years. The four unmarried daughters subsequently married. At present all the daughters are living and none is an infant.

The beneficiaries under the testator's will consisted solely of his wife and daughters, with certain contingent interests for the issue of the four youngest daughters.

The main provisions of the will, which was made on September 2, 1948, are summarized, or quoted, as follows:

All of the testator's property was devised and bequeathed to his executors, Montreal Trust Company, his wife, and his brother Leon, as trustees upon the trusts contained in the will.

Paragraph (*a*) provided for delivery to the testator's wife of all furniture and household effects, automobile, and articles of personal, household, or domestic use or ornament.

Paragraph (*b*) permitted his wife to use his residence during her lifetime or until remarriage, all taxes, insurance and water rates and reasonable repairs to be paid from the estate. Provision was made for the use of the house by unmarried children after the wife's death or remarriage.

Paragraph (*c*) directed the Trustees:

> (*c*) To receive the income from my junk business carried on after my death by the manager thereof, pursuant to the authority herein given in respect thereof, or such portion of the income as the manager shall not require for the operation of the business, and also the proceeds of the sale of the said business when the same has been sold by the manager pursuant to the authority hereinafter set forth.

This paragraph must be read in conjunction with a later paragraph in the will, reading as follows:

> I DO HEREBY APPOINT my said brother and my wife, or the survivor of them, to carry on my junk business for a period of one year after my death, with a view of selling the same; but no junk or other stock shall be bought after my death. My said brother and my wife, or the survivor of them, herein referred to as the manager, shall be accountable to the Trustees of my estate in respect to the income therefrom, and the proceeds of the sale of the said business; and the manager shall operate the

business for such period and shall sell the said business SUBJECT to the direction and control of my Trustees or a majority of them. My said manager shall quarterly from the date of my death account for and pay over to the Trustees all income in respect of the said business, but not so as to impair the funds required to operate the said business; and forthwith after the sale of the said business the manager shall render an account thereof to the Trustees, and the sale price thereof shall be paid to the Trustees and form part of the capital of my estate to be dealt with as herein provided. My Trustees are authorized to pay to my wife and my said brother as remuneration while engaged in carrying on my said business as herein provided the sum of ONE HUNDRED ($100.00) DOLLARS monthly to each of them.

Paragraph (*d*) related to a business block owned by the testator. The Trustees were directed to stand possessed of this property for ten years following his death, after which it might be sold. The Trustees were to lease the premises upon monthly tenancies. The income thus derived was to be used for payment of taxes, insurance, water rates, carrying charges and necessary repairs, the balance to be subject to "the same trust as hereinafter provided in respect of the income from the remainder of my estate."

Paragraphs (*e*) and (*f*) read as follows:

(*e*) SAVE as herein otherwise expressly provided, to sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner, and upon such terms as my said Trustees in their direction may decide upon, with the power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best; and I HEREBY DECLARE that my said Trustees may retain any portion of my estate in the form in which it may be at my death, and to pay out of the moneys so realized from such sale and conversion and any ready money that I may be possessed of, my just debts, funeral and testamentary expenses and all probate and succession duties that may be payable in connection with any insurance or gift or benefit given by me to any person either in my lifetime or by this will or any codicil thereto; such duties to be paid out of the capital of my estate so that any benefit, other than in respect of the residue, passing to any beneficiary shall accrue to such beneficiary without any deduction whatsoever for probate or succession duties.

(*f*) To keep the residue of the moneys realized from said sale or sales, calling-in or conversion, and any ready money, invested in securities of, or guaranteed by the Dominion of Canada; and to pay the net income therefrom, together with the income from any property which from time to time may remain unsold or unconverted, to my said wife in monthly instalments during her lifetime or so long as she shall remain my widow, and in the event of the death or remarriage of my wife during the infancy of any of my children, I DIRECT that my Trustees shall apply the income from my estate for the support, maintenance, education and advancement of my infant children, and in the event of this being insufficient for these purposes, or in the event of the illness of my wife or after the death or remarriage of my wife, in the event of the illness of any child or the child of any deceased child of mine, referred to in paragraph (*g*)

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. et al.

Martland J.

(V) hereof, or for any other reason my Trustees deem advisable, I EMPOWER my Trustees in their sole discretion to encroach on the capital of my estate to such extent as they consider necessary and proper, including the capital of the presumptive share of any child of mine.

The next following paragraphs contain provisions as to what is to occur following the death or remarriage of the wife.

Two annuities were to be purchased, one for each of the two eldest daughters. The amount to be expended for each was five per centum (5%) of the value of the estate at the time of the wife's death or remarriage.

Income from the residuary estate was to be applied for the maintenance, advancement and education of the other four daughters. As each one attained the age of twenty-one years she was to receive a Dominion of Canada annuity, guaranteed for twenty years, paying annually the sum of $1,200.

The residue of the estate was to be divided, when the testator's youngest living child attained the age of twenty-one years, into four equal shares, one such share for each of the four daughters. Each was to receive the income from her share, with one-quarter of the capital to be received at the age of thirty years, one-quarter at age thirty-five and the balance at age forty. This clause concluded with the following proviso:

PROVIDED that should any one or more of my said children die before receiving the whole or any part of her said share, the same shall be distributed per stirpes amongst the survivors of the said four children or their issue at such time or times as she would have received distribution had she lived to attain the ages herein mentioned.

The first succession duty return, dated October 25, 1951, disclosed the gross value of the estate at $609,594.77, of which the major items were:

Real Estate	$ 145,350.00
Bonds	30,975.97
Cash	339,100.49
Stock-in-trade	70,750.00

Debts were shown as $28,170.25, leaving a net estate of $581,424.52.

After appraisals had been made of the stock-in-trade, a revised return, filed on January 30, 1952, disclosed a gross estate of $778,230.18, with debts of $163,186.24, showing a net value of $625,043.94. The value of the stock-in-trade was shown at $208,862.

At the insistence of Mrs. Lotzkar, instead of selling the stock-in-trade in bulk, it was sold piece-meal over a period of time, up to April 1954, and ultimately realized a net amount of $1,034,678.17.

In June 1956, income tax was assessed for the years 1943 to 1951 totalling $727,639.14. This was paid out of capital and an appeal filed. Counsel retained by Mrs. Lotzkar undertook the carriage of this matter, with the Trustees' consent, and ultimately a refund was obtained of $419,-807.93 and interest in the sum of $2,294.79.

A large part of the refund was applied in settlement of succession duties. Ultimately the amounts paid for income tax and succession duties were:

Income Tax	$388,508.54	
Interest	58,274.12	$446,782.66
Succession Duties	$417,657.09	
Interest	41,890.42	459,547.51
		$906,330.17

During the period from the testator's death until October 31, 1961, the net income of the estate (other than $30,-451.76) was paid to Mrs. Lotzkar, and totalled $405,946.80, on which income she paid tax.

Following this, Montreal Trust Company applied by originating notice, returnable on January 9, 1962, later amended, for advice and directions in the form of five questions submitted to the Court. Only the first four of these are now relevant:

1. Are the Succession Duties, Probate Fees, just debts, funeral and testamentary expenses of the said deceased and of the estate of the said deceased payable out of the capital only of the said estate to the exclusion of the earnings of the money used to pay debts?
2. Is the total amount of interest charged upon the said Succession Duties, Probate Fees and said debts payable out of the capital only of the said estate to the exclusion of the earnings of the money used to pay debts?
3. Is the total net income of the estate of the said deceased, apart from the specific bequests in Paragraphs (*a*) and (*b*) on Page One of the said Will, which has been received by the Executors and Trustees from time to time since the date of death of the said deceased, payable to the widow of the said deceased, namely, ETA LOTZKAR, until her death or remarriage?
4. If the answer to any of the above questions is in the negative then what, if any, equitable rule of apportionment should be applied in each such case as between the beneficiaries of the income and the beneficiaries of the capital of the said estate?

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. *et al.*

Martland J.

All of the testator's daughters supported the position of the widow, contending that each of the first three questions should be answered in the affirmative. Counsel appointed to represent issue of the testator's daughters, born or unborn, who might, contingently, acquire an interest in the estate, opposed this position.

The issue raised by the first three questions is as to whether the rule in *Allhusen v. Whittell* is applicable in respect of the items of expenditure mentioned in the first two questions. That case, which was decided almost a hundred years ago, related to a will, by whose terms certain legacies were bequeathed, and which devised and bequeathed the residue of the estate, after payment of debts, funeral and testamentary expenses, to trustees upon trust to sell and convert and to invest the clear moneys, after payment of all incidental expenses, in specified investments. The income was to be paid to a life tenant, and, thereafter, the residue was to be divided among certain relatives of the testator.

The rule is stated by the Vice-Chancellor, Sir W. Page Wood, as follows:

> There appear to be two points well covered by authority. One is, that every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts, and which is found to be in a proper state of investment. He is entitled to the income of that property from the death of the testator. There have been numerous decisions on this point, some of the earliest being those of *Angerstein v. Martin*, T. & R. 232, and *Hewitt v. Morris*, T. & R. 241. These authorities clearly shew that, supposing a testator has a large sum, say £50,000 or £60,000, in the funds, and has only £10,000 worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. It is curious that I find none of the authorities pointing out this rule, but probably it has never been thought necessary to make so nice a distinction. It is quite clear that the executors must not be taken to have applied the whole income. Until the debts and legacies were paid, there would have been no interest from the death of the testator which could by possibility have come to the tenant for life. What I apprehend to be the true principle is, that, in the bookkeeping which the Court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. I have not been

able to find a case in which that calculation has been made, but it appears to me to be the principle upon which alone the rights can be adjusted. It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever.

The case is concerned with the adjustment of rights and liabilities, as between the life tenant and the remainderman of the residue of an estate during the "executor's year". Two matters are covered in this statement. The first is as to the right of the tenant for life to the income of that part of the residue not required for the payment of debts, which is in a proper state of investment. That right is to receive such income as from the date of death. The executors are not entitled during the one-year period from the date of death, as between him and the remainderman to apply that income in the payment of debts.

The second is that, in determining the portion of the residue required to meet the debts, the executors are to determine that amount which, together with interest on it for the one-year period, would pay the debts. On that portion of the residue the life tenant is not entitled to income, because that portion never becomes residue.

In essence, in doing the bookkeeping as between life tenant and remainderman the executors are required to set aside out of capital a fund which, applying the principles above stated, will provide for payment of the estate debts. This is done on the assumption that it is the intention of the deceased to do so. However, this must be subject to the specific directions of the testator who might, in his will, himself designate that fund which is to be applied for the payment of debts.

In the case of *In re Wills, Wills v. Hamilton*[1], Sargant J. held that the principle was not limited to payments made during the first year from the testator's death, but applied equally to payments made during the subsequent years. In that case he also held that the interest payable on estate duty should be included with the duty itself as being a debt to be discharged.

There has been a number of decisions regarding the applicability of the rule, many of which are reviewed in the judgment of Wells J. in *Re Coulson*[2]. I do not propose to recite them here. In none of them was the wording of the will the

[1] [1915] 1 Ch. 769.

[2] [1959] O.R. 156.

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. et al.

Martland J.

same as in the present case. The question to be decided is as to whether the rule applies in respect of this will, and, in that connection, I adopt the statement of Sir Wilfrid Greene M.R. in *Re Darby, Russell v. MacGregor*[1], at p. 916:

> The rule in *Allhusen v. Whittell*, like so many other rules which the Court of equity has adopted, is for the purpose of giving effect to an equitable arrangement which the testator may be presumed to have intended in making the dispositions which he did make. It can be displaced by any language of the will which sufficiently shows an intention to displace it and, in my opinion, it also ceases to be applicable where the nature of the property concerned or the circumstances affecting it are such as to make it impossible to apply the rule as it ought to be applied.

In the present case, the learned trial judge held that the wording of para. (*e*) of the will excluded the application of the rule to the payment of succession duties. He did apply it, as from the date of death, to debts and expenses. In the case of income tax and interest thereon, he applied the rule as from April 30, 1954, this being the month in which the sales of the stock-in-trade were completed. In the case of administration expenses, he applied the rule as from the date the expenses became payable. In each case the rate of interest used in the application of the rule was the rate actually earned by the estate.

On appeal, by a majority of two to one, the Court of Appeal for British Columbia[2] held that the rule applied to all of the above categories of estate liabilities, including succession duties, the determination to be made as from the date of death, in each case. It was also held that the amount of duties and taxes, for the purpose of applying the rule, should include the interest and penalties paid thereon.

Sheppard J.A. dissented, holding that the terms of the will displaced the application of the rule.

From the judgment of the Court of Appeal Mrs. Lotzkar has brought the present appeal.

In my opinion the rule is not applicable in the present case because, in view of the provisions contained in this will, the testator did not intend that it should apply.

The general intent of the whole will was to make provision for the testator's wife and daughters, with provision for the issue of daughters only if a daughter entitled to a share in the capital of the residue died before attaining the stipulated ages at which her share of the capital would be

[1] [1939] 1 Ch. 905.

[2] (1965), 50 D.L.R. (2d) 338.

payable. The wife was to receive furniture and personal effects outright, plus the use of the family residence and the income of the estate until her death or remarriage. Following that event the two eldest daughters were to receive annuities, while the income from the residue was to be applied for the benefit of the other daughters until the youngest attained the age of twenty-one years, with provision for each one receiving an annuity on attaining that age. None of the four younger daughters was to receive any part of the capital of the residue until she attained the age of thirty years. The whole emphasis is clearly placed on the provision of income for the testator's wife and daughters.

This is not a straightforward case of granting income of the residuary estate to a life tenant, with a gift of capital following the death of the life tenant, after providing for debts and legacies. Here there were no legacies, and the source of payment for the debts was specifically designated by the testator. The major portion of this estate was the stock-in-trade of the junk business. As to this, special provision was made. It was to be operated by the testator's wife and brother with a view to sale. Income of the business was only to be turned over to the Trustees provided that the funds required to operate the business were not impaired. The sale of the business was to be effected by the wife and the brother, subject to the direction and control of the majority of the Trustees. The wife and brother constituted such majority. As previously noted, the sale of the stock-in-trade of the business was not completed until April 1954.

The net income of the business block, which block was required to be retained for ten years, was to be applied on the same trust as provided in respect of the income from the remainder of the estate. I take this to mean that this income is to be applied as provided in para. (*f*), "remainder" meaning what remained of the capital mentioned in para. (*e*) after payment of debts and succession duties.

It should be noted that the provision in the will respecting payment of debts and succession duties was made subordinate to those provisions which related to the testator's business and the business block. Paragraph (*e*) commences with the words "Save as herein otherwise expressly provided".

The effect of this proviso, coupled with the provisions relating to the operation of, income from and sale of the

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. *et al.*

Martland J.

business and the provisions of para. (*d*) relating to the business block, was:

1. To limit the wife's right to receive income from the operation of the business to such portion of it as was not required for the operation of the business.
2. To preclude the sale of the business block for a period of ten years.
3. To direct payment of the net income derived from the business block in full to the wife.
4. To make the estate assets other than the business and the business block primarily responsible for the payment of debts and succession duties.

Payment of debts and succession duties is directed to be made out of those assets which are sold by the Trustees and converted into money and out of ready money of which the testator was possessed. Paragraph (*e*) in terms directs such payment "out of the moneys so realized from such sale and conversion", that is, out of the cash obtained from sale of those estate assets which the Trustees were authorized to sell, and out of ready money, which would include cash and bank accounts of the testator at the time he died. This description of the funds to be applied for such payment is of cash capital of the estate, derived from certain sources not comprising the whole of the residue of the estate. The testator designated a specified capital fund for the payment of debts and succession duties.

This view is reinforced by the wording of para. (*f*), relating to investment and income. The investments to be made by the Trustees to provide income are to be made out of "the residue of the moneys realized from said sale or sales, calling-in or conversion and any ready money", *i.e.*, what is left from the ready money and cash realized from the sale and conversion of the specified assets, after payment of debts and succession duties. The wife is to receive the income from those investments plus income from property not sold or converted.

It is further reinforced by the concluding words of para. (*e*):

> such duties to be paid out of the capital of my estate so that any benefit, other than in respect of the residue, passing to any beneficiary shall accrue to such beneficiary without any deduction whatsoever for probate or succession duties.

The purpose of this proviso, as indicated in the reasons of Davey J.A. in the Court below, was to exempt beneficiaries, other than in respect of the residue, from the liability for payment of succession duties in respect of the benefits which they received. In order to accomplish that particular purpose, however, it was not necessary to direct payment of such duties "out of the capital of my estate." It would have been sufficient to direct that such benefits be received free of any liability for the payment of succession duties.

The direction to pay succession duties and the description of the source of the funds for their payment are contained in the earlier part of para. (*e*). In my opinion, when the words "out of the capital of my estate" were used they refer back to that source of payment. To paraphrase, the testator is saying, at the conclusion of para. (*e*), that the succession duties, which are payable out of capital, shall, in respect of certain beneficiaries, be so paid that those beneficiaries shall not be liable for payment of them.

In other words, the reference to capital in respect of the succession duties, which are payable in exactly the same way, and from the same sources, as other debts, to me confirms the intention of the testator that all the estate liabilities were to be paid out of capital. They do not indicate that succession duties, as to source of payment, were to be treated in a separate category, distinct from estate debts.

To summarize, I construe this will as indicating the intention of the testator that all his debts and the succession duties should be paid by his executors, not out of the general residue of his estate, but out of the ready money of which he was possessed at the time of his death and the cash proceeds of the sale of a limited part of the residue, constituting a part of the capital of the estate.

In my opinion, for the foregoing reasons, the testator did not intend the rule in *Allhusen v. Whittell* to apply and displaced its operation.

No issue has been raised before us as to the propriety of the conclusion reached in the Courts below that interest payable in respect of income tax should be considered as a part of a total debt for income tax, and similarly with respect to interest in respect of succession duties.

In my opinion the appeal should be allowed, and each of the first three questions stated in the originating notice

1965

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. et al.

Martland J.

should be answered in the affirmative; consequently, no answer to question 4 is required. The costs of those parties who appeared before us should be payable out of the capital of the estate, those of Montreal Trust Company to be taxed on a solicitor and client basis.

Appeal allowed, CARTWRIGHT J. *dissenting.*

EDITORIAL NOTE:—A motion to vary the judgment in this appeal to provide that the costs of all parties who appeared before this Court be paid out of the capital of the estate on a solicitor and client basis was granted on December 2, 1965.

Solicitors for the appellant: Russell & DuMoulin, Vancouver.

Solicitors for the respondent Mary Southin: Ladner, Southin and Roberts, Vancouver.

Solicitors for the respondent Montreal Trust Company: Campney, Owen and Murphy, Vancouver.

Solicitors for the respondent Leon Lotzkar: Bull, Housser and Tupper, Vancouver.

Solicitors for the respondents Eva Goldberg, Branna James, Ruth Becker, Helen Lamer, Dolly Van Holtum and Cecil Slanz: Farris, Farris, Vaughan, Taggart, Wills and Murphy, Vancouver.

MAURICE F. HURLY and THE TORONTO DOMINION BANK (*Plaintiffs*) ..... APPELLANTS;

1965
*Oct. 12, 13
Nov. 9

AND

THE BANK OF NOVA SCOTIA (*Defendant*) ..... RESPONDENT;

AND

LAWRENCE DUNKLEY (*Defendant*).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Banks and banking—Sale of cattle subject to bank's security—Proceeds of sale deposited in debtor's account—Failure of bank's claim—Bank Act, 1953-54 (Can.), c. 48, s. 88.

The appellant H and the respondent bank were in contest over the distribution of a fund of $59,311.48, which was in court on a sheriff's interpleader and came from the sale of approximately 400 head of cattle. H claimed the first $45,633.01. The balance was not enough to pay the bank's claim. The Courts below directed a *pro rata* distribution of the fund which gave H 171/390ths and the bank 219/390ths. H founded his claim on ownership of a certain number of the cattle. The bank's claim was under s. 88 of the *Bank Act*, 1953-54 (Can.), c. 48, on security taken from its customer D.

Held: The appeal should be allowed.

The bank knew that its customer, from whom it had taken s. 88 security, had sold the cattle in question to H, had taken a cheque for this sale and had deposited that cheque in his account. The bank could not take the money, the proceeds of the sale, and at the same time say to a purchaser who had bought the herd that the herd was still subject to its security. By taking the money it consented to the sale. The herd then belonged to H and when it was sold on the market, he was entitled to the proceeds.

This dealing between D and H was not a mortgage transaction. It was an outright sale to H for immediate cash and a purchase back for a slightly higher consideration with this purchase price to be paid only when the herd was sold. In the meantime, H reserved the title.

The bank had no claim to the herd under its s. 88 security. But, in any event, the bank was bound by the terms of a subsequent agreement made by D, H and itself. The contention that this agreement was not binding on the bank because it was never carried out according to its exact terms failed. Under the agreement alone, H was entitled to priority to the extent of the indebtedness recited in the agreement.

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

1965

HURLY *et al.* *v.* BANK OF NOVA SCOTIA *et al.*

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Primrose J. Appeal allowed.

G. H. Steer, Q.C., for the plaintiffs, appellants.

J. M. Robertson, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Maurice F. Hurly and the Bank of Nova Scotia are in contest here over the distribution of a fund of $59,311.48, which is now in court on a sheriff's interpleader and comes from the sale of approximately 400 head of cattle. Hurly claims the first $45,633.01. The balance is not enough to pay the bank's claim. Up to this point the Alberta Courts have directed a *pro rata* distribution of the fund which gives Hurly 171/390ths and the bank 219/390ths. Hurly founds his claim on ownership of a certain number of the cattle. The bank's claim is under s. 88 of the *Bank Act*, 1953-54 (Can.), c. 48, on security taken from its customer Lawrence Dunkley.

Dunkley was in business as a licensed livestock dealer and cattle feeder near Grande Prairie, Alberta. From 1961 to March of 1963, he had extensive business dealings with Hurly, who was also a licensed livestock dealer. The course of these dealings was that Hurly would acquire cattle for feeding and sell them to Dunkley. Dunkley would feed the cattle for a certain period and then sell them for beef. In almost all cases these sales were made through Hurly. When Hurly acquired cattle which he sold to Dunkley, he would deliver an invoice setting out the number of cattle and their cost to him. To that cost was added 50 cents per cwt. and interest at 6 per cent for the stated period of the feeding. Dunkley would then give to Hurly a post-dated cheque payable at the end of the feeding period. When the cattle were sold the proceeds were sent to Dunkley, who would deposit the money in his account with the Bank of Nova Scotia. Hurly would then present his post-dated cheque for payment. In all these dealings Hurly reserved the title to the cattle and there is no question raised either by the bank or Dunkley that this was not an effective reservation of title.

[1] (1965), 52 W.W.R. 513.

To the extent that the fund of $59,311.48 represents the proceeds from the sale of cattle, which at the time when the trouble came were in the possession of Dunkley on these terms, Hurly's right is not disputed and no more needs to be said about this aspect of the case.

The dispute is over an item of $15,390 and a herd of 86 steers. The dealings between Dunkley and Hurly concerning this herd were different from those just outlined. In the first place, it was Dunkley himself who bought this herd. His previous course of dealing had been to buy from Hurly. Hurly was not anxious to see Dunkley go into this deal. However, Dunkley bought on his own and then wanted to sell them to Hurly and buy them back on the same terms as were embodied in the previous agreements, namely, a reservation of title in Hurly and a post-dated cheque to be presented at the date when the cattle were sold. Pursuant to this arrangement, Hurly did buy this herd of 86 steers, which will be referred to as the "Ross herd", and gave Dunkley his cheque for $14,752. Dunkley deposited this in his account in the Bank of Nova Scotia on February 6, 1963. Hurly then had second thoughts about the matter and stopped payment of the cheque, but, on February 13, 1963, he decided to go on and gave Dunkley another cheque, which replaced the first cheque, for $14,444.63. This also was deposited by Dunkley in his account and the first cheque was charged back. Therefore, as between Dunkley and Hurly at this time the position was that Hurly owned the Ross herd and had paid cash for it. The herd was in the possession of Dunkley where it had been since its acquisition from Ross. The bank knew the precise deal between Dunkley and Hurly, certainly on February 13 when the second cheque was deposited, and possibly on February 6 when the first cheque was deposited. The bank also had precise knowledge of the previous course of dealing between the two men. The terms of the deal between Dunkley and Hurly concerning the Ross herd are set out in the following agreement, which is in the same terms as the previous agreements:

> These above steers are branded 44 BAR on the left rib. These above steers are to be branded LAZY H7 on the right hip. Post-dated cheque dated June 5, 1963 received for the above amount of $15,390.00. The above steers remain the property of M. F. Hurly until post-dated cheque received is cleared through the bank.

1965

HURLY et al. v. BANK OF NOVA SCOTIA et al.

Judson J.

The proceeds of the sale of this herd form part of the fund now in court and Hurly claims them because he was the owner. The bank says that this herd came under its s. 88 security.

The bank knew that their customer, from whom they had taken s. 88 security, had sold the Ross herd to Hurly, had taken a cheque for this sale and had deposited that cheque in his account. It has been admitted all through the case that when Dunkley acquired this herd from Ross it did become subject to the bank's s. 88 security. But how can the bank, knowing that the cheque deposited on February 13 was for the purchase price of that herd, take the money and say that the herd is still subject to its s. 88 security? The bank had to take a position with respect to this particular herd on either February 6 or February 13. It could have said to its customer, "You had no right to sell this herd without our consent. We will not take the money and we will enforce our rights on the herd." But it could not take the money, the proceeds of the sale, and at the same time say to a purchaser who had bought the herd that the herd was still subject to its security. By taking the money it consented to the sale. The herd then belonged to Hurly and when it was sold on the market, he was entitled to the proceeds.

The Appellate Division has characterized this dealing between Dunkley and Hurly concerning the Ross herd as a mortgage transaction. In other words, while the herd in Dunkley's hands was subject to the s. 88 security, he mortgaged it to Hurly, who must take subject to the prior security. I do not see this as a mortgage transaction. It was an outright sale to Hurly for immediate cash and a purchase back for a slightly higher consideration with this purchase price to be paid only when the herd was sold. In the meantime, Hurly reserved the title. It is true that at all times possession was in Dunkley but throughout the whole course of this litigation no one has asserted a right to avoid any of the transactions between Hurly and Dunkley for non-compliance with legislation relating to bills of sale and chattel mortgages or conditional sales. The case has been presented and argued throughout on this basis. Whether it could have been done otherwise, I do not know. It is, however, clear that when the bank came to make the agreement with Dunkley and Hurley, which I deal with next, it recognized that the relationship between these two

in their dealings with the Ross herd was that of vendor and purchaser, that the title was in Hurly and that it held no security on the herd.

Later in February, 1963, it became evident that Dunkley was in difficulty. On February 26, 1963, Dunkley, Hurly and the bank made an agreement. This agreement recites that Dunkley owes Hurly $45,631.01; that he owes the bank $30,000; that he is in possession of approximately 400 head of cattle and that the bank and Hurly have the right to seize these cattle and sell them to satisfy the indebtedness.

Then the parties agree as follows:

1. The party of the first part (Dunkley) shall have from the date hereof to five o'clock in the afternoon of the 1st day of March, A.D. 1963 in which to repay to the party of the second part and the party of the third part the indebtedness as above set out.

2. In the event that the party of the first part (Dunkley) has not, at the expiration of the time limited herein, repaid his said indebtedness, the parties of the first and second parts (Dunkley and Hurly) hereby agree to sell the said cattle above set out, crediting all sums received from the said sale to the satisfaction of the said indebtedness. The said sale shall commence at five o'clock in the afternoon of the 1st day of March, A.D. 1963.

3. The said sale shall be under the joint direction of the party of the first part and the party of the second part (Dunkley and Hurly), but in the event that the said parties cannot agree as to the sale price of any or all of the said cattle, the said cattle shall then be consigned to Messrs. Weiller and Williams, Livestock Commission Agents, Western Stockyards, Edmonton, Alberta, for sale by Public Auction.

4. The party of the second part (Hurly) shall deduct from the proceeds of the sale such monies that are owing to him, and he shall thereafter remit the balance of all monies received from the said sale to the Bank of Nova Scotia at its Grande Prairie branch.

5. All sums received by the party of the second part (Hurly) pursuant to this Agreement, shall be credited on the Agreements for Sale of the cattle and the postdated cheques held by him from the party of the first part.

When this agreement was executed, the bank knew that Hurly owned the Ross herd and recognized that ownership by including in Hurly's claim of $45,631.01 the $15,390 owing for the Ross herd.

The bank now says that this agreement is not binding on it because it was never carried out according to its exact terms. What happened was this: Hurly and Dunkley could not agree on the sale of the cattle. On March 1, the bank made a seizure of all the cattle. After the seizure had been made, Dunkley, Hurly and the bank manager met and

1965

HURLY *et al.* v. BANK OF NOVA SCOTIA *et al.*

Judson J.

arranged that the cattle would be shipped to Edmonton and sold through Messrs. Weiller and Williams. This was done. The sheriff received the proceeds of the sale, the fund of $59,311.48 already referred to. Then the bank said that because Dunkley and Hurly had been unable to agree and it had become necessary to make a seizure, the agreement was at an end and the bank was free to make a claim on the Ross herd under its s. 88 security.

I have already dealt with the bank's claim to the Ross herd under its s. 88 security. It had no such claim. But I am equally clear that in any event, the bank is bound by the terms of this agreement, which did not come to an end because the bank chose to seize on March 1. This merely brought matters to a head and was a mode of enforcing performance of the agreement, which was in fact carried out through the designated sale agent with the proceeds paid to the sheriff. In my opinion, under the agreement alone, Hurly is entitled to priority to the extent of the indebtedness recited in the agreement.

I would allow the appeal and direct (1) that out of the moneys in court there be paid to Dunkley the sum of $1,193.08, plus interest at 4½ per cent from the date of sale, (this represents the value of his exemptions, as to which there is no question); (2) that the sum of $45,631.01, together with interest at 4½ per cent from the date of the sale, be paid to Hurly; (3) that the balance be paid to the Bank of Nova Scotia. The appellants Hurly and the Toronto Dominion Bank are entitled to one set of costs against the Bank of Nova Scotia at trial, on appeal and in this Court. I would not disturb the order for costs of $620 made in favour of Dunkley at the trial and added to his claim for exemptions nor the order for costs in the Appellate Division made in favour of Hurly against Dunkley.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Milner, Steer, Dyde, Massie, Layton, Cregan and Macdonnell, Edmonton.

Solicitors for the defendant, respondent: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan and Fraser, Calgary.

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

1965
*Nov. 16
Dec. 14

AND

GORDON WILLIAM LADE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit sharing plan—Stock purchase plan for employees—Whether plan qualified as an "employees profit sharing plan"—Income Tax Act, R.S.C. 1952, c. 148, ss. 6 (1)(k), 79(1), (3), (7).

The company, of which the respondent was an employee, operated a stock purchase plan under which the company contributed a monthly sum equal to 50 per cent of the employee's monthly contributions. The company undertook also to make an annual contribution of a sum based upon the ratio of its profits if such profits exceeded a certain percentage of its invested capital. During the year 1959, the company made monthly contributions but no annual contribution. The amount of the company's contributions in 1959 allocated to the respondent was ruled by the Minister to be taxable in the respondent's hands on the ground that the plan was an "employees profit sharing plan" within s. 79(1) of the *Income Tax Act*. The Minister's contention was upheld by the Tax Appeal Board, but was rejected by the Exchequer Court. The Minister was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The plan in the present case was not an "employees profit sharing plan" as defined in s. 79(1) of the *Income Tax Act*, since the payments were not computed by reference to the employer's profits from its business. An arrangement under which the amount of payments made by the employer is fixed by the amount contributed by his employees, regardless of whether he does or does not make a profit, is not brought within the definition in s. 79(1) of the Act merely because the employer agrees to make an additional payment in those years, if any, in which his profits exceed a certain ratio.

Revenu—Impôt sur le revenu—Plan de participation aux bénéfices—Plan d'achats de valeurs mobilières pour les employés—Le plan est-il un «plan de participation des employés aux bénéfices»—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 6(1)(k), 79(1), (3), (7).

La compagnie, dont l'intimé était un employé, administrait un plan d'achats de valeurs mobilières en vertu duquel la compagnie contribuait une somme mensuelle égale à 50 pour-cent des contributions mensuelles de l'employé. La compagnie s'engageait aussi à contribuer annuellement une somme basée sur la proportion de ses profits si ces profits excédaient un certain pourcentage de son capital investi. Durant l'année 1959, la compagnie a déposé ses contributions mensuelles mais n'a déposé aucune contribution annuelle. La Ministre a considéré que le montant des contributions de la compagnie en 1959 qui avait été alloué à l'intimé, était imposable entre les mains de l'intimé pour le

*PRESENT: Cartwright, Fauteux, Martland, Judson and Hall JJ.

1965

MINISTER OF NATIONAL REVENUE v. LADE

motif que le plan était un «plan de participation des employés aux bénéfices» dans le sens de l'art. 79(1) de la *Loi de l'Impôt sur le revenu.* La prétention du Ministre fut maintenue par la Commission d'appel de l'impôt, mais fut rejetée par la Cour de l'Échiquier. Le Ministre a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le plan en question n'était pas un «plan de participation des employés aux bénéfices» tel que défini à l'art. 79(1) de la *Loi de l'Impôt sur le revenu,* puisque les paiements n'étaient pas calculés par rapport aux bénéfices de l'employeur provenant de son entreprise. Un arrangement en vertu duquel le montant des paiements de l'employeur est fixé par le montant contribué par ses employés sans se soucier si l'employeur accuse ou non un profit, ne tombe pas sous la définition de l'art. 79(1) de la loi pour la simple raison que l'employeur s'engage à payer une somme additionnelle seulement pour les années où ses profits excéderaient une certaine proportion.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], renversant un jugement de la Commission d'appel de l'impôt. Appel rejeté.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], reversing a decision of the Tax Appeal Board. Appeal dismissed.

G. W. Ainslie and *D. G. H. Bowman,* for the appellant.

P. N. Thorsteinsson, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted in accordance with the provisions of s. 84 of the *Exchequer Court Act,* from a judgment[1] of Noël J. allowing an appeal by the respondent from a decision of the Tax Appeal Board in regard to the respondent's assessment for the taxation year 1959.

There is no dispute as to the facts. The question to be decided is whether an arrangement entered into between Richfield Oil Corporation, the employer of the respondent, and certain of its employees, including the respondent, is "an employees profit sharing plan" within the meaning of that phrase as defined in s. 79 of the *Income Tax Act.*

The arrangement is in written form and is produced as an exhibit to the agreed statement of facts upon which the

[1] [1965] 1 Ex. C.R. 214, [1964] C.T.C. 305, 64 D.T.C. 5189.

matter has been dealt with. It is entitled "Stock Purchase Plan for Employees of Richfield Oil Corporation".

Membership in the plan is voluntary. It is open to any person regularly employed by Richfield Oil Corporation, hereinafter referred to as "the Company", who has completed at least one year of service with the Company, is not over sixty-five years of age if a man or over sixty years of age if a woman and who files a completed application form with the administrator of the plan. A member is obligated to contribute a monthly sum determined by himself but not less than $5 nor more than 5 per cent of his monthly salary, to be paid through authorized pay-roll deductions; he may change the amount of his contribution, within the foregoing limits, on any January 1 or July 1 by filing a written request with the administrator. Failure to make the monthly contribution is construed as a voluntary withdrawal from the plan.

The provisions of the plan providing for the payments to be made by the Company read as follows:

Contributions by Company

A. Monthly Contribution. The Company will make a monthly contribution of a sum equal to 50 per cent of the member contributions made each month. These monthly contributions by the Company shall be reduced by amounts forfeited, if any, during the preceding month by members withdrawing from the Plan.

B. Annual Contribution. The Company will make an annual contribution of a sum based upon the ratio of its profits to invested capital which will adjust the total monthly contributions made by the Company to the following schedule:

Per Cent of Profits to Invested Capital	Company Contribution as per cent of Member Contribution
Up to but less than 11%	50%
11% but less than 12%	55%
12% but less than 13%	60%
13% but less than 14%	65%
15% or over	75%
14% but less than 15%	70%

'Invested Capital' shall mean the total of all Capital Stock and Surplus (or equivalent) accounts and Long Term Debt of the Company as of the beginning of the preceding calendar year, as reflected in its printed Annual Report to stockholders.

'Profits' shall mean the Company's Net Income after taxes for the preceding calendar year, as shown in its printed Annual Report to stockholders.

1965

MINISTER OF NATIONAL REVENUE v. LADE

Cartwright J.

This annual contribution, if any, shall be made as of March 31 of each year, beginning in 1955, and shall be related only to total member contributions made in the preceding calendar year which have not been withdrawn as of said March 31.

Paragraph 4 of the Agreed Statement of Facts sets out the contributions made by the Company in respect of Canadian members of the plan since the inception of the plan in 1953 up to the end of 1959 as follows:

	Contributions in respect of Canadian members only.	
Year	Section IV Part A Monthly	Section IV Part B Annual
1953	$ 120	None
1954	388	None
1955	903	None
1956	1,738	$ 84
1957	3,146	None
1958	4,175	None
1959	8,592	None
	$19,062	$ 84

Section 79(1) of the *Income Tax Act* reads:

79 (1) In this Act, an 'employees profit sharing plan' means an arrangement under which payments computed by reference to his profits from his business or by reference to his profits from his business and the profits, if any, from the business of a corporation with whom he does not deal at arm's length are made by an employer to a trustee in trust for the benefit of officers or employees of the employer or of a corporation with whom the employer does not deal at arm's length (whether or not payments are also made to the trustee by the officers or employees), and under which the trustee has, since the commencement of the plan or the end of 1949, whichever is the later, each year allocated either contingently or absolutely to individual officers or employees,

(*a*) all amounts received by him from the employer or from a corporation with whom the employer does not deal at arm's length, and

(*b*) all profits from the trust property (computed without regard to any capital gain made by the trust or capital loss sustained by it at any time since the end of 1955),

in such manner that the aggregate of all such amounts and such profits minus such portion thereof as has been paid to beneficiaries under the trust is allocated either contingently or absolutely to officers or employees who are beneficiaries thereunder.

Other sub-sections of s. 79 provide, *inter alia*, that the amount of payments into the plan made by the employer

and allocated by the trustee to an employee either contingently or absolutely during the year are required to be included in the employee's income for the year.

I agree with the submission made by counsel for the appellant that in order that the plan with which we are concerned may be considered an "employees profit-sharing plan" it must fulfil the following conditions:

(1) the employer must make payments to a trustee in trust for the benefit of its employees;

(2) the payments must be computed by reference to the employer's profits from its business;

(3) all amounts paid to the trustee and all profits (except capital gains or losses realized or sustained since 1955) must, in each year, be allocated either contingently or absolutely to individual employees.

It is common ground that the plan complies with the first and third of these conditions; the difference of opinion between the Exchequer Court and the Tax Appeal Board is as to whether it complies with the second. For the reasons given by Noël J. I agree with his conclusion that it does not and there is little that I wish to add.

The answer to this question no doubt depends primarily upon the construction of s. 79(1) read in the context of the whole Act, so that the actual results of the operation of the plan from the date of its inception up to the end of the year 1959 are not of decisive importance; but it is interesting to note that the contributions made by the Company during that period under Part A of Section IV which are computed by reference to the payments made by employees and which the Company was bound to make regardless of the amount of its profits, if any, total $19,062 while the contributions made by the Company under Part B of the section which are computed by reference to the Company's profits total only $84. It would be a strange result if an arrangement, under which no payment computed by reference to its profits was made by an employer in the taxation year in question and of the total payment it made during the seven years of the operation of the arrangement only $\frac{1}{2}$ of 1 per cent was so computed, were held to fall within the definition contained in s. 79(1).

Even if it had happened that in every year of the plan's operation the ratio of the Company's profits to invested capital had exceeded 15 per cent, the result would have been that $\frac{2}{3}$ of the payments made by the Company would have

1965

MINISTER OF NATIONAL REVENUE v. LADE

Cartwright J.

been computed by reference to one factor only, the amount paid by its employees, while the remaining $\frac{1}{3}$ would have been computed by reference to two factors (i) the amount paid by its employees, and (ii) the profits of the Company.

I agree with the submission of counsel for the respondent that the construction of s. 79(1) contended for by the appellant involves substituting for the words "payments computed by reference to his profits from his business" the words "payments computed by reference to a formula of which his profit from his business is one of the variable components". I do not think the words of the section are susceptible of that interpretation. In my opinion, an arrangement under which the amount of payments made by an employer is fixed by the amount contributed by his employees, regardless of whether he does or does not make a profit, is not brought within the definition in s. 79(1) merely because the employer agrees to make an additional payment in those years, if any, in which his profits exceed a certain ratio.

For the reasons given by Noël J. with which I have already expressed my agreement and those briefly stated above I would dismiss this appeal with costs which, in accordance with the terms of the order granting leave to appeal, will be taxed on a solicitor and client basis.

Appeal dismissed with costs.

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitor for the respondent: P. N. Thorsteinsson, Vancouver.

DOBIECO LIMITED ..... APPELLANT;

1965

*Nov. 15, 16
Dec. 14

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Underwriting and trading firm—Loss on sale of interest in oil syndicate—Inventory asset—Fair market value—Year in which loss sustained—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), 14(2), 27(1)(e).

The appellant company had obtained an interest in an oil syndicate, and the total of its contributions to the syndicate amounted to some $80,000. The syndicate agreement was an oral one. The syndicate's drilling was unsuccessful and its funds were exhausted in 1956. In March 1957, the appellant refused to contribute further funds to the syndicate, and although the other members of the syndicate could have terminated the appellant's interest therein, they continued to treat him as a member indebted to the syndicate. In 1958, the appellant sold its interest in the syndicate to another syndicate member for $1. The appellant treated the $80,000 as a loss suffered in 1957, and by virtue of s. 27(1)(e) of the *Income Tax Act*, carried it back and deducted it from its 1956 income. The Minister disallowed the deduction on the ground that the loss was not sustained in the 1957 taxation year. The Exchequer Court held that the loss was not deductible until 1958. The appellant company appealed to this Court, where another question (regarding inventory valuation) was raised but later abandoned.

Held: The appeal should be allowed.

The appellant company was entitled to the deduction claimed. The realized trading loss occurred in June 1958 when the appellant sold its interest in the syndicate. However, it was admitted that this interest was an inventory asset and that, in computing its income for the taxation year ended March 31, 1957, the appellant was entitled to value the interest at its cost or its fair market value whichever was lower. The evidence established, on a balance of probabilities, that on March 31, 1957, the fair market value of the appellant's interest in the syndicate did not exceed $1.

Revenu—Impôt sur le revenu—Déductions—Négociant en valeurs mobilières—Perte sur vente d'une part dans un syndicat—Biens décrits dans un inventaire—Juste valeur marchande—Année dans laquelle la perte est survenue—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 12(1)(a), 14(2), 27(1)(e).

La compagnie appelante avait obtenu une part dans un syndicat constitué en vue de l'exploitation pour la découverte du pétrole, et le montant total de ses contributions se chiffrait à quelque $80,000. Le contrat entre les associés était un contrat verbal. Le forage fait par le syndicat n'a pas eu de succès et en 1956 les fonds du syndicat étaient épuisés. En

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

1965

DOBIECO LTD. v. MINISTER OF NATIONAL REVENUE

mars 1957, la compagnie appelante refusa de contribuer d'autres fonds au syndicat, et quoique les autres membres auraient pu mettre fin au contrat avec l'appelante, ils ont continué de la traiter comme un membre endetté envers le syndicat. En 1958, l'appelante a vendu sa part dans le syndicat à un autre membre du syndicat pour la somme de $1. L'appelante a considéré le $80,000 comme étant une perte survenue en 1957, et se basant sur l'art. 27(1)(*e*) de la *Loi de l'Impôt sur le revenu,* l'a rapportée et déduite de son impôt pour l'année 1956. Le Ministre a refusé la déduction pour le motif que la perte n'était pas survenue durant l'année de taxation 1957. La Cour de l'Échiquier a jugé que la perte n'était pas déductible avant 1958. La compagnie en appela devant cette Cour. Une autre question (concernant l'évaluation de l'inventaire) a été soulevée devant cette Cour mais a été subséquemment abandonnée.

Arrêt: L'appel doit être maintenu.

La compagnie appellante avait droit à la déduction réclamée. La perte commerciale est survenue en juin 1958 lorsquel l'appelante a vendu sa part dans le syndicat. Cependant, il est admis que cette part était un bien décrit dans un inventaire et que, en calculant son impôt pour l'année de taxation finissant le 31 mars 1957, l'appelante avait droit d'évaluer la part au prix coûtant ou à sa juste valeur marchande selon le moindre des deux. La prépondérance de la preuve était à l'effet que le 31 mars 1957, la juste valeur marchande de la part de l'appelante dans le syndicat n'excédait pas la somem de $1.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], confirmant la cotisation du Ministre. Appel maintenu.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], affirming the Minister's assessment. Appeal allowed.

H. Howard Stikeman, Q.C., and *P. N. Thorsteinsson,* for the appellant.

G. W. Ainslie and M. A. Mogan, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Cattanach J. dismissing an appeal from the appellant's assessment for its taxation year ending March 31, 1956.

While additional matters were dealt with in the Court below the appeal to this Court raised only the two following questions:

(i) Whether the learned trial judge erred in finding that the appellant was not entitled in valuing its 1956 closing inventory of securities

[1] [1963] Ex. C.R. 348, [1963] C.T.C. 143, 63 D.T.C. 1063.

to make a deduction for known costs of sale of items included therein at market value, viz. $21,105.56 for brokerage payable on sale, and $1,648.23 for security transfer tax payable on sale, and

(ii) Whether the learned trial judge erred in finding that the appellant was not entitled to write down from $80,568.38 to $1.00 its inventory asset consisting of its interest in a syndicate, referred to as "the Jerd Syndicate", in the course of valuing its closing inventory on March 31, 1957 and in holding that the loss of $80,567.38, which was admittedly sustained by the appellant in respect of this syndicate, should be treated as having been sustained in a later year.

After some argument had been addressed to us on the first of these points it was abandoned by counsel for the appellant because it appeared that, even if the argument in respect of it were successful, the amount of the deduction claimed would be offset by an error in calculation in respect of other items in the closing inventory. I mention this in order to make it clear that this question having been withdrawn from our consideration we express no opinion upon it.

Turning to the second question, it is common ground that the appellant's interest in the Jerd Syndicate was an inventory asset, that in computing income for the taxation year ending March 31, 1957, the appellant was entitled to value it at its cost or its fair market value whichever was lower, that the cost of the asset to the appellant was $80,568.38 and that in its balance sheet for the year ending March 31, 1957, the appellant did in fact value it at $1.

The question becomes one of fact, whether the evidence established, on a balance of probabilities, that on March 31, 1957, the fair market value of the asset did not exceed $1.

The appellant was incorporated on December 23, 1954. Prior to this date a partnership known as Draper Dobie and Company carried on business in two branches, an underwriting and trading branch and a commission branch. On its incorporation the appellant took over the underwriting and trading business formerly carried on by the partnership. Among the assets acquired from the partnership was the interest in the Jerd Syndicate. In March 1955, the partnership had contributed $50,000 to the Syndicate. The appellant made further contributions bringing the total investment up to $80,568.34. The dates of these further contributions are not fixed with precision but it is clear that the latest of them was prior to March 31, 1957.

1965

DOBIECO LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

The partners in Draper Dobie and Company included Mr. H. W. Knight and Mr. Geo. W. Gooderman who are now President and Vice President of the appellant.

Before the appellant was incorporated, Mr. Robert Bryce, a mining engineer and promoter and manager of mining and oil exploration and development companies was interested in an area in Alberta adjacent to the British Columbia border which he hoped would prove to be oil producing. He first obtained a reservation which he later converted into lease holdings. It was a condition of the leases so obtained that Mr. Bryce should expend $200,000 in exploration. The area consisted of 40,000 acres in all, but a 25 per cent interest in it had been acquired by another party. The expenditure of $200,000 by Mr. Bryce would entitle him to a 75 per cent interest so that he would own the leasehold in 30,000 acres while the other party owned 10,000 acres. The area of 40,000 acres was unsurveyed. The 10,000 acres owned by the other party consisted of a corner of each section, the balance being owned by Mr. Bryce. Because of the fact that the area was unsurveyed it followed that the limits of the respective holdings of Mr. Bryce and the other party could not be clearly defined.

In order to raise the amount of $200,000 which was to be expended as a condition of the lease, Mr. Bryce formed a syndicate. Mr. H. W. Knight, Mr. Knight's father and Mr. Gooderman personally participated in this syndicate. The amount of $200,000 was raised through the syndicate so formed and was expended in the drilling of an oil well on the property. The amount of $200,000 was exhausted in drilling without oil being discovered and a company was formed under the name of Jerd Petroleum Company, Limited which then became the owner of the leasehold interest in the 30,000 acres. The members of the syndicate became shareholders in Jerd Petroleum Company, Limited in proportion of their participation in the syndicate and the syndicate was dissolved.

In order to finance further drilling, Mr. Bryce, who has been the prime mover throughout, formed a second syndicate. This second syndicate is the Jerd Syndicate with which we are concerned. Draper Dobie and Company was a member of this syndicate and as indicated above made an

expenditure of $50,000 as its proportionate share. It was this interest which was acquired by the appellant from the partnership.

The members of the Jerd Syndicate were Mr. Bryce, 10 per cent, Mr. Wayne, 10 per cent, Amerex Oil, 20 per cent, Decalta Oil, 30 per cent and the appellant, 30 per cent. There were subsequent changes in proportion and membership which are not material but the interest of the appellant remained a constant 30 per cent. Jerd Petroleum Company, Limited, owned a half interest in this venture and contributed half of the funds expended and the Jerd Syndicate owned the remaining half interest and was obligated to contribute one half of the funds to be raised. Jerd Petroleum Company, Limited was not a member of the Jerd Syndicate.

The Syndicate agreement was not reduced to writing. The custom in the trade was to conduct such arrangements orally and if necessity should arise to commit the arrangement to writing at a later time. It was understood, however, that each member of this syndicate was required to put up an amount of money in proportion to his membership interest each time an assessment was called and if the member did not meet the assessment then that member's interest was lost and the remaining members were to be offered the opportunity to take up the interest of the member in default.

The purpose of the appellant in entering into the Jerd Syndicate was two-fold, first, if oil were discovered the appellant would participate in the benefits thereof and second, if success attended the venture, there was a tacit understanding, though an unwritten one, that the appellant would be given the first refusal to underwrite the shares in any company which might be formed to acquire and operate the oil or gas field.

Jerd Syndicate, in conjunction with Jerd Petroleum Company, Limited, sank the well to a depth of 4,779 feet. At that depth harder rock was encountered than had been anticipated. A heavier drill would be required to penetrate deeper, but because of the cost involved, drilling was stopped on March 9, 1956, and has not since been resumed.

At the time drilling ceased the syndicate's funds on hand were exhausted, but the obligation to pay the annual lease rental of $30,000, being $1. an acre, continued, a payment in

1965

DOBIECO LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

that amount falling due on July 4th of each year. Jerd Petroleum Company, Limited was responsible for $15,000 of the annual rental and the Jerd Syndicate was responsible for an equal amount. The appellant's proportionate share of this liability was $4,500 for July 4, 1957. The appellant did not pay this amount into the syndicate.

Mr. Bryce, in his capacity as head of the Jerd Syndicate, called on Mr. Knight in March 1957, for the purpose of obtaining the appellant's payment of $4,500. Mr. Knight as president of the appellant, informed Mr. Bryce that the appellant did not intend to contribute this or any further sum. The appellant's interest in the Jerd Syndicate was not terminated upon this default as it might have been under the terms of the syndicate agreement and the appellant continued to be looked upon as a member of the syndicate by the other members. The syndicate treated the appellant as a member which was indebted to the syndicate in the amount of $4,500. A further payment of rent was falling due on July 4, 1958. In March 1958, Mr. Bryce again approached Mr. Knight for the appellant's contribution. Mr. Knight reiterated the appellant's previous decision to participate no further in the Syndicate and offered to sell the appellant's interest therein to Mr. Bryce for $1. and the assumption of the appellant's outstanding obligation to the Syndicate of $4,500 and of the further obligation of $4,500 becoming due on July 4, 1958. Mr. Bryce consulted the other members of the Jerd Syndicate who agreed to Mr. Bryce purchasing the appellant's interest.

On June 5, 1958, the appellant executed an agreement for sale of its interest in the Jerd Syndicate for the consideration of $1. in cash and the assumption of the appellant's outstanding obligation of $4,500 and a future obligation of $4,500 due on July 4, 1958.

The consideration so paid was $4,501 but, as is pointed out by the learned trial judge, this has no bearing on the amount of the appellant's alleged loss of $80,567.38 because if the obligation of $4,500 had been paid by the appellant then the loss of $80,567.38 claimed would have been increased by an amount of $4,500 and when the monetary consideration received was deducted from that greater figure, the amount of the loss would remain constant at $80,567.38.

The learned trial judge after setting out the facts recited above went on to hold that the appellant had suffered a loss of $80,567.38 which was properly deductible for income tax purposes and that it remained to decide when the loss occurred. The reasons of the learned trial judge continued as follows:

> While it was possible that the appellant's interest in the syndicate might have been forfeited in March, 1957 by reason of the appellant's failure to pay its assessment of $4,500 in accordance with the verbal syndicate agreement, nevertheless, the appellant's participation was not ended at that time. The syndicate did not act upon the default, but continued to treat the appellant as a member indebted to the syndicate in the amount of the default. The appellant, on its part, also considered itself a member otherwise it would not have been able to sell its interest to Mr. Bryce as it did on June 5, 1958, some fourteen months later. In my opinion the loss was not in the fiscal year ending March 31, 1957, but in the 1958 (sic) taxation year.

With the greatest respect to the learned trial judge I find myself in agreement with the submission of counsel for the appellant that this reasoning leads to the conclusion that as a matter of accounting the realized trading loss occurred in June of 1958 but leaves unanswered the question whether the fair market value of the asset, admittedly then still owned by the appellant, did not exceed $1. on March 31, 1957.

The evidence relevant to this question consists of the inferences to be drawn from the recital of the facts set out above and from the testimony at the trial of Mr. H. W. Knight, Mr. Greenwood, who is the auditor of the appellant, and Mr. Bryce.

I have considered with care all the evidence of these witnesses bearing on this point and have reached the conclusion that it should be found as a fact that by March 31, 1957, the fair market value of the appellant's interest in the Jerd Syndicate did not exceed $1.

In coming to this decision I am influenced particularly by the following matters.

(*a*) Prior to March 31, 1957, Mr. Knight had clearly formed the opinion that the asset had ceased to be of any value and was willing that the appellant should forfeit it rather than make any further contribution and he had so advised Mr. Bryce.

1965

DOBIECO LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

(*b*) The auditor of the company after going into the matter with Mr. Knight shared his opinion and certified the appellant's balance sheet accordingly.

(*c*) Drilling on the Syndicate property had ceased on March 9, 1956, and no further drilling had been done up to March 31, 1957, or indeed up to the date of the trial, in June 1962.

(*d*) No favourable results had been obtained from the drilling that was done.

(*e*) The funds of the Syndicate were exhausted but the liability to pay rentals continued.

(*f*) The appellant in fact sold its interest for $1. in June 1958, and nothing had occurred between March 31, 1957, and June 1958, to alter the market value of the interest.

As against all this there was the opinion of Mr. Bryce that the property was still worth holding, but this opinion has not been vindicated by subsequent events and does not appear to have been shared by the other members of the Syndicate, none of whom were willing to take over their proportionate share of the interest which the appellant relinquished.

Considering the whole of the evidence it appears to me to be shewn that on the balance of probabilities the correct finding is that on March 31, 1957, the fair market value of the appellant's interest in the Syndicate was not more than $1.

For these reasons I would allow the appeal, set aside the judgment of the Exchequer Court and direct that the assessment be referred back to the respondent to be amended in accordance with these reasons. While the appellant raised other points in the Court below and one other point in this Court on which it did not succeed it has succeeded on a substantial issue and is entitled to its costs in this Court and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: Stikeman and Elliott, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

GÉRALD MARTINEAU ..... APPELANT; 1965

*Oct. 26, 27
Dec. 14

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Conseiller législatif—Exercice indu d'influence—Conseiller législatif est-il un fonctionnaire—Les actes doivent-ils être posés en sa qualité de conseiller législatif—Code Criminel, 1953-54 (Can.), c. 51, arts. 21, 99(e), 100, 102(1)(a)(ii)(iii), 592(4)(b), 597(2)(a).

L'appelant, un conseiller législatif dans le gouvernement de la province de Québec, a subi son procès sur un acte d'accusation contenant onze chefs l'accusant d'avoir exigé, accepté, ou offert, ou convenu d'accepter d'une certaine compagnie, pour une personne désignée, une somme d'argent, le tout contrairement aux dispositions des arts. 102(1)(*a*) (ii) (iii) et 21 du *Code Criminel*. Il fut acquitté par le juge au procès pour les motifs qu'un conseiller législatif n'était pas un fonctionnaire au sens de l'art. 102 du Code, et que même s'il l'était, les actes qui lui étaient reprochés n'avaient pas été posés par lui en sa qualité de conseiller législatif. La Cour d'Appel rejeta ces deux motifs comme mal fondés en droit et ordonna un nouveau procès. D'où le pourvoi de l'appelant devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Cour d'Appel a bien jugé lorsqu'elle a décidé qu'un conseiller législatif était un fonctionnaire au sens de l'art. 102 du *Code Criminel*. La Cour ne peut se substituer au parlement pour ajouter à la définition de l'art. 99(*e*)(ii) du Code les mots «judiciaire ou ministérielle» comme qualificatifs des expressions «fonction publique». Il est douteux qu'en se servant du mot «nommée» le parlement ait eu l'intention d'attribuer à ce mot, dans le contexte de l'art. 99, le sens purement juridique et strictement restreint ainsi que la portée qu'il faudrait lui donner, si en fait—ce qui n'est pas—il apparaissait que le mot «nommée» est utilisé en contraste avec le mot «élue». A tout événement le conseiller législatif est une personne nommée par le lieutenant-gouverneur. Les arts. 100 et 102 du Code envisagent des situations différentes et rien ne s'oppose à ce que, par sa conduite, un conseiller législatif tombe sous l'un ou l'autre de ces deux articles.

La Cour d'Appel a bien jugé lorsqu'elle a rejeté la prétention que l'art. 102 ne s'applique au conseiller législatif que dans le cas où les actes incriminants ont été posés par lui en sa qualité officielle. On pourrait ajouter que dans ses termes, l'art. 102 n'exige pas, comme le fait l'art. 100, que l'acte incriminant soit posé en la qualité officielle de celui à qui il est reproché.

Il n'y a pas lieu d'intervenir pour modifier l'ordonnance d'un nouveau procès rendue par la Cour d'Appel.

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*CORAM: Les Juges Fauteux, Abbott, Martland, Judson et Ritchie.

1965

MARTINEAU v. LA REINE

Criminal law—Member of Legislative Council—Undue exercise of influence —Whether legislative councillor an official—Whether acts must be done in his capacity as legislative councillor—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 99(e), 100, 102(1)(a)(ii)(iii), 592(4)(b), 597(2)(a).

The appellant, a member of the Legislative Council of the province of Quebec, was prosecuted on an indictment containing eleven counts charging him with having demanded, accepted, or offered, or agreed to accept a sum of money from a designated company for a designated person, contrary to the provisions of ss. 102(1)(*a*)(ii)(iii) and 21 of the *Criminal Code*. He was acquitted by the trial judge on the grounds that a legislative councillor is not an official within the meaning of s. 102 of the Code, and that even if he were, the transactions of which he was accused had not been made in his capacity as a legislative councillor. The Court of Appeal rejected these two grounds as ill-founded in law and ordered a new trial. The appellant appealed to this Court.

Held: The appeal should be dismissed.

The Court of Appeal was right in holding that a legislative councillor was an official within the meaning of s. 102 of the *Criminal Code*. The Court cannot substitute itself to Parliament in order to add to the definition in s. 99(*e*)(ii) of the Code the words "judicial or ministerial" so as to qualify the expression "public duty". It is doubtful that in using the word "appointed" Parliament had the intention to give to this word, in the context of s. 99, the purely juridical and strictly restricted sense as well as the scope which one would have to give to that word, if in fact—which is not the case—it appeared that the word "appointed" was used in contrast with the word "elected". In any event, the legislative councillor is a person appointed by the Lieutenant-Governor. Sections 100 and 102 of the Code contemplate different situations, and there is nothing to prevent a legislative councillor to come, by his conduct, under one or the other of these two sections.

The Court of Appeal was right in rejecting the contention that s. 102 applies to the legislative councillor only when the incriminating acts have been done by him in his official capacity. Furthermore, by its terms, s. 102 does not require, as s. 100 does, that the incriminating act be done in the official capacity of the person.

The order of a new trial made by the Court of Appeal should not be interfered with.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec, setting aside the appellant's acquittal and ordering a new trial. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec, écartant un verdict d'acquittement et ordonnant un nouveau procès. Appel rejeté.

Joseph Cohen, C.R., Fred Kaufman, D. Dionne et *C. Rioux,* pour l'appelant.

Laurent E. Bélanger, C.R., pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:— Le 8 octobre 1963, le Juge Gérard Simard, de la Cour des Sessions de la Paix, condamnait l'appelant à subir un procès sur un acte d'accusation contenant onze (11) chefs dont chacun l'accuse d'avoir, directement ou indirectement, dans le district de Québec, entre le 1er janvier 1955 et le 30 juin 1960, étant un fonctionnaire—soit Conseiller Législatif pour la division des Laurentides et Lauzon, dans le Gouvernement de la Province de Québec,—exigé, accepté, ou offert, ou convenu d'accepter de la compagnie Peinture Sico Limitée, pour une personne désignée, une somme d'argent indiquée, en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou omission concernant la conclusion d'affaires avec le Gouvernement de la Province de Québec ou au sujet d'affaires ayant trait audit Gouvernement, le tout contrairement aux dispositions des articles 102(1)(*a*)(ii)(iii) et 21 du *Code Criminel.*

L'appelant fit option pour être jugé par un juge sans jury, et après un long procès présidé par le Juge Albert Dumontier, de la Cour des Sessions de la Paix[1], fut acquitté le 26 novembre 1964. Cet acquittement repose exclusivement sur deux motifs de droit. Aux vues du juge au procès un conseiller législatif n'est pas un fonctionnaire au sens de l'art. 102 du *Code Criminel* et de plus, ajoute-t-il,

> comme les démarches que l'accusé a entreprises auprès de la Compagnie 'La Peinture Sico Ltée' d'une part, et le directeur des achats dans le gouvernement de la province de Québec d'autre part, n'ont pas été faites en sa qualité de conseiller législatif, les actes criminels contenus dans l'acte d'accusation ne pouvaient, en droit, lui être reprochés.

En somme, un conseiller législatif ne serait pas un fonctionnaire au sens de l'art. 102 du *Code Criminel,* et même s'il l'était, cet article, dit-on, ne peut s'appliquer que si les actes incriminants qui lui sont reprochés ont été posés par lui en sa qualité de conseiller législatif.

Porté en appel, ce jugement fut infirmé par une décision unanime de la Cour du banc de la reine. Dans leurs raisons

[1] (1965), 45 C.R. 322.

1965

MARTINEAU v. LA REINE

Fauteux J.

de jugement MM. les Juges Casey et Brossard, avec l'accord de M. le Juge Pratte, rejettent comme mal fondés en droit les deux motifs de droit sur lesquels se fonde l'acquittement de l'appelant. L'appel de la Couronne fut donc accueilli et le verdict d'acquittement fut écarté. La Cour d'Appel ayant dès lors à considérer et décider, ainsi que l'exigent les dispositions de l'art. 592(4)(*b*) du *Code Criminel*, si elle devait consigner un verdict de culpabilité ou ordonner un nouveau procès, opta pour cette dernière alternative.

S'autorisant des dispositions de l'art. 597(2)(*a*) du *Code Criminel* l'appelant se pourvoit maintenant à cette Cour pour faire rétablir le jugement d'acquittement prononcé en première instance.

Sur le premier point de droit:—Les dispositions pertinentes de l'art. 102 sur lesquelles reposent les accusations logées contre l'appelant se lisent comme suit:

> 102. (1) Commet une infraction, quiconque,
> (*a*) directement ou indirectement,
> (i) .....
> (ii) étant fonctionnaire, exige, accepte ou offre ou convient d'accepter de quelqu'un pour lui-même ou pour une autre personne,
> un prêt, une récompense, un avantage ou un bénéfice de quelque nature que ce soit en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou omission concernant
> (iii) la conclusion d'affaires avec le gouvernement ou un sujet d'affaires ayant trait au gouvernement,
> ou
> (iv) .....
> que, de fait, le fonctionnaire soit en mesure ou non de collaborer, d'aider, d'exercer une influence ou de faire ou omettre ce qui est projeté, selon le cas.

L'expression «fonctionnaire» ou l'expression «official» dans la version anglaise ont, pour les fins de l'art. 102 et des autres articles de la Partie III du *Code Criminel*, le sens que leur attribuent les dispositions ci-après de l'art. 99(*e*).

> 99. Dans la présente Partie, l'expression
> * * *
> *e*) 'fonctionnaire' désigne une personne qui
> (i) détient une charge ou un emploi, ou
> (ii) est nommée pour remplir une fonction publique;

> 99. In this Part,
> * * *
> *e*) 'official' means a person who
> (i) holds an office, or
> (ii) is appointed to discharge a public duty;

La Cour d'Appel ayant d'abord noté que les membres du Conseil Législatif, nommés par le Lieutenant-Gouverneur au nom de la Reine, participent de par leur fonction à la discussion et à l'adoption des lois, considéra qu'il est difficile de concevoir une fonction qui plus que celle-là ait le caractère et la nature d'une fonction publique, que donnant au texte de l'art. 99(*e*)(ii) son sens ordinaire, il s'ensuit que la compréhensibilité de la disposition demande d'y inclure et non d'en exclure la fonction de conseiller législatif, ou «official» au sens de l'art. 102. Avec ces vues je suis et que partant le conseiller législatif est un «fonctionnaire» respectueusement d'accord.

A l'audition devant nous, l'appelant, au soutien de la proposition contraire, a d'abord soumis l'argument suivant: L'article 102 doit être interprété à la lumière de la Common Law; sous la Common Law, il n'y a pas d'offense de corruption (bribery) à moins que l'officier public concerné soit, suivant le langage des traités et de la jurisprudence «a judicial or a ministerial officer», ce qui exclut toute personne—tel un conseiller législatif—dont la fonction publique est ni judiciaire ni ministérielle. A mon avis cet argument ne peut être retenu. Nous ne pouvons en effet nous substituer au Parlement pour ajouter à la définition de l'art. 99(*e*)(ii) les mots «judiciaire ou ministérielle», dans la version française, et les mots «judicial or ministerial», dans la version anglaise, comme qualificatifs des expressions «fonction publique» et «public duty» respectivement. D'ailleurs nous ne pourrions attribuer au mot «ministerial» dans le contexte jurisprudentiel de l'expression «judicial or ministerial officer» le sens restreint que suggère l'appelant mais que rejette la Common Law, ainsi qu'il appert de la décision de la Cour d'Appel d'Angleterre dans *Rex. v. Whitaker*[1], où un argument similaire a été soumis et rejeté. Il convient de citer l'extrait suivant pris aux pages 1296 et 1297 du Rapport.

> Then it was argued that the appellant was not a 'public and ministerial officer'. A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer. The addition of the words 'and ministerial' does not affect the matter. In our view he is also a ministerial officer. The Attorney-General was right in his contention that the word 'ministerial'

[1] [1914] 3 K.B. 1283, 10 Cr. App. Rep. 245.

1965

MARTINEAU v. LA REINE

Fauteux J.

is here used in contrast with 'judicial'; every officer who is not a judicial is a ministerial officer. No other word would aptly qualify the position of the appellant as a public officer, and it is clear that the colonel of a regiment is a public ministerial officer.

L'appelant soumet de plus que si le Parlement avait eu l'intention d'inclure les législateurs dans le cadre de l'art. 102, il aurait manifesté cette intention en mentionnant, dans la définition de l'art. 99(*e*)(ii), la personne *élue* aussi bien que la «personne *nommée* pour remplir une fonction publique». Je doute sérieusement qu'en se servant du mot «nommée» le Parlement ait eu l'intention d'attribuer à ce mot, dans le contexte de la définition de l'art. 99(*e*)(ii), le sens purement juridique et strictement restreint ainsi que la portée qu'il faudrait lui donner, si en fait—ce qui n'est pas—il apparaissait que le mot «nommée» est utilisé, dans la définition, en contraste avec le mot «élue». Il me paraît difficile de concilier avec la notion fondamentale de l'offense de corruption (bribery) la proposition qu'uniquement en raison de la méthode par laquelle on accède à une fonction publique, on puisse, suivant qu'on a été nommé ou élu, être coupable ou innocent du crime de corruption même si dans les deux cas la conduite de celui qui remplit la fonction publique est identiquement répréhensible. Ce qui est certain, c'est que le texte de la définition est inéluctable en ce qui concerne la personne qui est «nommée pour remplir une fonction publique». Et c'est clairement là le cas du conseiller législatif—le seul que nous ayons à décider en l'espèce—qui, aux termes de l'art. 72 de l'*Acte de l'Amérique du Nord britannique*, est nommé par le Lieutenant-Gouverneur. Cet argument ne peut être accepté.

Enfin, s'appuyant sur le fait que le texte de l'art. 100 mentionne spécifiquement les membres du Parlement du Canada ou d'une Législature, l'appelant prétend que le cas de celui qui est conseiller législatif est exclusivement régi par l'art. 100 et que les dispositions de l'art. 102 ne sauraient jamais lui être appliquées. Je ne puis admettre cette façon de voir. Bien que ces deux articles visent un même mal, soit la corruption, chacun d'eux envisage une situation différente et rien ne s'oppose à ce que, par sa conduite, un conseiller législatif qui est aussi, pour les fins de la partie III, un «fonctionnaire» ou «official», se trouve, soit dans la situation décrite à l'art. 100, où l'acte incriminant doit, tel que l'exige le texte de cet article, avoir été posé par lui en sa qualité

officielle de membre de la Législature, ou dans la situation décrite à l'art. 102 où une telle exigence n'est pas indiquée et où il suffit que l'acte incriminant soit posé par un «fonctionnaire» ou «official».

Sur le deuxième point de droit:— Pour rejeter la prétention que l'art. 102 ne s'applique au conseiller législatif que dans le cas où les actes incriminants qu'on lui reproche ont été posés par lui en sa qualité officielle, la Cour d'Appel considéra que l'art. 102 est d'application générale; que cet article vise l'usage impropre que fait ou prétend faire, de l'influence réelle ou présumée dont il jouit, celui qui est nommé pour remplir une fonction publique; que le marchandage d'influence constitue l'essence de l'offense et que le but de la disposition est de prévenir ce genre de corruption dans au moins une sphère de la vie publique; que rien n'exige que, pour être atteint par les dispositions de l'article, le marchand d'influence agisse en sa qualité officielle et qu'il suffit qu'il soit «fonctionnaire» ou «official», puisque c'est de ce fait que certaines personnes pourraient être conduites à présumer qu'il a quelque chose à vendre, soit de l'influence. Avec cette façon de voir, je suis aussi respectueusement d'accord. J'ajouterai que, dans ses termes, l'art. 102 n'exige pas, comme le fait l'art. 100, que l'acte incriminant soit posé en la qualité officielle de celui à qui il est reproché.

Pour les raisons données par MM. les Juges Casey et Brossard et celles qui précèdent, je dirais, comme la Cour d'Appel, que les deux points de droit sur lesquels le Juge au procès s'est fondé pour acquitter l'appelant sont mal fondés. C'est donc à bon droit que l'appel logé par la Couronne à la Cour du banc de la reine a été accueilli et que le verdict d'acquittement a été écarté.

Reste à considérer l'ordonnance de nouveau procès rendue par la Cour d'Appel au regard de la demande faite par l'intimée en cette Cour d'écarter cette ordonnance et de consigner à la place un verdict de culpabilité.

L'appelant a déclaré qu'il ne niait pas qu'en principe cette Cour avait le pouvoir d'accorder semblable demande, mais il s'est opposé à ce qu'elle soit accordée en l'espèce en s'appuyant sur les raisons données en Cour d'Appel au soutien de l'ordonnance de nouveau procès.

Sur la question, M. le Juge Casey avec l'accord de ses collègues, MM. les Juges Pratte et Brossard, a noté que le

1965

MARTINEAU v. LA REINE

Fauteux J.

choix que donne l'art. 592(4)(*b*) du *Code Criminel* n'en est pas un qu'il est toujours facile d'exercer et en ce qui concerne le présent cas, il a particulièrement déclaré ce qui suit:

> This case deals with corruption in public life, a matter of extreme gravity. For this reason it is highly desirable—more so than in any other type of case—that the facts and, if it goes that way, the sentence be discussed in the Court of first instance.

Tenant compte de cette déclaration de la Cour d'Appel et ayant considéré la question, je croirais judicieux de ne pas intervenir pour modifier l'ordonnance de la Cour d'Appel. Et vu cette conclusion il convient de n'en dire davantage sur le point.

Je renverrais l'appel.

Appel rejeté.

Procureur de l'appelant: Joseph Cohen, Montréal.

Procureur de l'intimée: Ivan Mignault, Québec.

1965

*Nov. 5
9, 10
Dec. 14

FALCONBRIDGE NICKEL MINES LIMITED ..... APPELLANT;

AND

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

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

AND

FALCONBRIDGE NICKEL MINES LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Prospecting, exploration and development expenses—Mining and exploration companies—Work done under agreements with other companies—Income Tax Act, 1949 (Can.), (2nd Sess.), c. 25, s. 53(4)—Income Tax Act, R.S.C. 1952, c. 148, s. 83A(7) [as enacted by 1955 (Can.), c. 54, s. 22].

The appellant company, whose chief business was that of mining or exploring for minerals, claimed to deduct from its income for the years

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

1950, 1951 and 1952 certain prospecting, exploration and development expenses which it had incurred in searching for minerals pursuant to agreements entered into with different companies and individuals on properties owned by those companies and individuals. Twelve items of these expenses were disallowed by the Minister on the grounds that some of them did not meet the requirements of s. 53(4) of the *Income Tax Act*, 1949 (Can.) (2nd Sess.), c. 25, and that the others came within the provisions of s. 83A(7) of the *Income Tax Act*, R.S.C. 1952, c. 148, as enacted by 1955 (Can.), c. 54, s. 22. The Exchequer Court held that three items of expenses were not deductible and that the nine others were. Both the company and the Minister appealed to this Court.

Held: The company's appeal should be dismissed; the Minister's appeal should be allowed, subject to his admission that two items of expenditures and part of a third should be allowed as deductions.

A detailed analysis of the agreements led to the conclusion that the remaining items of exploration expenses came within the provisions of s. 83A(7)(*c*), and accordingly their deduction should be disallowed.

Revenu—Impôt sur le revenu—Déductions—Dépenses de prospection, d'exploration et de mise en valeur—Compagnie d'exploitation et d'exploration minières—Travaux faits en vertu d'ententes avec d'autres compagnies—Loi de l'Impôt sur le revenu, 1949 (Can.), (2e Ses.), c. 25, art. 53(4)—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. s. 83A(7)(*c*), and accordingly their deduction should be disallowed.

La compagnie appelante, dont l'entreprise principale était l'exploitation minière ou l'exploration pour la découverte de minéraux, a prétendu déduire de son revenu pour les années 1950, 1951 et 1952, certaines dépenses étaient couvertes par les dispositions de l'art. 83A(7)(*c*), et en elle pour la recherche de minéraux aux termes d'ententes conclues avec différentes compagnies et individus sur des propriétés appartenant à ces compagnies et individus. Le Ministre a rejeté douze rubriques de ces dépenses pour les motifs que certaines ne rencontraient pas les exigences de l'art. 53(4) de la *Loi de l'Impôt sur le revenu*, 1949 (Can.), (2e Ses.), c. 25, et que les autres entraient dans les cadres de l'art. 83A(7) de la *Loi de l'Impôt sur le Revenu*, S.R.C. 1952, c. 148, telle que décrétée par 1955 (Can.), c. 54, art. 22. La Cour de l'Échiquier a refusé la déduction de trois de ces rubriques de dépenses et a permis la déduction des neuf autres. La compagnie et le Ministre en ont tous deux appelé devant cette Cour.

Arrêt: L'appel de la compagnie doit être rejeté; l'appel du Ministre doit être maintenu, sujet à sa reconnaissance que la déduction de deux des rubriques de dépenses et partie d'une troisième devait être accordée.

Une analyse détaillée des ententes démontre que les autres rubriques de dépenses de prospection, d'exploration et de mise en valeur faites par conséquence leur déduction devait être rejetée.

APPEL de la compagnie et APPEL du Ministre d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel de la compagnie rejeté; appel du Ministre maintenu.

[1] [1965] 2 Ex. C.R. 77, [1965] C.T.C. 82, 65 D.T.C. 5046.

1965

FALCONBRIDGE NICKEL MINES LTD. v. MINISTER OF NATIONAL REVENUE

APPEAL by the company and APPEAL by the Minister from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in a matter of income tax. Appeal of the company dismissed; appeal of the Minister allowed.

Allan Findlay, Q.C., and *A. S. Kingsmill,* for Falconbridge Nickel Mines Ltd.

G. W. Ainslie and *D. G. H. Bowman,* for the Minister of National Revenue.

The judgment of the Court was delivered by

JUDSON J.:—The issue in this appeal is the claim of Falconbridge Nickel Mines Limited to deduct from its income for the years 1950, 1951 and 1952 certain prospecting, exploration and development expenses. Throughout the proceedings the expenses have been classified into 12 items and I will maintain that classification. The money was all spent on properties owned by others under the terms of written agreements, which I shall have to analyse later. To obtain these deductions Falconbridge must show that they come within s. 53(4) of the 1949 *Income Tax Amending Act,* (1949), Second Session, c. 25. This section must be read with an explanatory amendment enacted in 1955 and made to apply retroactively to the years in question (Statutes of Canada 1955, c. 54, s. 22(1)).

In full the sections read:

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

* * *

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

(*a*) shares of the capital stock of a corporation that owned or controlled the mineral rights,

[1] [1965] 2 Ex. C.R. 77, [1965] C.T.C. 82, 65 D.T.C. 5046.

(*b*) an option to purchase shares of the capital stock of a corporation that owned or controlled the mineral rights,

or

(*c*) a right to purchase shares of the capital stock of a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights.

I will begin with an analysis of the Gull Lake and the Gullbridge agreements. The properties on which these expenditures were made were owned by Newfoundland Gull Lake Mines Limited. That company and Falconbridge on August 17, 1950, made an agreement, which I now summarize.

(*a*) Falconbridge agreed to pay to Gull Lake $2,500 for an exclusive option to purchase certain mining claims;

(*b*) Falconbridge was to have 60 days to make an examination of the mining claims;

(*c*) Falconbridge during the currency of the option was to have exclusive possession of the mining claims;

(*d*) If Falconbridge before the expiry of the 60 days notified Gull Lake that it wished to proceed with the agreement, a new company was to be incorporated;

(*e*) Upon the incorporation of the new company, Gull Lake and Falconbridge would transfer the mining claims to the new company and, as consideration for the transfer, the new company would allot to Gull Lake 500,000 of its Class "A" shares and would allot to Falconbridge such number of its Class "B" shares as could be purchased, at five cents per share, by a payment equal to $2,500 plus the amount that Falconbridge had expended in connection with the examination of the claims.

(*f*) After the incorporation of the new company, the parties would cause the new company to enter into an agreement with Falconbridge under which Falconbridge would subscribe for shares in the new company on a specified basis and the new company would grant to Falconbridge an exclusive right or option to purchase a specified number of its Class "B" shares.

(*g*) Falconbridge was under no obligation to cause any examination to be made, to expend any moneys or to perform any other act other than the payment of the $2,500.

1965

FALCONBRIDGE NICKEL MINES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

Falconbridge notified Gull Lake on October 20, 1950, that it wished to proceed with the agreement, with the result that a new company, Gullbridge Mines Limited, was incorporated on November 14, 1950, and on December 27, 1950, Falconbridge made with it the agreement contemplated in the Gull Lake agreement. These are the features of this Gullbridge agreement with which we are concerned:

(*a*) Falconbridge subscribed and agreed to purchase 60,241 Class "B" shares of Gullbridge at a price of 5 cents per share and 119,880 Class "B" shares for 10 cents per share. This was in accordance with the Gull Lake agreement and was an application of the $2,500 and the expenses to date on the purchase of shares.

(*b*) Gullbridge granted Falconbridge 7 separate options to purchase a total of 2,059,638 Class "B" shares at specified times and prices.

The following clause gave Falconbridge the right to pay for the shares under option by the application of the moneys expended for exploration and development expenses:

> 4. The parties hereto agree that instead of the Optionee (Falconbridge) taking up and paying for the shares the Optionee (Falconbridge) may expend the monies required to keep this option in force on diamond drilling and on other exploration, development and mining work on the said mining claims . . . and the Optionee (Falconbridge) shall be reimbursed for all expenditures made by it on behalf of the Optionor (Gullbridge), such reimbursement being in the form of shares of the Optionor issued in accordance with the terms of this agreement.

GULLBRIDGE

There are four items of expenditure relating to these agreements:

Item	Period of Expenditure	Departmental Decision	Decision in Exchequer Court
I. $ 10,512.05	Prior to November 14, 1950, date of incorporation of Gullbridge	Disallowed	Allowed
II. $ 4,953.73	From November 14, 1950, to December 31, 1950	Disallowed	Allowed
III. $247,243.88	1951	Disallowed	Disallowed
IV. $ 56,047.26	1952	Disallowed	Disallowed

The Minister appeals the allowance of the first two items and Falconbridge appeals the disallowance of the second

two. Falconbridge applied all these expenditures on the purchase of shares under option at the specified prices.

On items I and II the learned trial judge[1] held:

> In my view, this was not an agreement by which the appellant "undertook" to incur the expenses in question if the word "undertook", as used in s.s. (7) of Sec. 83A, implies, as I think it does, a legal liability enforceable by legal action.
>
> This new company was incorporated with the name of Gullbridge Mines Limited on November 14, 1950 and the expenditures in question were incurred between that date and the end of that year. It would appear that these expenditures were not made pursuant to, or contemplated by, an agreement. What I have said with reference to the first item therefore applies with even greater force to the second item.

On Items III and IV the learned trial judge held:

> On the other hand, s.s. (4) of s. 53 does require that the expenditures must have been "incurred" by the taxpayer before the taxpayer can deduct them under that subsection. I think it must follow from this that the expenditures must have been incurred by the taxpayer on its own account—that is, as a principal and not merely as an agent or contractor for somebody else.
>
> . . . it is sufficient to say that in my view an exploration company cannot be said to be carrying on such a programme on its own behalf when it is carrying it on under a contract under which it is to be reimbursed for the total expenses of the programme as such or under which it carries on the programme as a means of obtaining a credit for the amount of the expenses against an amount which it would otherwise have to pay in cash.

The Minister argues here that the learned trial judge was correct on items III and IV and that there is no difference between these and items I and II. The first question is were any of these items within the terms of s. 53(4)? Falconbridge undoubtedly spent its own money for prospecting, exploration and development. The first item was spent on the property when it belonged to Gull Lake, the next three on the property when it belonged to Gullbridge. When it expended this money it did not intend to confer a gratuitous benefit on these companies. Unless it took up the options this is what it would have been doing.

The legal position of Falconbridge in making these expenditures is easily defined. First, it was under no legal obligation to make any of them. Second, it was under no legal obligation to apply them on the purchase of shares under option although it had the right to do so. Third, it did not make them as agent or contractor for anyone. I cannot accept the characterization of the relationship found later in the judgment of the Exchequer Court as that of agent or contractor on behalf of the owner.

[1] [1965] 2 Ex. C.R. 77, [1965] C.T.C. 82, 65 D.T.C. 5046.

1965

FALCONBRIDGE NICKEL MINES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

As to the first two items, I differ from the opinion of the learned trial judge. I do not think that the word "undertook" as used in s. 83A(7) means that there must be a legal liability enforceable by legal action. The words "pursuant to an agreement under which it undertook to incur those expenses in consideration for etc." mean no more than this. If Falconbridge takes it upon itself to spend this money on the property of another and it does so pursuant to an agreement which gives it that right, then the case is within s. 83A(7) if the consideration is as stated in the section.

Further, the trial judgment holds that the expenditures under item II were not made pursuant to any agreement. The Gullbridge agreement is dated December 27, 1950, and the money was spent between the date of incorporation of Gullbridge and the date of the agreement. There is no doubt that the parties treated these expenditures as having been made under the Gullbridge agreement and they were applied on the purchase of shares. Falconbridge was not making a gift of these expenditures. The Gullbridge agreement was contemplated and spelled out in the prior Gull Lake agreement which had as a schedule the proposed agreement with the new company. The new company issued shares for these expenditures when the option was exercised. What more is needed? It was not necessary to wait until the agreement was formally executed.

I am therefore of the opinion that there was twofold error in allowing Falconbridge to deduct items I and II.

As to items III and IV, in my opinion there was error in holding that these expenditures were reimbursed when Falconbridge applied them on the purchase of shares instead of paying cash, and that Falconbridge consequently did not incur these expenditures within the meaning of s. 53(4). If A spends money on the strength of a promise of B to reimburse him, he expects to receive money in return. Where B only promises an option on its share capital if A chooses to apply the expenditure in this way, then there is no reimbursement and I say that notwithstanding the use of the word in paragraph 4 of the Gullbridge agreement. If the expenditure is not applied on the purchase of shares, Gullbridge is under no obligation. I can get no help either way from *Okalta Oils Limited v. Minister of National Revenue*[1],

[1] [1955] Ex. C.R. 66, [1955] C.T.C. 39, 55 D.T.C. 1029.

and *Corporation of Birmingham v. Barnes*[1]. In the *Okalta* case a Crown corporation had advanced the money for exploration. The company was under no obligation to repay except out of production from the well. The well was unproductive. The oil company tried to include this subsidy in its drilling costs for the purpose of claiming a tax credit, which at that time was 26⅔ per cent of its costs. The Exchequer Court held that the oil company had not incurred those costs. In this Court[2], the point was not considered. On the other hand, in the *Birmingham* case, the corporation received a subsidy from the government to cover part of the cost of the reconstruction of certain tramlines. This came from the Unemployment Grants Committee. It also received a contribution towards the cost of a new line from a company that the new line was intended to serve. The question in issue was whether the corporation was entitled to include these two contributions in its cost when claiming a capital cost allowance in making its Income Tax Return. The House of Lords held that it was. Neither case touches the present problem.

Another ground given in the Exchequer Court for the disallowance of items III and IV was that Falconbridge had not incurred these expenditures on its own account. The reasoning is given in the extracts above quoted. Falconbridge did not incur these expenditures as agent or contractor for somebody else and the right to apply the expenditure on shares, which, I have said, was erroneously called reimbursement, cannot turn the operation into one carried on on behalf of somebody else.

In conclusion then I say that all these four items represent expenditures for exploration and were incurred by Falconbridge within the meaning of s. 53(4). I would disallow all four solely under the provisions of s. 83A(7)(*c*).

The next four items of expenditure relate to agreements made with Rambler Mines Limited and Rambridge Mines Limited. They are similar in set-up to those made with Gull Lake and Gullbridge. The Rambler agreement is dated October 21, 1950. It gives Falconbridge the right to make an examination for a period of 60 days on certain mining claims. Falconbridge was not legally bound to proceed with

[1] (1933-35), 19 T.C. 195; [1934] 1 K.B. 484; [1935] A.C. 292.

[2] [1955] S.C.R. 824, [1955] C.T.C. 271, 55 D.T.C. 1176, 5 D.L.R. 614.

1965

FALCONBRIDGE NICKEL MINES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

this examination. If Falconbridge wished to proceed with the agreement, the parties would cause a new company to be incorporated to which the mining claims would be transferred. In consideration of the transfer, the new company would issue and allot all its shares, 40 per cent to Rambler and 60 per cent to Falconbridge. Then Rambler and Falconbridge would cause the new company to enter into an agreement providing for the deposit in escrow of the issued shares to be released on defined conditions. Falconbridge did notify Rambler of its intention to proceed. The new company Rambridge Mines Limited, was incorporated on January 10, 1951. On February 16, 1951, the parties entered into the Rambridge agreement, the form of which had already been settled as a schedule to the Rambler agreement, and under this agreement Falconbridge agreed to extend or advance to Rambridge the sum of $100,000 at certain intervals within twenty-four months subject to the right of Falconbridge to discontinue at any time on giving Rambridge 30 days' notice. Any moneys expended in excess of $100,000 would be treated as a loan by Falconbridge to Rambridge and would be repayable before any dividends could be declared.

There are four items of expenditure relating to these agreements:

RAMBRIDGE

Item	Period of Expenditure	Departmental Decision	Decision in Exchequer Court
V. $20,435.41	1950	Disallowed	Allowed
VI. $15,123.57	From January 1, 1951 to February 16, 1951, date of execution of Rambridge Agreement	Disallowed	Allowed
VII. $13,765.73	From February 1, 1951 to December 31, 1951		
VIII. $13,677.68	1952		

The learned trial judge in his reasons for judgment in dealing with items V and VI adopted the same reasoning as he did in dealing with items I and II. In this I think that there was the twofold error I have already noted. However, item V must be dealt with on different grounds. The Minister, in his exchange of documents when the taxpayer

filed an appeal, agreed with the taxpayer's contention on item V and agreed to vary his assessment accordingly. The same applies to part of item VI. That part amounts to $4,212.36, leaving the balance of item VI $10,911.21. These items, because of the Minister's notification, were not included in the company's Notices of Appeal to the Exchequer Court. I think that once he had agreed with the taxpayer's submission and agreed to vary the assessment, the assessment must be taken as varied. Consequently, these two amounts were not in issue in the Exchequer Court and nothing more needs to be said about them.

With regard to the balance of item VI, the whole of item VII, and the whole of item VIII, the same result must follow as under the Gull Lake—Gullbridge agreements. The learned trial judge was of the opinion that these expenditures were made pursuant to an agreement but not the kind of agreement dealt with in s. 83A(7). He thought that the consideration was "shares of the capital stock of a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights, namely, 83A(7)(*c*)", and that this was not a right to purchase such shares within the subsection. I cannot understand this distinction. The right to purchase shares of the capital stock of a corporation to be formed to hold the claims includes the actual issue of the shares and their delivery in escrow just as it does an option to purchase. If Falconbridge carried out the terms of the agreement and expended the $100,000 within the times specified, then it would be entitled to purchase the shares and have them delivered free of the escrow.

The next two items, items IX and X, arose from an agreement dated June 15, 1952, between Falconbridge and Jawtam Key Gold Zones (Rambler) Limited. There were minor differences in detail which do not affect the principles to be applied. The claims were transferred to a trustee pending transfer to a new company. There was the usual six months for the preliminary examination and then another 30 months during which time Falconbridge was required to expend $50,000. If it gave notice requiring the incorporation of the new company and had not spent the $50,000, the difference had to be paid to Jawtam. On the incorporation of the new company the claims had to be delivered by the trustee to it, whereupon it was to issue its shares—one-fifth to Jawtam and four-fifths to Falconbridge. Falconbridge

1965

FALCONBRIDGE NICKEL MINES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

never gave notice to require the incorporation of the new company and eventually abandoned its option on March 4, 1955. Particulars of the items are as follows:

JAWTAM

Item	Period of Expenditure	Departmental Decision	Decision in Exchequer Court
IX. $6,991.89	Until October 16, 1952		
X. $6,221.00	October 17, 1952 to the end of the year.		

As to both items, the learned trial judge held, as he had done with reference to items I and II, that Falconbridge had not undertaken these expenditures in the sense of entering into a legally enforceable agreement and that they were not made pursuant to any agreement. He consequently allowed the deductions. I have already expressed my disagreement with these propositions. However, item IX must be dealt with in the same way as item V and part of item VI. The Minister accepted the taxpayer's submission on item IX and agreed to vary the assessment. I would therefore allow the deduction on this ground alone. As to item X where there was no admission and agreement to vary the assessment, s. 83A(7)(*c*) applies and the deduction is disallowed.

STANMORE

Item XI $15,063.71.

This agreement is dated April 27, 1951, between Falconbridge, Stanmore Mining Smelting Limited and a number of other companies and individuals. The purpose was to get certain mining claims consolidated and transferred to a new company. Falconbridge advanced to Stanmore $5,000 for this purpose and had the right to purchase free treasury shares of the new company at 10 cents per share with this sum. The agreement went on to provide that Falconbridge would act as manager for a minimum period of three years; that it would receive shares at 10 cents per share for the first $10,000 expended on development and shares at the rate of 25 cents per share for the next $40,000 of expenditure. Falconbridge bound itself to expend up to this sum of $50,000. In 1951 and 1952 Falconbridge spent a total of

$65,063.71 in exploring and developing the claims. It is common ground between the parties that s. 83A(7) prevents any deduction for the first $50,000. However, Falconbridge sought, in computing its income for 1952, to deduct the balance of $15,063.71. The learned trial judge disallowed this deduction on the ground above stated, that these expenditures were made not on its own behalf and were therefore not expenses incurred by it within the meaning of s. 53(4). I disagree with this reasoning but I think the case is within s. 83A(7)(*c*) and the deduction is accordingly disallowed.

BRODIE

Item XII $3,603.14

This agreement is dated July 29, 1952 and was made with two individuals. It granted an option to purchase certain mining claims. Falconbridge had the usual 60 days to make an examination during which period it was to give the optionors notice that it wished to proceed. The agreement also provided that Falconbridge could have a new company incorporated to acquire and hold the claims and Falconbridge would be entitled to receive shares for its development expenses in this new company. In 1952 Falconbridge spent the above mentioned sum of $3,603.14 in conducting its examination. It did not proceed with the incorporation of the new company and it elected to abandon the option. The learned trial judge held, as he did with item I, that there was no "legally enforceable agreement" within s. 83A(7). On the contrary, I think that the item is within s. 83A(7)(*c*) and that the deduction must be disallowed.

The result is that all the items are disallowed as coming within s. 83A(7)(*c*) with the exceptions item V, item VI to the extent of $4,212.36, and item IX as to which there were admissions.

Falconbridge appealed the disallowance of items III, IV and XI. The Minister appealed or moved to vary on all the other items. The company's appeal fails and is dismissed with costs. The Minister's appeal succeeds on everything except item V, part of item VI and item IX. All the assessments made by the Minister stand with this exception. There should be no costs of the Minister's appeal. The issues discussed were the same as those involved in the appeal with the exception of quantum, date and detail.

1965

FALCONBRIDGE NICKEL MINES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

Appeal of the Company dismissed with costs; appeal of the Minister allowed without costs.

Solicitors for Falconbridge Nickel Mines Ltd: Tilley, Carson, Findlay & Wedd, Toronto.

Solicitor for the Minister of National Revenue: E. A. Driedger, Ottawa.

1965

*Oct. 13, 14
Dec. 14

WILLIAM GILCHRIST (*Plaintiff*) .....APPELLANT;

AND

A & R FARMS LTD., DELMER CHARLES PERCY and ANNE MERLE PERCY (*Defendants*) . } RESPONDENTS.

WILLIAM GILCHRIST (*Plaintiff*) .....APPELLANT;

AND

THE TRUSTEE OF THE ESTATE OF A & R FARMS LTD. IN BANKRUPTCY (*Defendant*) ... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Injury sustained by farm labourer while lifting defective barn door—Duty owed by employer to servant with respect to safety of premises—Whether injury a reasonably foreseeable result of employer's failure to repair door.

The appellant was employed as a farm labourer by the respondent A & R Farms Ltd. When, from time to time, a defective door on one of the respondent's barns fell to the ground, it was part of the duty of the appellant to raise the door again to an upright position so that it would lean against the barn. While thus attempting to lift the door the appellant suffered a severe injury described as a protruded intervertebral disc between the fourth and fifth lumbar vertebrae. The trial judge dismissed the appellant's action for damages on the ground that the risk of injury resulting from the failure to repair the door was not such as ought reasonably to have been foreseen. The trial judgment was affirmed by a unanimous judgment of the Court of Appeal and from that judgment an appeal was brought to this Court.

Held (Martland and Ritchie JJ. dissenting): The appeal should be allowed.

Per Cartwright, Judson and Hall JJ.: The employer failed in its duty to the appellant when it allowed the door to remain in the defective

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

condition which had existed for many months. That breach of duty caused the injury of which the appellant complained; that it could do so was not only foreseeable but actually foreseen. In the circumstances of the case the maxim *volenti non fit injuria* had no application. Consequently, the appellant was entitled to judgment against the employer for the amount of damages ($19,010.01) assessed by the trial judge, as to which no question was raised in the argument before this Court. *Glasgow Corporation v. Muir*, [1943] A. C. 448, referred to.

Per Martland and Ritchie JJ., *dissenting:* An employer's duty to maintain his plant and property only arose in respect of each employee if the lack of maintenance created a situation of potential danger for him. "Danger" in this sense meant risk of injury to the employee in the carrying out of his duties and "risk" in turn did not mean a mere remote possibility but a potential peril which a reasonable man could foresee as not unlikely to injure the employee in question. In the present case, under all the circumstances as they existed on the evening when the injury was sustained, the broken barn door as it lay on the ground did not constitute any danger whatever and the task of lifting it back into place when it had fallen to the ground did not give rise to any foreseeable risk against which the employer was under a duty to safeguard its employee. *Regal Oil & Refining Co. et al. v. Campbell*, [1936] S.C.R. 309; *Bolton v. Stone*, [1951] A.C. 850; *Qualcast (Wolverhampton) Ltd. v. Haynes*, [1959] A.C. 743, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Smith J. Appeal as against respondent company and trustee in bankruptcy allowed, Martland and Ritchie JJ. dissenting; appeal as against individual respondents dismissed.

P. W. Schulman and *M. M. Schulman*, for the plaintiff, appellant.

G. H. Lockwood and *D. Proctor*, for the defendants, respondents.

The judgment of Cartwright, Judson and Hall JJ. was delivered by

CARTWRIGHT J.:—Pursuant to leave granted by my brother Judson, the appellant appeals *in forma pauperis* from a unanimous judgment of the Court of Appeal for Manitoba[1] affirming the judgment of Smith J. dismissing the appellant's action with costs. The learned trial judge assessed the plantiff's damages at the sum of $19,010.01 and in the argument before this Court no question was raised as to this assessment.

In October 1960 the appellant was employed by A & R Farms Ltd., hereinafter referred to as "the employer" as a farm labourer on its farm at Dugald, Manitoba. The feed

[1] (1965), 50 W.W.R. 705.

1965

GILCHRIST v. A & R FARMS LTD. et al.

Cartwright J.

barn on this farm was entered by a doorway 8 feet wide with two sliding doors. Each of these doors was 7 feet in height and 4 feet 4 inches in width and was said to weigh between 100 and 125 lbs. Originally the doors were suspended from overhead tracks. The door on the right, as one faces the barn, was still so suspended but from some date before the appellant was employed the overhead track from which the door on the left had been suspended was missing and when it was necessary to open it it had to be lifted or slid sideways. It would then be leaned against the side of the barn in an upright position. From time to time this door would fall or be blown down and would have to be raised up again to its leaning position against the barn. On such occasions it was part of the duty of the appellant to raise the door. This situation was well known to all the parties throughout the period of the appellant's employment.

On May 9, 1961, the door was lying on the ground and the plaintiff proceeded to raise it into an upright position and in so doing suffered a severe injury described as a protruded intervertebral disc between the fourth and fifth lumbar vertebrae.

The learned trial judge was of opinion that the door should have been repaired and that it was surprising that it had been left in the condition described for so long a period but he dismissed the action on the ground that the risk of injury resulting from the failure to repair was not such as ought reasonably to have been foreseen. He said in part:

> This is a case of an employee injured while performing the duties of his employment. The injury occurred while he was in the course of raising a barn door which had been lying on the ground, intending to place it in position to cover the door opening.
>
> It is an employer's duty to keep the premises in which his employees work reasonably safe, and the matter of liability in this case depends upon the answer to the question: Was this door a source of danger, in the condition in which it then was, and was it foreseeable that as a result someone was likely to be injured while lifting it?
>
> * * *
>
> There was no reason to think that lifting the door was likely to cause injury. Injury was not reasonably forseeable as a consequence of so doing.

The Court of Appeal agreed with the view of the learned trial judge. Guy J.A. who wrote the unanimous judgment of the Court said in part:

> That being so, we have to consider here whether or not the failure to repair the barn door, and leaving it in such a condition that it had to be

lifted into place from time to time, could, as such be 'reasonably foreseen' as the cause of injury such as the plaintiff sustained here. We think not.

In the circumstances outlined above I think it clear that the employer failed in its duty to take reasonable care to see that the property where its servant was required to work was safe, and that as a result of such failure the appellant was injured. The only question of difficulty is whether the injury to the appellant was a reasonably foreseeable result of the employer's failure. In *Glasgow Corporation v. Muir*[1], at p. 457, Lord Macmillan said:

> Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation.

This rule is equally applicable whether the fault imputed to the defendant is an act or, as in the case at bar, an omission. In the same case, at p. 457, Lord Macmillan continued:

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

Counsel for the appellant makes two submissions on this branch of the case.

The first is that the learned judges in the Courts below erred in failing to hold that a reasonable man in the position of this employer would have foreseen that the condition of the door was a probable source of injury to persons working in its vicinity, that this is sufficient to impose liability and that it is not necessary to determine whether he would have foreseen injury caused in the precise manner in which the appellant was injured. In support of this, reference is made to such cases as *Winnipeg Electric Railway Co. v. Canadian Northern Railway Co.; Re Bartlett*[2] and *Hughes v. Lord Advocate*[3].

[1] [1943] A.C. 448.
[2] (1919), 59 S.C.R. 352, 50 D.L.R. 194.
[3] [1963] A.C. 837.

1965

GILCHRIST v. A & R FARMS LTD. et al.

Cartwright J.

The second submission is that in this case it was unnecessary for the learned trial judge to consider what the reasonable man would have had in contemplation and ought to have foreseen because the evidence shows that the employer contemplated and foresaw that injury of the very sort which the appellant suffered might well be caused by failure to put the door in a safe condition.

I have reached the conclusion that the second of these submissions should be upheld and this renders it unnecessary for me to reach a final conclusion as to the first, although I incline to the view that it should be upheld also.

In the direct examination of the appellant at the trial the following questions and answers appear:

Q. Did you have any conversation with the defendant, Delmer Percy, about the door before the 9th of May, 1961?

A. Oh, yes, after I had hired on there, we were doing some small repairs in different barns, and we had discussed repairing the door several times in case somebody got hurt.

Q. Can you tell us what was said in any of these conversations?

A. Yes, Delmer had discussed fixing the door and the tools were there and the only thing needed was to get the material. Delmer himself said the door should be fixed.

Q. Do you remember any specific conversations with Delmer about the door?

A. Well, after I got hurt—

Q. No, before the 9th of May, 1961?

A. Well, we had discussed repairing the door several times and putting it back where it belonged for fear somebody could get hurt.

Q. Was it specifically said in these conversations that as you have just stated 'For fear somebody could get hurt'? Was there some mention of somebody getting hurt on these conversations?

A. Yes.

Q. Who said it?

A. Well, the both of us had said the same thing. With the children running around the barn the door could fall on them or somebody could get hurt by lifting it.

The transcript of the cross-examination of the appellant at the trial occupies 27 pages of the case but he was not cross-examined as to these conversations.

The defendant Delmer Percy was called as a witness for the defendants but was not asked about the conversation to which the appellant had deposed.

In these circumstances we must take it that the conversation sworn to by the appellant took place. Were it otherwise I cannot think that he would not have been cross-examined as to it and that Delmer Percy would not have denied it.

The situation then is that, before the event, the employer's manager, Percy, and the appellant had both realized, and stated, that the defective condition of the door was a source of danger of injury occurring in the very way in which the appellant was in fact injured. The knowledge of Percy is, in the circumstances, the knowledge of the employer. It is not necessary to debate whether a reasonable man in the position of the employer ought to have foreseen the danger when we know that in fact it was actually foreseen by it.

The learned trial judge did not overlook the evidence which I have quoted above and which appears to me to be of crucial importance. He dealt with it as follows:

> The plaintiff's evidence of a conversation with Mr. Percy about the need to repair the door was clearly inspired by the thought that it might fall and injure a child. Any reference to possible injury in lifting it was I feel sure only incidental and not a matter of real concern.

With the greatest respect I am unable to agree with this view of the importance of the conversation referred to.

In the respondent's argument stress was laid on the evidence in the record that an injury similar to that suffered by the appellant could be caused by lifting a sack of feed or by types of exertion less strenuous than that of raising the door. I am unable to see how the employer is assisted on the question of foreseeability by showing that injury to an employee's back similar to that sustained by the appellant may well result from activities in regard to which no blame attaches to the employer. Such evidence would be relevant to the question whether the omission of the employer did in fact cause the appellant's injury but in the case at bar that question is no longer debatable.

In my opinion, the employer failed in its duty to the appellant when it allowed the door to remain in the defective condition which had existed for many months, that breach of duty caused the injury of which the appellant complains, that it could do so was not only foreseeable but actually foreseen, in the circumstances of this case the maxim *volenti non fit injuria* has no application and consequently the appellant is entitled to judgment against the employer for the amount at which the learned trial judge assessed his damages.

At the conclusion of the argument of counsel for the appellant we told counsel for the respondents that it was unnecessary to hear them in regard to the appeal as to

1965

GILCHRIST v. A & R FARMS LTD. et al.

Cartwright J.

Delmer Charles Percy and Anne Merle Percy and the appeal as against those two persons will be dismissed.

By orders made in the Court of Queen's Bench on March 12, 1964, and March 19, 1964, it was directed that the action be continued against A & R Farms Ltd. notwithstanding its bankruptcy and also against the Trustee of A & R Farms Ltd. in bankruptcy.

I would allow the appeal against A & R Farms Ltd. and the Trustee of A & R Farms Ltd. in bankruptcy and direct that judgment be entered against them for $19,010.01 with costs throughout, the costs of the appellant in this Court to be taxed as provided by Rule 142(4). I would dismiss the appeal as against Delmer Charles Percy and Anne Merle Percy but would direct that as to them there be no order as to costs in this Court or in the Courts below.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment of my brother Cartwright who has outlined the factual background giving rise to this appeal.

The appellant, who was familiar with conditions existing on the turkey farm owned by the respondent A & R Farms Ltd., including the state of disrepair of the sliding door giving access to the feed barn, accepted employment on that farm as a hired man on December 15, 1960, with duties which he describes as follows:

> My normal course of duties were I had to feed the chickens, feed the turkeys, grind feed, bedding the birds, gathering eggs and anything else that came along that needed to be done.

One of the things "that came along that needed to be done" on the farm was to pick up the untracked portion of the feed barn door when it had fallen to the ground, and the appellant says that he had done this a number of times without difficulty during the first five months of his employment, but that on the evening of May 9, 1961, when he was lifting the door he strained his back with the results for which he now claims damages. The injury was sustained when the appellant had lifted the door to approximately shoulder height and in making the extra effort "to put it in a standing position" he says "I took this pain in the back and the next thing I knew I was on the ground with the door laying on top of me".

There is no evidence that the ground was slippery or that the door would have been likely to fall on him if the appellant had not suffered the strain which was later diagnosed as what is now commonly called "a slipped disc", nor indeed was there any suggestion that the injury which the appellant suffered was caused by the door having fallen on him. In fact the appellant's own doctor gave it as his opinion that "The fall backwards was the result of the injury to the back rather than the cause".

The door in question had been broken since the farm property was acquired by A & R Farms Ltd. in December 1957 and between that date and the time of the accident it was lifted from the ground on many occasions by Delmer Percy the farm foreman and president of A & R Farms Ltd. and once by his wife. The condition of the door also made it necessary, when it was standing, to lift it up so as to slide it over in opening or closing the barn and this work had been done by the respondent Percy's sixty-seven year old father and by a hired man then employed on the farm and by others. In all this time there was no suggestion that anyone had any difficulty or suffered any kind of strain or injury through lifting the weight of the door, but the learned trial judge found that it weighed between 100 and 125 pounds and it therefore appears to me to have been a foreseeable possibility that "somebody *could* get hurt by lifting it" to use the words which the appellant attributed to Delmer Percy. (The italics are, of course, my own).

With the greatest respect for those who hold a different view, I do not think that the question of whether "somebody could get hurt by lifting it" is determinative of this appeal. In my view the questions to be determined are whether the door as it lay on the ground created such a likelihood of causing injury to the appellant as to make the premises unsafe and whether it was foreseeable that *the appellant was likely to be hurt* while lifting it.

The learned trial judge stated the problem in these words:

> It is an employer's duty to keep the premises in which his employees work reasonably safe, and the matter of liability in this case depends upon the answer to the question: Was this door a source of danger, in the condition in which it then was, and was it foreseeable that as a result someone was likely to be injured while lifting it?

1965

GILCHRIST v. A & R FARMS LTD. et al.

Ritchie J.

This is, in my view, fundamentally a question of fact which was answered in the negative by both of the Courts below and although it is, of course, open to this Court to reach a different conclusion, great respect must be accorded to such a finding and also to the findings of the learned trial judge with respect to the weight to be attached to the evidence.

The duty owed by an employer to his employees under such circumstances was concisely stated by Sir Lyman Duff in this Court in *Regal Oil & Refining Co. Ltd. et al. v. Campbell*[1], at p. 312 where he said:

> By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property.

The employer's duty to maintain his plant and property only arises in respect of each employee if the lack of maintenance has created a situation of potential danger for him.

I venture to say that there are many farms in this country where things which need to be done have been left undone from year to year but this does not mean that every farmer when he engages a hired man to help him comes under a duty to repair all defects in his plant and machinery. It is only when lack of maintenance is such as to expose the new employee to danger that the employer owes him a duty to effect repairs.

"Danger" in this sense, as I understand it, means risk of injury to the employee in the carrying out of his duties and "risk" in turn does not mean a mere remote possibility but a potential peril which a reasonable man could foresee as not unlikely to injure the employee in question. In a different context, Lord Reid was considering the general duty which each man owes to his neighbour in *Bolton v. Stone*[2], and having obviously examined many cases he observed that he found:

> A tendency to base duty rather on the likelihood of the damage resulting than on its foreseeability alone.

It is to be noted, as I have suggested, that the employer's duty of care is owed to each employee as an individual, and in determining whether a foreseeable risk exists which could

[1] [1936] S.C.R. 309. [2] [1951] A.C. 850.

give rise to such a duty, account must be taken of the individual characteristics of each employee. The matter was made plain by Lord Radcliffe in the course of his reasons for judgment in *Qualcast (Wolverhampton) Ltd. v. Haynes*[1], at p. 753 where he said:

> The second point is that, however much attention is concentrated in these cases upon the adequacy of the system of working at the place of work, actions of negligence are concerned with the duty of care as between a particular employer and a particular workman. An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition.

In determining whether the event which happened in the present case was reasonably to be foreseen and guarded against by the employer, consideration must be given not only to the fact that for more than three years someone had lifted the door up every time it had fallen down without any strain or difficulty being experienced, but also to the question of whether it was at all likely that a healthy man who was 32 years of age, 5'11" tall, weighed 180 pounds and had been brought up on a farm would injure himself in doing a routine task of lifting which he had been doing without difficulty for the past five months. In my view it was not an injury which a reasonable employer would have been likely to contemplate.

The question of whether or not the broken barn door constituted a danger or hazard against which the employer was under a duty to protect its employee, is in my opinion, to be determined in light of the circumstances as they existed on the evening of May 9, 1961, when the injury was sustained. At this time, as I have said, the door was lying on the ground where it had been all day and I do not think the fact that if it had been standing up it might have been blown or fallen over so as to hit the appellant on the head or back is a circumstance which affects the employer's liability in respect of an injury sustained by lifting it.

There is no evidence to suggest that the door presented any danger to anybody so long as it remained on the ground, and the sole question is whether the appellant was placed in danger against which his employer was under a duty to protect him when he was performing the task of picking it up. It is true that the door was in the position in which the appellant found it because the respondent had failed to have

[1] [1959] A.C. 743.

1965

GILCHRIST v. A & R FARMS LTD. et al.

Ritchie J.

it repaired, but this lack of maintenance does not constitute negligence *qua* the appellant unless it can be said that he was thereby exposed to risk. The breach of duty which gives rise to liability in such a case as this is a breach of the employer's duty to safeguard his employee against unnecessary danger and the fact that the failure to maintain a piece of equipment may constitute a risk under one set of circumstances does not fix the employer with any such duty in relation to that equipment under a different set of circumstances in which no danger exists.

It was, however, submitted by the appellant's counsel that the foreseeability of the door injuring the appellant by being blown down formed a ground for liability in respect of the damage which he sustained in picking it up, and in support of this proposition he cited such cases as *Hughes v. Lord Advocate*[1], and *Winnipeg Electric Railway Co. v. Canadian Northern Railway Co.; Re Bartlett*[2]. I can derive no assistance from these cases because they appear to me to be primarily concerned with liability for the unexpected consequences of a breach of duty whereas in my view the primary question in the present case is whether any duty existed to be breached. For the same reason I find it unnecessary to discuss the famous case of *Re Polemis and Furness, Withy & Co.*[3]

Under all the circumstances as they existed on the afternoon and evening of May 9, 1961, I do not think that the broken barn door as it lay on the ground constituted any danger whatever and I am satisfied that the task of lifting it back into place when it had fallen to the ground did not give rise to any foreseeable risk against which his employer was under a duty to safeguard this appellant.

For these reasons as well as for those given by the learned trial judge, I would dismiss this appeal with costs.

Appeal as against respondent company and trustee in bankruptcy allowed with costs, MARTLAND *and* RITCHIE JJ. *dissenting; appeal as against individual respondents dismissed.*

Solicitors for the plaintiff, appellant: Schulman & Schulman, Winnipeg.

Solicitors for the defendants, respondents: Pitblado, Hoskin & Company, Winnipeg.

[1] [1963] A.C. 837. [2] (1919), 59 S.C.R. 352, 50 D.L.R. 194.
[3] [1921] 3 K.B. 560.

1965

*June 8, 9
Nov. 9

GUARANTEE COMPANY OF NORTH AMERICA, PROVIDENCE WASHINGTON INSURANCE COMPANY, CANADA SECURITY ASSURANCE COMPANY, FEDERAL INSURANCE COMPANY, WESTERN ASSURANCE COMPANY, HOME INSURANCE COMPANY (*Defendants*) ... } APPELLANTS;

AND

AQUA-LAND EXPLORATION LIMITED (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Plaintiff company entering agreement under which new company to take delivery of drilling tower under construction—Loss of tower—Whether plaintiff company had insurable interest.

On April 29, 1957, the respondent company, the president of A Co. and the latter's associate executed an agreement under the terms of which a new company (M Ltd.) was to be incorporated for the purpose, *inter alia,* of taking delivery from A Co. of a drilling tower of a new type which had already been partially constructed by that company. The tower was to be delivered to M Ltd. to be its absolute property for and in consideration of the payment, on such delivery, by M Ltd. to A Co. of the sum of $39,200. Under the agreement the respondent was to subscribe for 39,200 preference shares of M Ltd. of a par value of $1 each. The president of A Co. and his associate were to transfer their interest in the patent rights for the tower to M Ltd. and in return were each to receive 19,600 preference shares. An advance of $30,000 toward the cost of building the tower was made by the respondent to A Co. on May 10, 1957.

The tower was a part of the property described in a policy of insurance taken out by the respondent on June 19, 1957. It was destroyed while being towed into place on July 25 before it had been delivered by A Co. to M Ltd. or to anyone else. The question raised was whether at the time when the insurance was effected and at the time of its destruction, the respondent had an insurable interest in the tower so as to entitle it to recover for the loss under the terms of the policy. The trial judge and the majority of the Court of Appeal found that the respondent had an insurable interest in the tower consisting of "a right derivable out of some contract about the property".

Held (Cartwright and Judson JJ. dissenting): The appeal should be allowed.

Per Martland J.: The respondent did not have any insurable interest in the tower but even assuming that it had, such interest would have been that of a buyer to whom neither risk nor property had passed. If this gave ground for any insurance to be validly effected by the assured, it would have been for insurance on that interest and not on the property. Consequently, even if an interest did exist in the respondent, it was not such an interest as was insured under the policy in question.

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

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Per Martland and Ritchie JJ.: It was not shown that there existed, either at the time when the insurance was applied for or at the time of loss, such a contract between the respondent and A Co. in respect of the tower under construction as conferred on the respondent an interest in it which a court of law or equity would recognize and enforce.

The agreement of April 29, 1957, contained no reference to delivery of the tower to the respondent by A Co., nor was there any provision for payment by the respondent; the tower was to be delivered to M Ltd. and it was the company which was to pay the purchase price. The respondent held no interest in the patent for the tower design except in its capacity as a potential shareholder of M Ltd. The advance of $30,000 was not made in part performance of any contractual obligation of the respondent to A Co.; it was made on behalf of M Ltd. to be credited by that company against the respondent's obligation to pay for its shares of M Ltd.

The respondent in effect was seeking from its insurers the recoupment of the loss which it sustained when it did not receive back the $30,000. A loan not secured by a lien or charge on the insured property did not give rise to an insurable interest therein and even if the $30,000 received by A Co. were to be treated as a loan made by the respondent on its own behalf, it was in no way secured by any lien or charge on the tower.

Clark v. Scottish Imperial Insurance Co. (1879), 4 S.C.R. 192; *Macaura v. Northern Assurance Co. Ltd. et al.*, [1925] A.C. 619, referred to.

Per Spence J.: In the circumstances, the respondent's only interest in the tower was that of a shareholder in M Ltd., or an investor entitled to have issued to it shares for which it had paid in part, such payment having been used in part payment for the completion of the tower. Such a result would not give to the respondent the direct relationship to the property in the tower to constitute an insurable interest.

Per Cartwright and Judson JJ., *dissenting:* The question whether the respondent had a right derivable out of a contract about the tower which would be enforced by a court of equity could be tested by considering what the situation would have been if the tower had not been destroyed but A Co. had announced that it was going to deliver it to a stranger who had offered a better price. M Ltd. would have had no cause of action against A Co. for it was not a party to the contract with that company. The contractual situation was that the respondent (and others) had a contract with A Co. whereby the latter was bound to construct the tower and deliver it to M Ltd.; the consideration moving to A Co. was the sum of $39,200 and the respondent had paid $30,000 of this to A Co. The manner in which this payment was to be accounted for and dealt with as between the respondent and M Ltd. was irrelevant. The tower being a chattel which could not readily be replaced, equity, at the suit of the respondent, would grant specific performance and compel the delivery of the tower to M Ltd. Accordingly, the respondent had an insurable interest in the tower at all relevant times.

The defence that even if the respondent did have an insurable interest in the tower that interest was not adequately described in the policy was not open to the appellants. The issue to be tried was limited to the question whether the respondent had an insurable interest in the tower. If it had it was entitled to succeed, if it had not its action must fail.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. Appeal allowed, Cartwright and Judson JJ. dissenting.

W. B. Williston, Q.C., and *R. J. Rolls*, for the defendants, appellants.

J. J. Gray, for the plaintiff, respondent.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The relevant facts and the course of the proceedings in the Courts below are set out in the reasons of my brother Ritchie.

I have reached the conclusion that the appeal fails.

I am in substantial agreement with the reasons of McRuer C.J.H.C. and particularly with the summary of his views, concurred in by the majority in the Court of Appeal, which he expressed as follows:

> To summarize my views, without going beyond the special facts of this case I think the plaintiff had an insurable interest in the tower both at the time the contract of insurance was entered into and when the loss occurred because, (1) the construction of the tower was ordered by the plaintiff and Bodi and Bowland; (2) it was being constructed in the development of an invention in which the plaintiff had an interest under its contract with Bodi and Bowland; (3) the tower was for a specific purpose and as part of the drilling operations of the plaintiff; (4) the plaintiff had advanced $30,000 to further its construction; and (5) at the time the loss occurred there had been no corporate act on the part of Marine Drilling Towers Limited to affect the plaintiff's interest or its liability.
>
> If I am correct in these findings the plaintiff has "a right derivable out of (a) contract about the property."

In my opinion, the question whether the respondent had a right derivable out of a contract about the tower which would be enforced by a court of equity may be tested by considering what the situation would have been if the tower had not been destroyed but Accurate Machine and Tool Company Limited, hereinafter referred to as "Accurate", had announced that it was going to deliver it to a stranger who had offered a better price. It seems clear that Marine Drilling Towers Limited, hereinafter referred to as "Marine", would have had no cause of action against "Accurate" for it was not a party to the contract with that company. The contractual situation was that the respondent (and

[1] [1964] 2 O.R. 181, 44 D.L.R. (2d) 645.

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Cartwright J.

others) had a contract with "Accurate" whereby the latter was bound to construct the tower and deliver it to "Marine"; the consideration moving to "Accurate" was the sum of $39,200 and the respondent had paid $30,000 of this to "Accurate". The manner in which this payment was to be accounted for and dealt with as between the respondent and "Marine" appears to me to be irrelevant. The tower being a chattel which could not readily be replaced, equity, at the suit of the respondent, would grant specific performance and compel the delivery of the tower to "Marine".

In these circumstances it is my opinion that the respondent had an insurable interest in the tower at all relevant times.

It remains to mention the second ground on which Kelly J.A. would have allowed the appeal which is that even if the respondent did have an insurable interest in the tower that interest was not adequately described in the policy.

In my opinion in view of the way in which the trial proceeded this defence is not open to the appellants. At the trial Mr. Gray appeared for the respondent and Mr. Smiley for the appellants. At the commencement of the trial before any witness was called the record reads as follows:

HIS LORDSHIP: I thought from the pleadings that it indicated that it was construction of the policies, whether the loss fell within the policies or not.

MR SMILEY: My lord, I will concede this, that if they have an insurable interest, and I make a judicial admission, then they are entitled to recover to the extent of their interest. I don't deny that.

My sole defence is that the evidence—may I retract the word "sole"—my major defence, my lord, is that on the evidence and the facts as we know them the plaintiff did not have an insurable interest in this tower under the policies of insurance which were issued.

HIS LORDSHIP: Well then, with that statement, Mr. Gray, probably you should direct your evidence to establishing your insurable interest.

Later in the trial, while Mr. Gray was examining an officer of the company which had signed the policy as authorized representative of the insuring companies with the apparent purpose of establishing that all the circumstances were disclosed to him at the time the policy was applied for, Mr. Smiley made the following objection:

MR SMILEY: My lord, may I say that to this line of evidence I would take objection. There is no suggestion here that we were not bound to the extent of insurable interest. I suggest, with deference, that it is a collateral issue.

There is no doubt as to how McRuer C.J.H.C. understood these statements. In his reasons for judgment after setting out the facts he said:

> The case for the defendant is placed on the sole ground that on these facts the plaintiff had no insurable interest in the tower in question at the time the policy was written or at the time the tower was destroyed.

The words used by counsel for the appellants do not appear to me to be open to any construction other than that placed upon them by the learned Chief Justice. The issue to be tried was limited to the question whether the respondent had an insurable interest in the tower. If it had it was entitled to succeed, if it had not its action must fail.

Having reached the conclusion, for the reasons stated by McRuer C.J.H.C. and those briefly set out above, that the respondent had an insurable interest it follows that in my opinion the appeal fails.

I would dismiss the appeal with costs.

MARTLAND J.:—I agree with my brother Ritchie and also with the reasons delivered by Kelly J.A. in the Court of Appeal, whose conclusions are summarized in the following paragraph:

> In my opinion, the assured has not proven that it had any insurable interest of a nature which it purported to insure under the terms of the policy in question. I do not consider that it had any insurable interest whatsoever but even assuming that it had, the insurable interest which it had would have been that of a buyer to whom neither risk nor property had passed. If this gave ground for any insurance to be validly effected by the assured, it would have been for insurance on that interest and not on the property. Consequently, even if an interest did exist in Aqua-Land, it was not in such an interest as was insured under the policy in question.

In my opinion the appellants were not precluded from relying upon the alternative ground stated at the end of the quoted paragraph.

My brother Cartwright has quoted the statement made by counsel for the appellants at the commencement of the trial. Counsel then stated that his major defence was that "the plaintiff did not have an insurable interest in this tower *under the policies of insurance which were issued.*" I understand this to mean that it was contended that the respondent did not have any interest in the tower which was insurable under the terms of the policy of insurance which was in issue.

Very shortly after this statement was made by counsel, and still during the discussion between the Court and

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Martland J.

counsel before the evidence was commenced, the learned trial judge stated to counsel for the respondent:

> I think I can decide that, Mr. Gray. We will decide whether you have an insurable interest under the policy. I will have to decide if you have insurable interest and what the insurable interest is.

The objection taken by counsel for the appellants to the question being put by counsel for the respondent to Mr. Garfat, which is quoted by my brother Cartwright, was with respect to the following question:

> Now then, what is the standing of your firm as to power to bind the insurance companies?

Counsel for the appellants then said:

> My lord, may I say that to this line of evidence I would take objection. There is no suggestion here that we were not bound to the extent of insurable interest. I suggest, with deference, that it is a collateral issue.

The learned Chief Justice then said:

> The policy speaks for itself. You cannot vary the terms of the policy by oral evidence.

I would dispose of this appeal in the manner proposed by my brother Ritchie.

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal of Ontario[1] (Kelly J.A. dissenting) affirming the judgment at trial rendered by McRuer C.J.H.C. whereby he ordered that the respondent should recover $7,500 from each of Canada Security Assurance Company and The Guarantee Company of North America, and $3,750 from each of the other appellants in respect of a claim for the destruction of a drilling tower made pursuant to the terms of a policy of insurance dated June 19, 1957, whereby the appellants bound themselves "severally but not jointly" to insure the respondent against "direct loss or damage", as provided in the policy, to property which was described as follows:

> On property of every description pertaining to the Assured's drilling operations on Structure No. 2, consisting principally but not limited to Casings, Pipe Equipment, Compressors, Hydraulic Jacks, Tools, Platforms, Binoculars, Cabins, Camp Supplies and Equipment, the property of the Assured or the Property of others for which the assured may be responsible, including personal effects of the Assured's employees with a limit of $500.00, subject to a limit of $100.00 per employee.

Although the total amount of the judgment appealed from was $30,000, the recovery against each appellant was for a sum less than $10,000 and the respondent moved to

[1] [1964] 2 O.R. 181, 44 D.L.R. (2d) 645.

quash the appeal invoking the provisions of s. 36(*a*) of the *Supreme Court Act* whereby the right to appeal to this Court is limited to judicial proceedings "where the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars".

It has been settled since the case of *Glen Falls Insurance Company et al. v. Adams*[1] that when two or more insurance companies have been sued in one action on separate policies and seek to appeal to this Court, the appeal of each is a distinct and separate appeal in which the matter in controversy is its own liability and nothing else. In the present case, although there is only one policy, the liability is several and it was accordingly found to be necessary for the present appellants to apply for leave to appeal pursuant to the provisions of s. 41(1) of the *Supreme Court Act*. Upon consideration such leave was granted.

The respondent is a company which at all times material hereto was engaged in the business of drilling for oil and gas at Lake Erie where it carried on its activities from drilling platforms built from the surface of the ground to the surface of the lake, and for this purpose it had employed at least one conventional drilling tower constructed by Accurate Machine and Tool Company Limited (hereinafter referred to as "Accurate Machine").

In the month of September 1956, after the close of the drilling season, George Bodi, who was the president of Accurate Machine, and his associate, J. A. Bowland, approached James Paxton, who was the vice-president of the respondent company, and discussed with him the construction of a new type of drilling tower of which they had the plans and patent rights, and which they claimed would revolutionize drilling operations at Lake Erie. The respondent company was genuinely interested in this new design and after prolonged discussions, lasting from September 1956 until April 1957, an agreement was finally executed on April 29, 1957, between the respondent, Bodi and Bowland under the terms of which a new company, Marine Drilling Towers Limited (hereinafter referred to as "Marine Drilling") was to be incorporated for the purpose *(inter alia)* of taking delivery from Accurate Machine of a drilling tower

[1] (1916), 54 S.C.R. 88.

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Ritchie J.

of the new type which had already been partially constructed by that company.

It is common ground that the new tower was a part of the property described in the policy of insurance taken out by the respondent on June 19 and that it was destroyed while being towed into place on Lake Erie on July 25 before it had been delivered by Accurate Machine to Marine Drilling or to anyone else. The question to be determined on this appeal is whether at the time when the insurance was effected and at the time of its destruction, the respondent had an insurable interest in the tower so as to entitle it to recover for the loss under the terms of the policy.

At the outset of the proceedings at trial, the appellants' counsel, referring to the respondent as "they", made the following admission:

> My lord, I will concede this that if they have an insurable interest, and I make a judicial admission, then they are entitled to recover to the extent of their interest, I don't deny that.

The leading authorities defining the nature of an insurable interest have been referred to in the judgments in the Courts below and it appears to me that they are well summarized in MacGillivray on Insurance Law, 5th ed., at pp. 219 and 220, where it is said:

> Insurable interest in property is not confined to the absolute legal ownership. Generally, *any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it.* But *there must be some direct relationship to the property itself, for otherwise the interest is too remote and therefore not insurable.* In *Lucena v. Craufurd* [(1806), 2 Bos. & Pul. (N.R.) 269] Lord Eldon said, 'I am unable to point out what is an interest unless it be a right in the property or *a right derivable out of some contract about the property,*' and if we add to this, 'or some legal liability to make good the loss', we get a substantially accurate definition of insurable interest in property.

(The italics are my own.)

The nature of the insurable interest claimed by the respondent is described in para. 6 of the statement of claim as follows:

> On or about the 29th day of April, 1957 the plaintiff agreed to participate jointly with George Bodi and J. A. Bowland to patent and to complete the construction of a type of marine drilling tower, known as a Mark V Tower and on or about the 10th day of May, 1957 the plaintiff, pursuant to arrangements with the said Bodi and the said Bowland, advanced to Accurate Machine & Tool Company Limited, the fabricator of the said Tower, the sum of $30,000.00 toward the cost of fabrication thereof.

The character of the claim is also apparent from the terms of the revised proof of loss which reads:

> ...the drilling platform referred to...was at the time of the loss owned by Accurate Machine & Tool Company Ltd. but the assured had an insurable interest *by reason of its monetary interest in platform;...*

(The italics are my own.)

The monetary interest referred to is a cheque for $30,000 given by the respondent to Accurate Machine on May 10, 1957, under circumstances which will be hereinafter described and it was this advance to which the respondent's vice-president referred when he said in the course of his examination-in-chief:

> We were insuring the interest of Aqua-Land which was indicated by the monies that had been advanced and by the exhibits here.

The learned trial judge and the majority of the Court of Appeal found that the respondent had an insurable interest in the tower in question consisting of "a right derivable out of some contract about the property", and Mr. Justice Schroeder expressly found that:

> In the present case the plaintiff was a purchaser of the property insured who had advanced more than three-fourths of the builder's stipulated consideration.

The kind of contractual right which is recognized at law as creating an insurable interest was discussed in the case of *Clark v. Scottish Imperial Insurance Company*[1] where this Court considered a claim made under an insurance policy taken out by one Clark on a vessel being built by a shipbuilder named Bishop with whom Clark had an arrangement that if he (Clark) would make the necessary advances to enable the vessel to be built, he would be in a position to look to the vessel when completed as security for his advances. The advances were therefore made on the security of the vessel and on the faith of the agreement between the parties. On completion the vessel was to be delivered to Clark for sale and he was to be recompensed out of the proceeds. The vessel was destroyed by fire when only partially built.

In the course of delivering the judgment of the majority of the Court, which held that Clark had an insurable interest, Ritchie C.J. said:

> The contract of insurance being a contract of indemnity, it is abundantly clear that the plaintiff must establish some interest in the subject-matter insured.

[1] (1879), 4 S.C.R. 192.

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Ritchie J.

The questions we have to determine are, what constitutes such an insurable interest? And did the verbal agreement and the advances made on the strength of it, confer on *Clark* an insurable interest in the vessel while in course of construction?

As to the first, it is easily answered, negatively, that an insurable interest is not confined to a strict legal right of property; and, affirmatively, that any interest which would be recognized by a Court of Law or Equity is an insurable interest, or, as Mr. *Bunyon* thus sums up the question (Bunyon on Fire Insurance p. 8) 'that any legal or equitable estate or right which may be prejudicially affected, or any responsibility which may be brought into operation by a fire will confer an insurable interest.' There must therefore be a valid subsisting contract, susceptible of being enforced between the parties themselves, in order to constitute an insurable interest, or right of action against the insurer, not a mere expectancy or probable interest, however well founded. Was there, then, in this case such an existing contract between *Clark* and *Bishop*, in respect to this vessel in course of construction, as conferred on *Clark* an interest in it binding in law or equity, which a Court of Law or Equity would recognize and enforce, and which interest was prejudicially affected by the fire?

In conformity with this decision it appears to me that the question to be answered is whether there was such an existing contract between the respondent and Accurate Machine in respect to the tower under construction as conferred on the respondent an interest in it which a court of law or equity would recognize and enforce.

In the course of being questioned as to the negotiations between the respondent, Bodi (the president of Accurate Machine) and Bowland, during the months preceding the signing of the agreement, the attention of Mr. Paxton, the respondent's vice-president, was drawn to the April 29th agreement and he was asked:

Q. Do I take it that this agreement after these extensive negotiations that you refer to, the agreement that you arrived at, was intended to be expressed in this document?

A. Yes.

At a later stage, Mr. Paxton was asked:

Q. It has been stated that Aqua-Land instructed the building of the tower. Did you have anything to do with the instructions given by Aqua-Land to build the tower?

A. I do not recall them as instructions from Aqua-Land. I don't recall them as being specific instructions. It was by agreement where we would meet and say all right we are going to construct the thing but I have no recollection of any specific instructions having been given by Aqua-Land.

Q. Does this mean the instructions were given by the group, rather than—

A. That's right. It was an agreement by the partners, Aqua-Land, Bodi and Mr. Bowland.

The only agreement between Aqua-Land, Bodi and Bowland in respect to the tower of which there is any direct evidence is that expressed in the agreement of April 29, 1957, and I adopt the view expressed by Kelly J.A. in the course of his dissenting opinion in the Court of Appeal where he said:

> The decision to proceed by the incorporation of Marine and the careful spelling out of the relationship to Marine of each of the parties to the agreement of 29th April, 1957, is a denial of the existence of any obligation to each other or to any one else save what has been written into the agreement. Consequently, I infer that no such legal relationship existed prior to 29th April, 1957, and thereafter the relationship was solely that to be found in the agreement.

By that agreement Bodi and Bowland each agreed to subscribe for 250 common shares of the capital stock of Marine Drilling while the respondent was to subscribe for 500 such shares. It was further provided that the respondent was to subscribe for 39,200 preference shares of a par value of $1 each which were to be paid for "forthwith after the incorporation of Marine Drilling". Bodi and Bowland on their part agreed that they would each transfer to Marine "all (their) right, title and interest in and to the plans and patent rights of the Mark V tower and the said invention and any improvements thereto" and in return they were each to receive 19,600 preference shares. Clause 5(6) of the agreement provides as follows:

> The parties hereto agree that forthwith after the incorporation of Marine Drilling they shall ensure that Marine Drilling shall enter into an agreement with Accurate Machine & Tool Company Limited under which the latter shall forthwith construct a Mark V Tower in accordance with the specifications set out in Schedule 'A' hereto and deliver the same to Marine Drilling to be its absolute property for and in consideration of the payment, on such delivery, by Marine Drilling to Accurate Machine and Tool Company Limited of the sum of $39,200.

The agreement contains no reference to delivery of the tower to Aqua-Land by Accurate Machine, nor is there any provision for payment by the respondent. It is true that when the insurance was effected and at the time of the loss Marine Drilling had not exercised any of its corporate powers but it was in existence as a separate legal entity and it was the company which was to pay the purchase price and to which the tower was, on completion, to be delivered as its absolute property.

It remains to consider the circumstances under which the sum of $30,000 was advanced to Accurate Machine on

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Ritchie J.

May 10. There is no doubt that on that day the respondent issued a cheque for the amount in question bearing the notation "Re Loan to Marine Equipment", the stub of which was endorsed: "Accurate Machine advance $30,000".

The position at that time was that the construction of the tower was well advanced and that it was to be delivered to Marine Drilling and paid for by that company which had at that time been incorporated but was not yet in business and had no funds with which to pay for it. The respondent had agreed to pay $39,200 for 39,200 shares of Marine Drilling which had not yet been issued to it, and it appears to me to be clear from the respondent's own evidence that the advance of $30,000 to Accurate Machine was made on behalf of Marine Drilling to be credited by that company against the respondent's obligation to pay for its shares. This is borne out by the evidence of the respondent's secretary, Mr. Gerald Kirby, who said:

Q. If that is so, then at the time you advanced the money, and you showed "Re Loan to Marine Drilling", the money was advanced by way of an advance on your obligation to buy shares in Marine Drilling?

A. Yes.

Q. And that is why you showed "Re Loan to Marine Drilling", because you hadn't purchased the share certificates at the time you issued the cheque?

A. Actually Aqua-Land should never have issued a cheque to Accurate Machine & Tool.

Q. Nevertheless you did. We are trying to find out Aqua-Land's interest in this matter; that is what we are aiming at. That is perhaps the bone of contention, I guess, among all of us. But if I follow you then, the cheque was written by way of an advance or a credit against your obligation to buy shares in Marine Drilling?

A. Yes.

Q. But instead of being sent to Marine Drilling or put in Marine Drilling's bank account, for it to be opened and a new one issued to Accurate Machine, you sent the cheque directly to Accurate Machine?

A. That is correct.

On the same subject the respondent's vice-president, Mr. Paxton, stated:

Q. Mr. Bodi has said that the $30,000 that was paid by Aqua-Land to Accurate was a progress payment on the tower?

A. That is true.

Q. Made by Aqua-Land?

A. Made by Aqua-Land on behalf of Marine Drilling Towers in the future.

HIS LORDSHIP: Q. Well, Marine Drilling Towers was in existence at that time?

A. Just the charter, that is all, sir.

Q. Well, it was in existence?

A. That's right.

MR. GRAY: Q. Mr. Bodi has said that Aqua-Land still owes Accurate $9,200 on the construction of the tower?

A. That is true.

HIS LORDSHIP: Q. Is that strictly accurate?

A. On the fulfillment of the delivery of the tower and the completion of the terms of the agreement, my lord.

Q. *Would it not be that Marine Drilling owed $9,200 and Aqua-Land would owe Marine Drilling that amount on the balance of their subscription for stock?*

A. *All right; yes, my lord.*

(The italics are my own.)

For some months after it was made, the advance of $30,000 was carried on the respondent's books as a loan to Accurate Machine and there was some discussion of taking legal action to recover it.

It appears to me to be pertinent to note that Accurate Machine had insured the tower with its own insurers and in due course filed a proof of loss which stated that:

It (the tower) was at the time of the accident owned outright by Accurate Machine and Tool Company Limited free of any lien or encumbrance.

Pursuant to this claim a settlement was reached by Accurate Machine with its insurers based on the total cost to it of the building of the tower.

I agree with Kelly J.A. that what the respondent is now seeking from its insurers "is the recoupment of the loss which it sustained when it did not receive back the $30,000 for which a cheque had been given to Accurate Machine".

It is clear from the decision of the House of Lords in *Macaura v. Northern Assurance Company Limited and Others*[1], that a loan which is not secured by a lien or charge on the insured property does not give rise to an insurable interest therein and even if the $30,000 received by Accurate Machine were to be treated as a loan made by the respondent on its own behalf, it was in no way secured by any lien or charge on the tower. It is equally plain that the respondent's position as one entitled to become a shareholder of Marine Drilling could not give it an insurable interest in

[1] [1925] A.C. 619.

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Ritchie J.

property in which that company was interested. It is contended, however, that the advance of $30,000 was made by the respondent by way of part performance of a contract to purchase the tower and, as I have indicated, the majority of the Court of Appeal appear to agree with this contention.

With the greatest respect for those who hold a different view, the conclusion that the respondent was the purchaser of the tower appears to me to leave out of account the reality of the position assigned to Marine Drilling under the terms of the agreement of April 29. It was clearly contemplated by that agreement that Marine Drilling was to be the purchaser of the tower and it was upon this basis that the respondent agreed to become interested in the matter at all.

Marine Drilling was in fact incorporated, as the respondent's president has said:

> . . . for the purpose of owning and possessing not only the tower that was under construction, but other towers that were to be developed and would be manufactured, fabricated and would function as a company for the purpose of making available to the operators in Lake Erie this type of tower for the purpose of drilling for gas.

It was a term of the agreement of April 29 that "Forthwith after the issue of the common and preference shares", the original parties to the agreement would transfer 15,680 preference and 200 common shares to G. R. Johnson of Radar Exploration Co. who was to become a director and it is otherwise apparent that it was contemplated by all concerned that Marine Drilling would operate on a large scale as a distributor of the new towers to all those engaged in drilling for oil in Lake Erie.

The fact that at the time of the loss Marine Drilling had not issued any shares except to its incorporators and had not otherwise engaged in corporate business does not, as I have said, detract from its existence as a separate legal entity, and the fact that the respondent was to become one of its substantial shareholders and with Bodi and Bowland was to ensure that it agreed to take delivery of the tower and pay for it, does not, in my view, serve to identify the respondent with Marine Drilling under the contract so as to cast it in the role of a purchaser of the insured property.

The full implications of the view adopted by Mr. Justice Schroeder become apparent from the penultimate paragraph of his reasons for judgment where he said:

> . . . had the loss not occurred and had the Mark V tower been completed as contemplated by the agreement, and had Accurate Machine and Tool

Company Limited then attempted to divert it to alien purposes to the detriment of the plaintiff's claim, a *Court of equity* would have interposed at the plaintiff's instance and *would have compelled Accurate Machine and Tool Company Limited to carry out its side of the agreement upon payment or tender of the balance of $9,200.00, by placing the tower in the hands of the plaintiff and its associates in the venture.* Manifestly, it would be fraudulent for Accurate Machine and Tool Company Limited to refuse to perform its obligation under the agreement *after such substantial part performance on the plaintiff's part, having special regard to the fact that its design was the subject of a patent in which the plaintiff held an interest.*

(The italics are my own.)

With the greatest respect, as I have indicated, I take the view that the obligation of Accurate Machine upon payment of the agreed purchase price for the tower was not to place it "in the hands of the plaintiff and its associates in the venture", but was to deliver it to Marine Drilling, and it appears to me also that the respondent held no interest in the patent for the tower design except in its capacity as a potential shareholder of Marine Drilling. It will appear also from what I have said that I do not consider the advance of May 10 to have been made in part performance of any contractual obligation of the respondent to Accurate Machine.

In the Courts below significance was attached to the fact that the plaintiff had placed its tools on the platform of the tower under some arrangement which was not developed in the evidence. Although this may be some evidence that the respondent intended to make use of the tower, I do not consider it to be in itself in any way decisive of the question of whether or not the respondent had an insurable interest in the insured property.

In view of all the above, it will be seen that I am not satisfied that there existed, either at the time when the insurance was applied for or at the time of the loss such a contract between the respondent and Accurate Machine in respect of the tower under construction as conferred on the respondent an interest in it which a court of law or equity would recognize and enforce. I am accordingly of opinion that the respondent has failed to discharge the burden of showing that it had an insurable interest in the property insured. In this regard I also adopt the reasoning contained in the dissenting opinion of Kelly J.A. in the Court of Appeal.

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Ritchie J.

I would allow this appeal and direct that the judgment of the Court of Appeal and of the learned trial judge be set aside.

The appellants will have their costs in this Court and in the Courts below.

SPENCE J.:—I have had the privilege of reading the reasons of my brothers Cartwright and Ritchie. With respect I concur with the view of the former, that the defence that the interest of the respondent was not adequately described in the policy, was not open to the appellants and I have nothing to add to what has been said by Mr. Justice Cartwright thereon.

However, I concur with the opinion of Mr. Justice Ritchie that the respondent has failed to discharge the burden of showing that it had an insurable interest in the property insured. Since Mr. Justice Ritchie has reviewed the facts in detail and quoted excerpts from the evidence which I find relevant, I shall not repeat them. It would seem that as of April 29, 1957, the whole agreement between Aqua-Land, Bodi and Bowland was contained in that document. As Mr. Justice Ritchie has pointed out, that agreement in clause 5(6) provides:

> The parties hereto agree that forthwith after the incorporation of Marine Drilling they shall ensure that Marine Drilling shall enter into an agreement with Accurate Machine & Tool Company Limited under which the latter shall forthwith construct a Mark V Tower in accordance with the specifications set out in Schedule 'A' hereto and deliver the same to Marine Drilling to be its absolute property for and in consideration of the payment, on such delivery, by Marine Drilling to Accurate Machine and Tool Company Limited of the sum of $39,200.

What occurred thereafter? Mr. Paxton in his evidence, quoted by Mr. Justice Ritchie in his reasons, testified that no formal instructions were given thereafter as to the completion of the tower but that the parties, *i.e.*, Aqua-Land and Bodi and Bowland, would meet and say "All right we are going to construct the thing" and further agreed that instructions were given by this group. In my view, that conduct did not constitute an order of purchase by Aqua-Land any more than it did by Bodi or Bowland. It was simply a carrying out of the agreement contained in the said clause 5(6) of the agreement of April 29, 1957. The three were seeing that Accurate Machine & Tool Company Limited should "forthwith construct a Mark V Tower" and

were doing so on behalf of Marine Drilling Towers Limited. The same three, in accordance with clause 1 of the said agreement of April 29, 1957, had caused Marine Drilling Towers Limited to be incorporated and that corporation was therefore a legal entity with the powers granted by the charter at the time. To order the completion of the tower on behalf of Marine Drilling was merely the carrying out of the next and most important duty of the three parties to the agreement. It is true that no formal order in the name of Marine Drilling Towers Limited was ever given in writing nor was any by-law or even resolution ever enacted, but the three persons who had the sole control of that company acted in concert to see that this next and most important step of the company was taken in accordance with the agreement. It must be remembered that the regrettable failure to employ the usual corporate procedures would not have concerned Accurate Machine & Tool Company Limited. That company was controlled completely by Messrs. Bodi and Bowland who were parties to the agreement of April 29, 1957, and who would recognize that the "go-ahead order", no matter how informal, was the carrying out of clause 5(6) of that agreement and that in fact Marine Drilling, out of the mouths of those who had incorporated it and who alone controlled it, was ordering the completion of the tower.

Then when the payment of the $30,000 to Accurate Machine & Tool Company Limited is considered, we see an exact confirmation of this view of what occurred. A consideration of the evidence given by Mr. Paxton, the vice-president of Aqua-Land and Mr. Kirby its secretary, surely demonstrates that the cheque for that amount made out by Aqua-Land in favour of Accurate Machine & Tool Company Limited and delivered to the latter was simply a method of paying to the latter company of part of the price which, by the agreement of April 29, 1957, Marine Drilling was to pay for the construction of the tower. Aqua-Land, under the terms of that agreement, was to subscribe $39,200 for preference stock in Marine Drilling. By this cheque for $30,000, Aqua-Land was paying, or pre-paying, that much of its subscription. The balance of $9,200 was still owing on its subscription for shares in Marine Drilling and after such payment and the completion and delivery of the tower,

1965

GUARANTEE CO. OF NORTH AMERICA *et al.* *v.* AQUA-LAND EXPLORATION LTD.

Spence J.

Marine Drilling still owed $9,200 to Accurate Machine & Tool Company Limited. Again the proper method would have been to have Aqua-Land draw its cheque for $30,000 in favour of Marine Drilling and then Marine Drilling deliver its cheque for that amount to Accurate Machine & Tool Company Limited. However, Marine Drilling had only provisional directors and no bank account so the informal means were employed but the essential character of the payment was not altered.

This view of the circumstances would result in the respondent's only interest in the tower being that of a shareholder in Marine Drilling, or an investor entitled to have issued to it shares for which it has paid in part such payment having been used in part payment for the completion of the tower. It would appear upon the authorities analyzed by Mr. Justice Ritchie that such a result would not give to the respondent the direct relationship to the property in the tower to constitute an insurable interest.

Therefore, I would allow this appeal, set aside the judgment at trial and upon appeal to the Court of Appeal for Ontario and dismiss the action. The appellants will have their costs throughout.

Appeal allowed with costs, CARTWRIGHT *and* JUDSON JJ. *dissenting.*

Solicitors for the defendants, appellants: Smiley and Allingham, Toronto.

Solicitor for the plaintiff, respondent: J. J. Gray, Esq., Toronto.

1965

*Oct. 18, 19
Dec. 14

CITY OF PORTAGE LA PRAIRIE (*Defendant*) ..... APPELLANT;

AND

B.C. PEA GROWERS LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Nuisance—Seepage from city's sewage lagoon to plaintiff's farm land—Liability for damages—Charter of the City of Portage la Prairie, 1907 (Man.), c. 33, ss. 98, 99, 100—The Expropria-

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

tion Act, 1962 (Man.), c. 18, s. 28A—The Municipal Act, R.S.M. 1954, c. 173, s. 944.

The plaintiff was the owner of land, on which it operated a seed cleaning mill and a farm, which adjoined land owned by the defendant on which the defendant located and operated a sewage lagoon, erected in 1958, for the purpose of disposing of sewage from the City of Portage la Prairie. It was put into operation in the year 1959. The plaintiff claimed that during the fall of that year, in 1960, and in 1961 to the date of the statement of claim, "water" had seeped from it on to the plaintiff's land, causing damage to crop and the flooding of the pit in its mill, so that it could not be operated without extensive repairs. The judgment at trial in favour of the plaintiff granted an injunction restraining the defendant municipality from causing or permitting sewage, water, or effluent, or any part of these to escape from its sewage lagoon and to flow or pass into or upon the plaintiff's land, and also awarded damages and costs. The Court of Appeal unanimously affirmed the trial judgment and the municipality then appealed to this Court.

Held: The appeal should be dismissed.

The appellant, having created a nuisance which caused damage to the respondent, was liable therefor, because that which was complained of as a nuisance was not expressly or impliedly authorized by the statute (*Charter of the City of Portage la Prairie,* 1907 (Man.), c. 33) in accordance with which the lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated. Other statutory provisions relating to construction of sewage facilities, *i.e.* 1957 (Man.), cc. 86 and 87, added nothing to the powers which were given to the appellant under its charter. The same applied to the regulations made pursuant to *The Public Health Act,* R.S.M. 1954, c. 211.

Section 28A of *The Expropriation Act,* 1962 (Man.), c. 18, respecting compensation for land taken or injuriously affected, was not a bar to the respondent's action. That section did not provide any remedy to the respondent, because, in the light of the findings of fact made by the trial judge, it could not be said that damage to the respondent necessarily resulted from the exercise by the appellant of its power to construct a sewage system. Nor was there any intention on the part of the Legislature to deprive the respondent of those remedies available to it at common law in respect of the damage which it sustained. *District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.,* [1965] S.C.R. 377, distinguished.

The liability of the appellant for damages did not arise from negligence on the part of its engineers. Accordingly, s. 944 of *The Municipal Act,* R.S.M. 1954, c. 173, which provides a defence in respect of an engineer's negligence, was not applicable.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Nitikman J. Appeal dismissed.

G. T. Gregory, for the defendant, appellant.

J. K. Knox, for the plaintiff, respondent.

[1] (1965), 50 W.W.R. 415, 49 D.L.R. (2d) 91.

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

The judgment of the Court was delivered by

MARTLAND J.:—This appeal is from the unanimous judgment of the Court of Appeal for Manitoba[1], which affirmed the judgment at trial in favour of the plaintiff, which granted an injunction restraining the defendant from causing or permitting sewage, water, or effluent, or any part of these to escape from its sewage lagoon and to flow or pass into or upon the plaintiff's land, and also awarded damages and costs.

The respondent is the owner of land, on which it operates a seed cleaning mill and a farm, which lies immediately to the north of land owned by the appellant on which the appellant located and operated a sewage lagoon, erected in 1958, for the purpose of disposing of sewage from the City of Portage la Prairie. It was put into operation in the year 1959. The respondent claimed that during the fall of that year, in 1960, and in 1961 to the date of the statement of claim, "water" had seeped from it on to the respondent's land, causing damage to crop and the flooding of the pit in its mill, so that it could not be operated without extensive repairs. A claim was also made in respect of noxious odors emanating from the lagoon, but this aspect of the claim is no longer in issue.

After a careful review of the evidence, the learned trial judge reached the following conclusions:

I am convinced that there is seepage from the lagoon with the result that the escaping water flows into and onto the plaintiff's land and into the pit of the mill and basement of the farm buildings. In consequence thereof, the plaintiff's land has become overburdened and cannot be used for farming operations or, for that matter, any operation formerly carried on there by the plaintiff. Nor can the mill be used for the purpose for which it was intended, or was put to, prior to operation of the defendant's lagoon.

* * *

I find as a fact that the water-logging and overburdening is caused by, and is the result of, seepage from the defendant's sewage lagoon and that, insofar as the plaintiff is concerned, this constitutes a nuisance. It is an interference with the plaintiff's rights. I further find as a fact that by reason of the overburdening by water on the plaintiff's land, the plaintiff was unable to farm it for the period from 1961 onward and that, in addition, due to water in the mill pit, operation of the mill could not be carried on for part of 1960, and from 1962 onward.

[1] (1965), 50 W.W.R. 415, 49 D.L.R. (2d) 91.

Dealing with the question as to whether the escape or seepage of the effluent was necessarily incidental to the operation by the appellant of the sewage lagoon, he found as follows:

I cannot under any circumstances conceive seepage to be incidental to the operation of a lagoon. As stated earlier, the purpose of a lagoon is to contain the effluent, not permit it to escape.

Nor has the defendant satisfied me that seepage is the inevitable result of lagoon construction or operation and cannot be prevented by the employment of proper means. The defendant has not only failed to establish that it has used reasonable diligence or taken all reasonable steps and precautions to prevent leakage from the lagoon with its resulting nuisance, but to my mind quite the contrary is the case.

The conclusions of the learned trial judge were upheld by the Court of Appeal.

On the appeal to this Court the argument of counsel for the appellant was in respect of two submissions of law:

1. That the appellant was under a statutory mandate to erect and maintain the work in question, and that it was required to do what it did, in the fashion which it did, by such mandate.
2. That s. 944 of *The Municipal Act*, R.S.M. 1954, c. 173, provided a complete defence to the action.

In determining the first question, it is necessary to consider the statutory provisions upon which the appellant relies. These are ss. 98, 99 and 100 of the *Charter of the City of Portage la Prairie*, 1907 (Man.), c. 33, which provide as follows:

98. The city may and shall have power to install, design, contract, build, purchase, improve, hold and generally maintain, manage, operate and conduct a system of waterworks and sewerage, and all main pipes, buildings, matters, machinery and appliances therewith connected or necessary thereto, in the City of Portage la Prairie, and parts adjacent as hereinafter provided.

99. The city shall have all the powers necessary to enable it to build the waterworks and sewers hereinafter mentioned, and to improve, secure, maintain and enlarge any of said works from time to time as to the said city may seem meet, and to carry out all and every the other powers conferred upon it by this Act.

100. It shall be the duty of the council of said city to examine, consider and decide upon all matters relative to supplying the said City of Portage la Prairie, by the means contemplated by this Act, with a sufficient quantity of pure and wholesome water for the use of its inhabitants, and also to provide, build or construct the necessary waterworks, sewers, buildings, machinery and other appliances requisite for the said object.

Section 98 gives to the city the power to install, maintain and operate a system of waterworks and sewerage in the

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

Martland J.

city and parts adjacent. The lagoon in question was in a part adjacent.

Section 99 confers on the city all powers necessary to enable it to build the waterworks and sewers mentioned in the subsequent sections of the Act and to improve, maintain and enlarge them from time to time.

Section 100 relates not to the city, but to the city council, upon which is imposed the duty to decide upon matters relating to supplying the city with a sufficient quantity of pure and wholesome water, *i.e.*, to formulate the plans necessary for that purpose, and also to carry them out by providing, building or constructing the necessary waterworks, sewers, etc., requisite for that object.

The combined effect of these sections, in relation to the circumstances of this case, is that the appellant was granted the power to build and maintain a sewerage system, with a duty imposed upon its council to devise the necessary plans for the object of providing a water supply and to carry them out, including the provision of sewers. There was no direction to adopt any particular method of sewage disposal. The appellant was given the power to construct a sewage lagoon but it was not subject to a specific mandate to do so irrespective of whether a nuisance was thereby created or not. There is nothing in the City Charter expressly providing that it was to be exempted from its common law liability for maintaining a nuisance if, in fact, a nuisance did result. Nor is this a case in which the appellant can contend successfully that the creation of a nuisance was an inevitable consequence of the exercise of its statutory powers and that, in consequence, the statute would provide a defence to a claim in respect of it. The learned trial judge has made a specific finding to the contrary.

In addition to the provisions, previously quoted, contained in the *Charter of the City of Portage la Prairie,* some reliance was placed on other statutory provisions. Counsel referred to the two special Acts, Chapters 86 and 87 of the Statutes of Manitoba 1957. These statutes ratified, confirmed and made binding on the appellant by-laws authorizing it to enter into an agreement with Campbell Soup Company Limited, and to borrow money, without a vote of the ratepayers for the construction of sewage facilities necessitated by that agreement. In my

opinion they do not assist the appellant's submission on this point. They do not add anything to the powers which were given to the appellant under its charter.

The same applies to the regulations made pursuant to *The Public Health Act*, R.S.M. 1954, c. 211. In brief, these regulations require a municipality contemplating the construction of a sewage disposal or treatment system to submit plans, specifications and other material to the Minister, and prohibit such construction without his certificate that such construction may be carried out. These provisions do not add to the appellant's statutory powers, but make their exercise conditional upon this required procedure being followed. Nor are the appellant's powers enlarged by the provision which enables the Minister to authorize the construction by one municipality of sewage disposal works in another municipality.

Some reliance was placed upon the decision of this Court in *District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.*[1]. Reference was made to the statutory provision contained in s. 28A of *The Expropriation Act*, enacted by c. 18, Statutes of Manitoba 1962, which replaced s. 398 of *The Municipal Act*, R.S.M. 1954, c. 173. It reads as follows:

> 28A. A municipal corporation shall make to the owners of, or other persons interested in, land entered upon, taken, or used by it in the exercise of any of its powers, or injuriously affected thereby, due compensation for the land so entered upon, taken, or used, and for any damages necessarily resulting from the exercise of those powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, or if no other provision is made for determining the compensation, shall be determined by arbitration as herein provided.

The wording of this section is similar to, but not identical with, that of the first portion of s. 478(1) of the *Municipal Act*, R.S. B.C. 1960, c. 255, which was referred to in that case.

Section 398 of *The Municipal Act* of Manitoba was repealed on August 4, 1959, and an entirely different section was substituted for it. It reappeared, as a part of *The Expropriation Act*, by an amendment to that Act enacted on March 30, 1962, and was then given retroactive effect to August 4, 1959. The provision did not exist at the time the

[1] [1965] S.C.R. 377, 49 D.L.R. (2d) 710, 51 W.W.R. 193.

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

Martland J.

respondent suffered the damage complained of in the statement of claim, nor at the time the statement of claim was issued.

The essential difference between the British Columbia case and the present one was the existence in the British Columbia statute of s. 529, which provided that:

> No action arising out of, or by reason of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch authorized by section 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any district municipality.

The decision in the *District of North Vancouver* case was that, in the light of that provision, a person who sustained damage as a result of the construction, maintenance, operation or user of a drain or ditch authorized by s. 527 could only make such claim for compensation as might be available to him under the provisions of s. 478(1). There is no statutory provision similar to s. 529 in any Manitoba statute to which we were referred.

I do not regard s. 28A of *The Expropriation Act* of Manitoba as constituting a bar to the bringing of an action for damages by the respondent in the circumstances of the present case. That section did not provide any remedy to the respondent, because, in the light of the findings of fact made by the learned trial judge, it could not be said that damage to the respondent necessarily resulted from the exercise by the appellant of its power to construct a sewage disposal system. Nor do I find in this section, or in the other statutory provisions cited to us, any intention on the part of the Legislature to deprive the respondent of those remedies available to it at common law in respect of the damage which it sustained.

My conclusion, in respect of the first point raised by the appellant, is that the appellant, having created a nuisance which caused damage to the respondent, is liable therefor, because that which is complained of as a nuisance was not expressly or impliedly authorized by the statute in accordance with which the lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated.

The next point raised is that a complete defence to the action is to be found in the provisions of s. 944 of *The Municipal Act*, which provides:

944. Where a municipal corporation constructs any public work under the supervision of a civil engineer, a Manitoba land surveyor, or some other person competent to perform the work, if the work is carried out in accordance with the plans and specifications and in good faith, the corporation is not liable for damages arising from any negligence on the part of the engineer, surveyor, or other person entrusted with the supervision of the work.

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

Martland J.

The learned trial judge made a specific finding that there was no evidence of such negligence in this case and, in consequence, held that the section had no application. The reasons delivered in the Court of Appeal confirm this view and point out that the appellant's liability in this case is founded, not on negligence, but on nuisance.

The appellant's submission before us was that a nuisance could not have arisen unless the appellant's engineers had been negligent, and that, since s. 944 provides a defence in respect of an engineer's negligence, the action fails for that reason.

I do not agree with this reasoning. It was not necessary, in order to fix the appellant with liability for the creation of a nuisance, for the respondent to establish negligence on the part of the appellant or of its engineers in the construction of the lagoon. The learned trial judge has found that there was no negligence on the part of the engineers. The position is that a nuisance was created, even though the engineers were not negligent, which was not expressly or impliedly authorized by the statutory powers which permitted its construction, and that is sufficient to make the appellant liable. In these circumstances s. 944 can have no application. The liability of the appellant for damages, in this case, does not arise from negligence on the part of the engineers.

For the foregoing reasons, in my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Swift, Macleod, Deacon, Kirby & Gregory, Winnipeg.

Solicitors for the plaintiff, respondent: Tupper, Adams & Co., Winnipeg.

1965

*Oct. 20, 21
Dec. 14

ADELAIDE MOTORS LIMITED (*Plaintiff*) ..... APPELLANT;

AND

JAMES BYRNE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND (ON APPEAL)

Guarantee—Cars purchased by taxi company—Promissory note—Defendant's personal guarantee of payment—Company's indebtedness increased by subsequent transaction—New promissory note signed—Refusal to increase guarantee—Defendant's liability.

The defendant, who along with another person formed a taxi company, negotiated the purchase of nine used cars from the plaintiff for a purchase price of $19,382.40. The taxi company gave a promissory note to the plaintiff for the amount of the purchase price and the defendant gave his personal guarantee of payment. The plaintiff discounted the note with the Bank of Nova Scotia and the latter informed the parties that the limit of its lending on this account would be $20,000.

After having made four payments of $1,000 each to the bank, the taxi company purchased five new cars from the plaintiff for a total sum of $13,672.50. It traded in five of its fleet of used cars and received a credit of $7,982.50, leaving a balance owing on the deal of $5,690. As part of the same deal the taxi company paid direct to the plaintiff the sum of $1,000, so that the amount of indebtedness would not exceed the $20,000 limit set by the bank. A new note was signed for $19,855.60, which, in turn, was discounted with the bank. The defendant, however, refused to extend his liability on the guarantee to cover the new indebtedness. The taxi company made further payments to the bank amounting to $4,000.

Subsequently, the taxi business failed and some months thereafter the bank charged back to the plaintiff the amount of the note which was then outstanding. The plaintiff, at the defendant's request, had taken possession of the cars and those that could be repaired were sold. The plaintiff later sued the defendant on his guarantee. The amount allowed by the trial judge was varied on appeal, and an appeal by the plaintiff was then brought to this Court.

Held: The appeal should be allowed.

The plaintiff was entitled to judgment for the balance remaining of the original indebtedness of $19,382.40 less the principal payments of $8,000 and less the sum of $200 which was realized on the four original cars. It was also entitled to interest at the contractual rate on the diminishing sum after giving credit for these payments.

The $1,000 paid on the new deal was not a payment on the guaranteed indebtedness. Nor could the total proceeds from the sale of the cars be applied on that indebtedness. The defendant was only entitled to be subrogated to the security on the four original cars. As guarantor he had no interest in the five new cars purchased in the second

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

transaction. Also, the defendant's contention that non-compliance with *The Conditional Sales Act*, 1955 (Nfld.), c. 62, excused the taxi company entirely from the whole indebtedness failed. The plaintiff did not repossess under the terms of its conditional sales contracts; on the contrary, there was a voluntary surrender of the cars and the plaintiff was instructed to make the best of the situation.

The defendant also failed in his submission that when the new note was signed, the indebtedness represented by the old note or the balance owing on the old note disappeared. The reduced sum owing at the time of the new purchase was incorporated in the new note, but the defendant's liability as guarantor was limited to the reduced sum only.

APPEAL from a judgment of the Supreme Court of Newfoundland (On Appeal)[1], varying a judgment of Dunfield J. in an action on a guarantee. Appeal allowed.

B. A. Crane, for the plaintiff, appellant.

G. J. Gorman, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Adelaide Motors Limited sued James Byrne on a guarantee which he had given to that company for the indebtedness of A.B.C. Taxi Cabs Limited. The company obtained a judgment at trial which, on the reference directed, would have resulted in an assessment of $15,519.89. On appeal[1] judgment was given for $2,399.90. The Appellate Court took a different view from the trial judge concerning the application of certain payments made on account of the taxi cab company's indebtedness. This makes necessary a review of the dealings among the three parties.

Early in 1958, Byrne, along with one other person, incorporated A.B.C. Taxi Cabs Limited. He intended to go into the taxi business and he negotiated the purchase of nine used cars from Adelaide Motors for a purchase price of $19,382.40. These were sold under conditional sales contracts and, in addition, Byrne gave his personal guarantee of payment in the following terms:

St. John's Nfld.
June 30th, 1958.

Adelaide Motors Ltd.,
St. John's Nfld.
Dear Sirs,

This is to advise you that in view of the accommodation which you arranged through the Bank of Nova Scotia for $19,382.40 on behalf of the A.B.C. Cabs Ltd., I give you my personal guarantee that I will see that this indebtedness is paid off according to the arrangements made and that your interests are protected at all times.

(sgd) James E. Byrne

[1] (1964), 49 M.P.R. 197.

1965

ADELAIDE MOTORS LTD. v. BYRNE

Judson J.

"The arrangements made" referred to in the guarantee were that monthly instalments of $1,000 each would be paid in accordance with the terms of the conditional sales contract.

When the cars were purchased the taxi cab company had given a promissory note to Adelaide Motors for the purchase price of $19,382.40. Adelaide Motors had discounted this note with the Bank of Nova Scotia and the bank had informed the parties that the limit of its lending on this account would be $20,000. In August, September, October and November of 1958 the taxi company paid to the bank four payments of $1,000 each. There is no question that these payments must be applied on the $19,382.40, the guaranteed indebtedness, in reduction of Byrne's liability under the guarantee.

In December 1958, the taxi cab company purchased five new cars from Adelaide Motors for a total sum of $13,672.50. It traded in five of its fleet of used cars and received a credit of $7,982.50, leaving a balance owing on the deal of $5,690. With $15,000 plus interest still outstanding on the original purchase, if this sum of $5,690 had been added to the outstanding indebtedness any consolidated new note taken would have been over the $20,000 limit set by the bank. Therefore, as part of the same deal, the taxi cab company paid direct to Adelaide Motors the sum of $1,000. Byrne now says that this $1,000 should be credited on the guaranteed indebtedness. When these new cars were purchased Byrne had refused to extend his liability on the guarantee to cover this new indebtedness. The $1,000 cash paid on the new deal is in the same position as the credit of $7,982.50. It was not a payment on the guaranteed indebtedness any more than the $7,982.50 credit for the old cars which were traded in. Both the credit and the $1,000 cash payment were part and parcel of the purchase of the new cars. Up to this point, therefore, Byrne is entitled only to a credit of $4,000 on the original guaranteed indebtedness of $19,382.40.

In 1959, the taxi cab company paid to the bank in February, March and April three payments of $1,000 each, and in August and September two payments of $500 each. These payments were made in accordance with the terms of the guarantee and the surety is entitled to have these

credited on the original amount. Therefore, the total principal payments on the original note of $19,382.40 amount to $8,000, and Byrne, as guarantor, is entitled to these credits. From the date of each payment interest runs on a diminishing sum which will have to be calculated.

The taxi cab company did not prosper and its cars deteriorated rapidly. After September 1959 no further payments were made on account of its liabilities to Adelaide Motors and it went out of business in October or November. In May of 1960 the bank charged back to Adelaide Motors the amount of the note which was then outstanding. This note, of course, included not only the original indebtedness but the $4,690 by which the original indebtedness had been increased as a result of the purchase of the new cars in December of 1958 and for which Byrne was not liable on his guarantee.

After the failure of the taxi cab company, at Byrne's request Adelaide Motors took possession of the cabs. Again at the suggestion of Byrne, those cars that could be repaired were sold and the proceeds amounted to $1,713.32. Byrne is claiming this sum to be applied on the guaranteed indebtedness. He is in error in this submission. He was only entitled to be subrogated to the security on the four original cars that were left. As guarantor he had no interest in the five new cars purchased in December 1958. He had not increased his guarantee to cover this purchase. He also says that non-compliance with *The Conditional Sales Act*, 1955 (Nfld.), c. 62, excuses the taxi cab company entirely from the whole indebtedness but the evidence shows that Adelaide Motors did not repossess under the terms of its conditional sales contracts; that, on the contrary, there was a voluntary surrender of these cars and that Adelaide was instructed to make the best of the situation. They did repair the cars and sold them privately. It was agreed by counsel that the four original cars in which Byrne was interested as guarantor realized approximately $50 each. Byrne is entitled to a further credit on the guaranteed indebtedness of $200.

Byrne also urged that when the new cars were purchased and a new note was signed for $19,855.60, the indebtedness represented by the old note or the balance owing on the old note disappeared. Again, this is incorrect. What Byrne guaranteed was a specific indebtedness of $19,382.40. This

1965
ADELAIDE MOTORS LTD. v. BYRNE
Judson J.

indebtedness was not paid off. The reduced sum owing at the time of the new purchase in December 1958 was incorporated in a new note which, in turn, was discounted with the bank. But the liability of Byrne as guarantor was limited to only the reduced sum owing. The offsetting entry in the books kept by Adelaide Motors was in no sense a payment in full of the old indebtedness which discharged Byrne's liability under his guarantee.

I would allow the appeal with costs of the trial and the appeal to this Court. There should be no order for costs on the first appeal. Adelaide Motors is entitled to judgment for the balance remaining of the original indebtedness of $19,382.40 less the payments of $8,000 above referred to and less the sum of $200 realized on the sale of the four cars. It is also entitled to interest at the contractual rate on the diminishing sum after giving credit for these payments.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: P. D. Lewis, St. John's.

Solicitor for the defendant, respondent: N. S. Noel, St. John's.

1965
*Dec. 2, 3
1966
Jan. 25

BORIS T. PARKINSON and RUPERT A. PARKINSON (*Defendants*) ..... APPELLANTS;

AND

CHARLES R. REID (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Easements—Grant of right of way over stairway—Covenant by servient owners to maintain and repair—Building including stairway taken down by subsequent owners following fire—Action for injunction to compel restoration of stairway and for damages dismissed.

The defendants were the owners of a lot which adjoined a lot owned by the plaintiff. In 1926 the predecessors in title of the defendants entered into an agreement under seal with the predecessor in title of the plaintiff with respect to a stairway that the former were constructing on their premises. The stairway was to lead to the second floor of their building and it was agreed that it should also lead to the second floor of the building on the adjacent lot. The parties of the first part, the defendants' predecessors in title, granted to the party of the second

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

part, the plaintiff's predecessor in title, "the free and uninterrupted use and right of way to use the said stairway... in common with the said parties of the first part at all times without any let, molestation or hindrance from the said parties of the first part, their heirs, executors, administrators and assigns". The parties of the first part also entered into a specific covenant to repair and to reconstruct in case of partial or total destruction of the stairway. On March 18, 1961, the defendants' building was badly damaged by fire, and, subsequently, the building including the stairway was taken down, for which the defendants accepted responsibility. In an action for an injunction to compel the restoration of the stairway and for damages, judgment was rendered in favour of the plaintiff. On appeal, the trial judgment was affirmed by the Court of Appeal, subject to a variation as to the amount of damages. Pursuant to leave granted by this Court, the defendants appealed from the judgment of the Court of Appeal.

Held (Spence J. dissenting): The appeal should be allowed.

Per Cartwright, Martland, Judson and Ritchie JJ.: As held by the Court of Appeal, there was no privity of contract between the plaintiff and the defendants, there was no privity of estate between them, and the covenant to repair and reconstruct the stairway did not run with the land.

The principle referred to by the Court below in dismissing the appeal, *i.e.*, "the covenant to repair, which extends to the support of the thing demised, is *quodammodo* appurtenant to it, and goes with it", did not assist the plaintiff; the cases from which it is induced deal with leases or life tenancies where there is privity of estate. An obligation on the owner of the servient tenement to perform work on it would be inconsistent with the nature of an easement which as regards the servient owner is always negative, the obligation on him being either to suffer or not to do something.

Neither *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, nor *Rider v. Smith* (1790), 3 T. R. 766 (which cases are usually cited as authority for the proposition that the owner of the dominant tenement may, under the doctrine of prescription, claim to have the way repaired by the servient owner) established that a covenant contained in a grant of a right of way that the grantor will keep the way in repair was enforceable against a successor in ownership of the servient tenement. In the case at bar, the parties of the first part to the agreement were bound by their express covenant to keep the stairway in repair but the burden of that covenant did not run with the land so as to bind subsequent owners.

Assuming that so long as the defendants made use of the westerly wall on the plaintiff's lot as a party-wall, as was provided for in earlier agreements, they were bound to keep the stairway in repair, they ceased to be under any such obligation when they no longer made use of that wall. *Halsall v. Brizell*, [1957] Ch. 169, referred to.

Per Spence J., *dissenting*: The stairway was passable after the fire and the plaintiff could have continued to enjoy his right of way. It was, however, necessary to the defendants for the proper enjoyment of their property that the burned-out building be torn down; this tearing down entailed the destruction of the stairway and, therefore, the effective denial to the plaintiff of his right of way. The grant of the right of way and the covenant not to interfere with the right of way which such grant implied ran with the land and the plaintiff was entitled to

1966

PARKINSON *et al.* *v.* REID

the benefit, and the burden fell upon the defendants as successors in title to the original grantor. The defendants, by their action, terminated the right of way and the plaintiff was entitled to damages for that breach of his right of way.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming, subject to a variation as to the amount of damages, a judgment of Grant Co.Ct.J. Appeal allowed. SPENCE J. dissenting.

William Gray Dingwall, for the defendants, appellants.

W. B. Williston, Q.C., and *John Sopinka,* for the plaintiff, respondent.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] affirming, subject to a variation as to the amount of damages, a judgment of His Honour Judge Grant pronounced in the County Court of the County of Dufferin. That judgment as varied by the Court of Appeal reads, so far as relevant, as follows:

1. THIS COURT DOTH ORDER AND ADJUDGE that the Defendants do forthwith restore the stairway referred to in the pleadings in such manner that the same can be used in the manner described in the agreement registered in the Registry Office for the Registry Division of the County of Dufferin on the seventeenth day of March, 1926, as number 12360 for the Town of Orangeville; AND DOTH AWARD the Plaintiff a mandatory injunction for the restoration of such stairway as aforesaid.

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Plaintiff do recover against the said Defendants the sum of Seven Hundred and Ninety-five dollars ($795.00) for special damages.

The appellants are the owners of lot 28 on the north side of Broadway Street in the Town of Orangeville according to plan number 47. The respondent is the owner of lot 29 on the same plan. These are adjoining lots, 28 being to the west of 29.

On January 8, 1926, Alexander B. Holmes and Frank J. Crowe, who were then the owners of lot 28 entered into an agreement under seal with John E. Sanderson who was then the owner of lot 29. Holmes and Crowe were the parties of the first part and Sanderson was the party of the second part. This agreement was registered on March 17, 1926, as number 12360; it recites the ownership of lots 28 and 29 and continues:

[1] [1965] 1 O.R. 117, 47 D.L.R. (2d) 28.

1966

PARKINSON *et al.* *v.* REID

Cartwright J.

AND WHEREAS the parties of the First Part are constructing a stairway to the second story of the building now on their said lands, the said stairway leading up to the second story from the north side of Broadway Street in the said Town of Orangeville immediately and adjacent to the westerly wall belonging to the said party of the Second Part and the said party of the Second Part, his respective heirs, executors, administrators and assigns are to have rights in common with the said parties of the First Part, their respective heirs, executors, administrators and assigns in the use of the said stairway, the said stairway shall also lead up to the second story of the building erected on the lands owned by the said party of the Second Part and along the westerly surface of the westerly wall of the said building now erected on the said lands owned by the said party of the Second Part.

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the premises and the sum of One Hundred and Seventy-five Dollars now paid by the said party of the Second Part to the said parties of the First Part (the receipt whereof is hereby acknowledged) they the said parties of the First Part do hereby grant unto the said party of the Second Part, his respective heirs, executors, administrators and assigns on the said lands of the parties hereto of the First Part the free and uninterrupted use and right of way to use the said stairway herein described in common with the said parties of the First Part at all times without any let, molestation or hindrance from the said parties of the First Part, their heirs, executors, administrators and assigns.

The parties of the First Part covenant and agree with the party of the Second Part as follows:

The said stairway shall be constructed by the parties of the First Part and ready for use on or before the first day of March, A.D. 1926 and the said parties of the First Part agree with the said party of the Second Part to construct the said stairway in a good workmanlike manner using material which shall be proper, fit and adapted for the traffic required up and down the said stairway by either of the parties hereto. The said stairway shall be three (3) feet six (6) inches wide and completely built for the traffic required for same from the sidewalk up and leading into the door of the second story of the building erected on the said lands of the said party of the Second Part, and there shall be a suitable landing at the head of the said stairway for entrance into the second story of the said building erected on the said lands of the said party of the Second Part.

The said parties of the First Part covenant and agree with the said party of the Second Part that they shall keep the said stairway in good repair and re-construct the same in the event of partial or total destruction thereof so as it can be used safely for traffic up and down the said stairway by the said party of the Second Part.

AND it is agreed that the covenants herein contained shall run with the lands, but no covenant herein contained shall be personally binding on any person except in respect of breaches during his or their seisin or title to the said lands.

It is common ground that the stairway was constructed in accordance with the agreement and that the $175 was paid.

By deed dated December 29, 1936, Sanderson conveyed lot 29 to the respondent in fee simple,

together with all rights of the grantor as set out in Instrument 12360 for the said Town of Orangeville and covering a portion of lot 28 plan 47 aforesaid.

1966

PARKINSON *et al.* *v.* REID

Cartwright J.

By deed dated April 1, 1946, Alexander B. Holmes and Margaret Elizabeth Crowe, the devisee of Frank J. Crowe, conveyed lot 28 to Telford Sinclair Parkinson in fee simple,

> together with all the rights and privileges and subject to the obligations contained in the agreements registered as numbers 5294, 5330, 6134, 6518 and 12360 respectively.

Telford Sinclair Parkinson died on October 9, 1957, and lot 28 devolved upon the appellants under the terms of his will.

On March 18, 1961, the building on lot 28 was badly damaged by fire. Mr. Kyles, an architect, testified that he recommended that the building be taken down. His evidence reads in part:

> Q. In your opinion, would it have been safe to leave the stairway as it existed after the fire?
>
> A. Well, you could not leave the stairway or the building. We recommended that the entire building be taken down. You could re-erect it with new supports. You couldn't leave the stairway. You could take it down and re-erect it with new supports, but you couldn't leave it. You couldn't remove the rest of the building and leave it there.

This evidence was not weakened on cross-examination and was not contradicted. The building including the stairway was taken down and counsel for the appellants stated at the opening of his argument that the appellants accept the responsibility for doing this.

It is clear, however, that the cause of the stairway being no longer available for the use of the respondent was the destruction by fire of the appellants' building of which the stairway formed part.

The statement of claim sets out the ownership of lots 28 and 29, the chain of title, the agreement number 12360, the removal of the stairway in March 1961, requests by the plaintiff that the defendants replace the stairway, their neglect and refusal to do so and concludes with a prayer for a mandatory injunction and damages.

The statement of defence says that the building of which the stairway was a part was destroyed by fire and continues:

> The defendants further say, as the fact is, that there is no privity of contract between the plaintiff and the defendants, and that the defendants are under no obligation in law to replace the said stairway which was destroyed by fire.

There is no dispute as to the relevant facts. The question to be decided is one of law.

The reasons for judgment of the Court of Appeal were delivered by Kelly J.A. After reciting the facts he held, (i) that there was no privity of contract between the plaintiff and the defendants, (ii) that there was no privity of estate between them and, (iii) that the covenant to repair and reconstruct the stairway did not run with the land. I agree with the views of the learned Justice of Appeal on these three points. They do not require elaboration. As to the third point the law is accurately and succinctly stated in Gale on Easements, 12th ed. at p. 77 as follows:

> The rule in *Tulk v. Moxhay* does not extend to affirmative covenants requiring the expenditure of money or the doing of some act. Such covenants do not run with the land either at law or in equity. The doctrine only applies to covenants which are negative in substance though they may be positive in form.

However, Kelly J.A. went on to hold the plaintiff entitled to succeed on three grounds.

The first of these was that the easement created by instrument 12360 was not a mere right of passage over a portion of the surface of the servient tenement but was a right to pass over a structure the terminus of which was at the level of the second story of the building on the dominant tenement, that the easement would be incapable of enjoyment unless the stairway was maintained in a safe state of repair and that the provision for its repair was an inherent part of the easement. Having said this the learned Justice of Appeal quoted from Broom's Legal Maxims, 10th ed., p. 482, as follows:

> . . .the covenant to repair, which extends to the support of the thing demised, is quodammodo appurtenant to it, and goes with it; . . .

With respect, I do not think that the principle stated in this quotation assists the respondent; the cases from which it is induced deal with leases or life tenancies where there is privity of estate. An obligation on the owner of the servient tenement to perform work on it would be inconsistent with the nature of an easement which as regards the servient owner is always negative, the obligation on him being either to suffer or not to do something. (*vide* Jowitt, Dictionary of English Law, vol. 1, p. 690).

1966

PARKINSON *et al.* v. REID

Cartwright J.

The second ground was based on the cases of *Pomfret v. Ricroft*[1] and *Rider v. Smith*[2]. These cases are usually cited as authority for the proposition that the owner of the dominant tenement may, under the doctrine of prescription, claim to have the way repaired by the servient owner, but I do not read either of them as establishing that a covenant contained in a grant of a right of way that the grantor will keep the way in repair is enforceable against a successor in ownership of the servient tenement. No case in which it was actually so decided was cited to us.

Both *Pomfret v. Ricroft* and *Rider v. Smith* are cited in the foot-notes to the following passage in Halsbury's Laws of England, 3rd ed., vol. 12, p. 579, para. 1256:

> As a general rule the owner of the servient tenement is under no liability to repair the way over which a right of way has been granted, for such a liability is not a condition incident by law to the grant of a right of way; nor is it even a legal obligation incumbent on the grantee. The person entitled to the use of the way must do such repairs as he requires, and has a right of entry upon the servient tenement for that purpose.

In the case at bar, no doubt, the parties of the first part in instrument 12360 were bound by their express covenant to keep the stairway in repair but I have already expressed my view that the burden of that covenant which is the basis of the respondent's claim did not run with the land so as to bind subsequent owners of lot 28.

The third ground was based on the maxim, *Qui sentit commodum sentire debet et onus*. It was said that as the appellants' predecessor in title, Telford Sinclair Parkinson, and the appellants themselves, had enjoyed the privileges contained in the agreements registered as numbers 5294, 5330, 6134, and 6518 referred to in the deed dated April 1, 1946, in part recited above, they could not refuse to perform the obligations contained in the agreement 12360. The first four mentioned agreements were not put in evidence but counsel for the appellants, for the purposes of this appeal, was willing to admit that they conferred on the owners of lot 28 the right to use the westerly wall on lot 29 as a party-wall.

Assuming that so long as the appellants made use of the last-mentioned wall as a party-wall they were bound to keep the stairway in repair, they ceased to be under any

[1] (1669), 1 Wms. Saund. 321, 85 E.R. 454.
[2] (1790), 3 T.R. 766, 100 E.R. 848.

1966

PARKINSON *et al.* v. REID

Cartwright J.

such obligation when they no longer made use of the respondent's wall. It is not suggested that the appellants have made any use of that wall since their building was destroyed by fire. A case in which this principle was applied is *Halsall v. Brizell*[1] which was discussed in the reasons of Kelly J.A.

For the above reasons I am of opinion that since the time when the building on lot 28 was destroyed the appellants have been under no obligation enforceable at law or in equity to replace the stairway.

I would allow the appeal, with costs throughout, including the costs of the motion for leave to appeal, set aside the judgments in the Court of Appeal and at the trial and direct that judgment be entered dismissing the action; the respondent will recover from the appellants the costs of the motion to quash the appeal.

SPENCE J. (*dissenting*):—I have had the privilege of reading the reasons of my brother Cartwright. I agree with the conclusions of law outlined therein but on the peculiar circumstances present in this case I have come to a different result.

Firstly, it must be noted that by Instrument No. 12360 the parties of the first part, the predecessors in title of the appellants here, granted unto the party of the second part, the predecessor in title of the respondent here, "the free and uninterrupted use and right of way to use the said stairway herein described in common with the said parties of the first part at all times without any let, molestation or hindrance from the said parties of the first part, their heirs, executors, administrators and assigns". It is also true that the parties of the first part entered into a specific covenant to repair and to reconstruct in case of partial or total destruction of the stairway. I shall concern myself with the grant of the right of way alone as, for the purposes of these reasons, the covenant to maintain and repair may be ignored.

According to the evidence of the plaintiff, here respondent, a fire occurred in the premises of the appellants on March 18, 1961. That fire seems to have been fiercest on the west side of the property, *i.e.*, the side farthest away from

[1] [1957] Ch. 169.

1966

PARKINSON *et al.* v. REID

Spence J.

the property owned by the plaintiff, here respondent. The plaintiff swore that from the day of the fire until the defendants commenced to wreck the building on April 27, 1961, his tenant continued to use the stairway, which is the subject-matter of this action, for the purpose of gaining access to the apartment on the second floor.

John Douglas Kyles, the architect employed by the defendants to advise them, was asked in direct examination:

Q. You could get up the stairs?

A. The east stairs. I don't know whether you could get in the west stairs . . .

He further testified that at the time he considered the building should be entirely torn down as the damage extended into every part of the building and that there was nothing he could see that could be saved. He further testified:

A. Well, you could not leave the stairway or the building. We recommended that the entire building be taken down. You could re-erect it with new supports. You couldn't leave the stairway. You could take it down and re-erect it with new supports, but you couldn't leave it. You couldn't remove the rest of the building and leave it there.

John Knox Henry, called by the defendant, was the contractor who had wrecked the defendants' building. When he was asked in direct examination if he had looked at the stairway at all, his answer was:

A. Where the stairway was, there wasn't any fire there. That was next to Mr. Reid's, the brick wall where you entered the stairway where the danger was.

Q. What about the entrance to the stairway?

A. It was quite dangerous.

The situation would appear therefore to be that this stairway was passable after the fire and that the plaintiff, here respondent, could have continued to enjoy his right of way. It was, however, necessary to the defendants for the proper enjoyment of their property that the burned-out building be torn down and this tearing down entailed the destruction of the stairway and, therefore, the effective denial to the plaintiff of his right of way. The grant of the right of way and the covenant not to interfere with the right of way which such grant implies do, of course, run with the land and the plaintiff, here respondent, was entitled to the benefit, and the burden fell upon the appellants as successors in title to the original grantor. The appellants,

1966

PARKINSON *et al.* v. REID

Spence J.

by their action, terminated the right of way and the plaintiff is entitled to damages for that breach of his right of way.

I cannot understand that the fact that the appellants had to destroy that stairway in order to properly utilize their own lands would provide any excuse: *Thorpe v. Brumfitt*[1]; *Kain v. Norfolk*[2].

In the Court of Appeal, the appeal of the present appellants was dismissed with costs. The formal judgment of that Court varied para. 2 of the judgment of Grant Co.Ct.J. to provide that the damages should be $795 although by the judgment of the County Court Judge such damages had been fixed at $570 for special damages and $1,200 for general damages. The reason for this variation does not appear in the record. It might well be that the Court of Appeal has felt that the sum awarded in its formal judgment compensates for the damages which the plaintiff suffered from interference with his right of way.

I would dismiss the appeal with costs.

Appeal allowed with costs, SPENCE J. *dissenting.*

Solicitors for the defendants, appellants: Willis, Dingwall & Newell, Toronto.

Solicitors for the plaintiff, respondent: Church & Church, Orangeville.

E. W. O'BRIEN (*Plaintiff*) .....APPELLANT;

AND

ERNEST MAILHOT (*Defendant*) .....RESPONDENT.

1965

*Nov. 1, 2
Dec. 14

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

Motor vehicles—Intersection—Constable—Signal to change direction of traffic—Infant pedestrian struck by car while crossing street—Standard of care—Whether presumption rebutted—Aggravation of damages—Motor Vehicle Act, R.S.Q. 1941, c. 142, s. 53.

The plaintiff's minor son was injured when struck by a car driven by the defendant. The victim, who was coming out of school at the same time as other pupils, attempted to cross a street from west to east after the

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

[1] (1873), 8 Ch. App. 650.

[2] [1949] 1 All E.R. 176 at 183-4.

1965

O'BRIEN v. MAILHOT

southbound traffic had been given the signal to advance by a constable on duty at the intersetion. A southbound bus was parked close to the west sidewalk, at a short distance from the intersection. The defendant had stopped his car with its front about even with the rear of the bus. The victim had to pass in front of the bus. When the front of the automobile was about in line with the front of the bus, the defendant saw the victim for the first time and, although he applied his brakes immediately, he could not avoid hitting him. It was further alleged against the defendant that he aggravated the victim's damages by permitting him, while driving him home after the accident, to walk, at the boy's own suggestion, the last part of the way to his home. The trial judge dismissed the action. This judgment was affirmed by a majority decision in the Court of Appeal. The plaintiff appealed to this Court.

Held (Hall J. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Ritchie and Spence JJ.: The question in such cases was whether the driver fell short of the standard of care that would be expected of a reasonable man under the circumstances. A driver might escape liability if he could establish that he had conformed with that standard. The defendant has successfully rebutted any presumption that he was at fault. The defendant's conduct subsequent to the accident did not constitute a fault even though it may have resulted in aggravating the injuries.

Per Hall J. *dissenting*: The defendant has not successfully rebutted the presumption under s. 53 of the *Motor Vehicle Act* that he was at fault. Any time a driver in a school zone, in broad daylight, at a time when young pupils are leaving adjacent school premises and some had to cross in front of him and who admits, as the defendant did, that he did not see any of the children who crossed in front of his car as he sat there stationary from 50 to 60 seconds and who says further that he did not see the boy which his vehicle struck until the moment of the impact, that driver has not rebutted the presumption of fault which the statute imposes on him. The traffic officer's signal did not relieve the defendant from his duty to keep a sharp lookout for school children who might emerge in front of the bus.

Automobiles—Intersection—Agent de circulation—Signal pour changer la direction du trafic—Jeune piéton frappé par une automobile alors qu'il traversait la rue—Norme des soins requis—La présomption a-t-elle été réfutée—Aggravation des dommages—Code de la Route, S.R.Q. 1941, c. 142, art. 53.

Le fils mineur du demandeur fut blessé lorsqu'il fut frappé par une automobile conduite par le défendeur. La victime, qui sortait de l'école en même temps que d'autres écoliers, a tenté de traverser une rue de l'ouest à l'est après qu'un agent de circulation qui était en devoir à l'intersection eut donné au trafic se dirigeant vers le sud le signal d'avancer. Un autobus pointant vers le sud était stationné près du trottoir ouest, à une courte distance de l'intersection. L'avant de la voiture du défendeur se trouvait près de l'arrière de l'autobus. La victime devait passer en avant de l'autobus. Lorsque l'avant de l'automobile était en ligne avec l'avant de l'autobus, le défendeur a vu la victime pour la première fois et, malgré qu'il ait appliqué les freins immédiatement, il n'a pu s'empêcher de frapper le jeune gar-

çon. Il fut aussi allégué contre le défendeur qu'il avait aggravé les dommages du garçon en lui permettant, alors qu'il le reconduisait chez lui après l'accident, de marcher une partie du trajet, et ceci à la propre suggestion du garçon. Le juge au procès a rejeté l'action. Ce jugement fut confirmé par une décision majoritaire de la Cour d'Appel. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Hall étant dissident.

Les Juges Fauteux, Abbott, Ritchie et Spence: La question à débattre dans de tels cas est de savoir si le conducteur a manqué à la norme des soins qui sont requis d'un homme raisonnable dans les circonstances. Un conducteur peut être libéré de toute responsabilité s'il peut établir qu'il s'est conformé à cette norme. Le défendeur a réfuté avec succès toute présomption qu'il était en faute. La conduite du défendeur subséquemment à l'accident n'a pas constitué une faute même s'il en est résulté une aggravation des blessures.

Le Juge Hall, *dissident*: Le défendeur n'a pas réfuté avec succès la présomption établie par l'art. 53 du *Code de la Route* qu'il était en faute. Lorsqu'un conducteur dans une zone d'école, en plein jour, à un temps où des jeunes écoliers sortent des écoles et que certains de ceux-ci doivent traverser en avant de lui et qu'il admet, comme le défendeur l'a admis, qu'il n'a vu aucun des enfants qui ont traversé en avant de sa voiture alors que celle-ci était stationnaire de 50 à 60 secondes et qui dit de plus qu'il n'a vu le garçon que seulement au moment de la collision avec sa voiture, ce conducteur n'a pas réfuté la présomption de faute que la loi lui impute. Le signal donné par l'agent de circulation n'a pas relevé le défendeur de son devoir de se tenir aux aguets au cas où des écoliers surgiraient en avant de l'autobus.

APPEL d'un jugement majoritaire de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Jolicœur. Appel rejeté, le Juge Hall étant dissident.

APPEAL from a majority judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Jolicœur J. Appeal dismissed, Hall J. dissenting.

T. P. Slattery, Q.C., and *F. E. Barnard, Q.C.*, for the plaintiff, appellant.

Rémi Taschereau, Q.C., for the defendant, respondent.

The judgment of Fauteux, Abbott, Ritchie and Spence JJ. was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1], confirming a judgment of the Superior Court which dismissed an action by appellant acting in his quality of tutor to his minor son Patrick

[1] [1964] Que. Q.B. 340.

1965

O'BRIEN v. MAILHOT

Abbott J.

O'Brien, claiming damages in the sum of $75,000 alleged to have been suffered as a result of the said Patrick O'Brien having been struck by an automobile owned and driven by the respondent.

Owen J. dissenting, held that both respondent and Patrick O'Brien were at fault and responsible for the accident, in the proportions of one-third and two-thirds respectively. He assessed the damages at $26,941.80. He would therefore have allowed the appeal with costs and condemned respondent to pay to appellant ès qualité the sum of $8,980.60 with interest and costs.

The facts are not now seriously in dispute. They are recited by Owen J. in his dissenting judgment, as follows:

On the 13th March 1958, at approximately 11.30 A.M., Patrick O'Brien, 10½ years of age, came out of St. Patrick High School at Thetford Mines with the other pupils. From the school he went to the North-West corner of the intersection of Dumais St., (which runs East to West) and Notre Dame St. (which runs North and South). He wanted to cross Notre Dame St. from West to East. A Southbound autobus was parked on the West side of Notre Dame St. a short distance to the North of Dumais St. The defendant Mailhot was driving his automobile from North to South on Notre Dame St. When a constable at the intersection stopped the traffic on Notre Dame St., Mailhot brought his automobile to a stop with its front about even with the rear of the autobus and to the East of the autobus. There were no other motor vehicles in the traffic lane in front of Mailhot's automobile.

After several school children had crossed Notre Dame Street from West to East the constable apparently gave the signal to permit traffic on Notre Dame Street to move. Mr. Mailhot started his automobile, advanced in a Southerly direction alongside the autobus which remained stationary on his right. When the front of the automobile was about abreast of the front of the autobus Mailhot, for the first time, saw young O'Brien in front of and very close to his automobile. The automobile was being driven at a moderate speed, less than 10 miles per hour, and although Mailhot applied the brakes as soon as he was aware of the danger he was unable to avoid hitting the boy and knocking him down with the front of the automobile. Young O'Brien had crossed in front of the stationary autobus and did not see the automobile coming from his left until it was on top of him.

The evidence is contradictory as to whether the boy was walking quickly or running just prior to the accident. The evidence is also contradictory as to the distance between the boy and the front of the stationary bus when he crossed in front of the bus. The bus driver Walker said that his bus was about seven or eight feet from the corner and that young O'Brien passed right in front of his bus no more than a foot away. However according to the witness Donovan the accident happened at a point about 15 to 20 feet to the South of the front of the stationary autobus.

As Montgomery J. points out, the bus driver Walker was perhaps best situated to see what happened. He described the accident as follows:

> J'ai arrêté, et puis j'ai vu un petit bonhomme sauter devant l'autobus, il y avait un constable qui faisait la circulation, il n'y en avait plus, il a fait signe à monsieur Mailhot, il a passé, j'ai vu arriver le petit bonhomme à la course, il a sauté devant le char à Monsieur Mailhot.

As to the distance between the boy and the autobus when he passed in front of it, Walker's evidence on cross-examination was as follows:

> Q. A quelle distance, à combien de pieds le jeune O'Brien passait-il devant votre autobus quand vous l'avez vu?
>
> R. Il n'y avait certainement pas plus qu'un pied, il passait juste en avant.
>
> Q. Et, après l'accident, de combien de pieds à peu près, le devant de l'automobile de monsieur Mailhot dépassait-il le devant de votre autobus?
>
> R. Monsieur Mailhot ne devait pas avoir plus d'un pied et demi en avant de mon autobus, je n'ai pas mesuré, mais...

His testimony was confirmed on this point by that of other witnesses.

The legal principle to be applied in order to determine whether Mailhot had successfully rebutted any presumption that he was at fault, was correctly stated by Montgomery J. in the following passage of his judgment:

> In any case where the driver of an automobile strikes a pedestrian, it is difficult to find with certainty that the driver could not have avoided the accident by taking some extra precautions. In my opinion, this is not the test. The question in each case is whether the driver fell in any way short of the standard of care that would be expected of a reasonable man under the circumstances. While our courts are ready to condemn the driver for even a slight deviation from this standard, he may escape liability if he can establish that he has conformed with it.

Among other grounds, counsel for appellant submitted that Mailhot was at fault in stopping his car at the rear rather than at the front of the autobus. This ground does not appear to have been pressed in the Courts below and is not dealt with in the judgments. In any event I am unable to agree with this submission. It is obvious that Mailhot could have stopped abreast of or about abreast of the front of the autobus, but in my view there was no particular reason why he should have done so. On the facts above set out, it is clear that the accident must have happened a fraction of a second after the front of the Mailhot car passed the front of the stationary autobus. Moreover in

1965

O'BRIEN v. MAILHOT

Abbott J.

order for Mailhot to have seen the approach of young O'Brien, before putting his car in motion, it is clear that the front of his car would have had to project at least five or six feet in front of the bus.

Applying the test to which I have referred, in my opinion, the majority in the Court below were correct in holding that respondent had successfully rebutted any presumption that he was at fault. Similarly, I agree that respondent's conduct subsequent to this unfortunate accident did not constitute a fault even though it may have resulted in aggravating the injury.

Having considered the evidence, the arguments of counsel and the authorities to which they referred, I find myself in agreement with the conclusion and reasons of Montgomery J. I do not think that anything would be gained by attempting to summarize or re-state those reasons and I am content to adopt them.

I would dismiss the appeal with costs.

HALL J. (*dissenting*):—To the facts stated by Owen J. in his dissenting judgment as set out in the judgment of my brother Abbott, certain further facts ought, I think, to be noted, namely: (1) The intersection in question was, to the knowledge of Mailhot, in a school zone and he was aware that at the time in question in this action the pupils were leaving the school premises and heading homewards for lunch and that some would have to cross Notre Dame Street from west to east on their way home; (2) The O'Brien boy was in the pedestrian cross-walk area when struck. He was partially crippled and walked with a limp; (3) A man named Louis Donovan was sitting at the wheel of his car on the east side of Notre Dame north of Dumais Street waiting for his daughter to take her home for lunch. Ellen Donovan crossed from west to east. The O'Brien boy was right behind her as she started to cross. Seeing her father, she ran towards her father's car. She had not reached her father before young O'Brien was struck.

Mailhot testified that he was not aware of having seen Ellen Donovan or any other children cross Notre Dame Street as he sat waiting for the signal to go ahead although it was beyond question that Ellen was immediately ahead of the O'Brien boy as they started across, and that several other children had in fact crossed from in front of the bus

before Ellen. That a number of children had crossed Notre Dame Street after Mailhot arrived on the scene is fully established by the evidence of Leopold Poulin, the officer directing traffic at the intersection in question. He said:

Q. Voulez-vous nous raconter, monsieur, ce qui s'est passé?

R. En faisant la circulation, j'avais donné le signal d'arrêt à l'automobiliste monsieur Mailhot pour laisser passer les jeunes enfants, des enfants de huit à dix ans.

* * *

Q. Avant l'accident, je comprends que vous aviez laissé traverser les enfants du coin ouest de la rue Dumais vers le coin est de la rue Dumais, traverser Notre-Dame?

R. Oui monsieur.

Q. Un groupe d'enfants ensemble?

R. Oui monsieur.

Q. Est-ce qu'ils étaient nombreux?

R. Ils étaient six ou huit.

Q. Est-ce que c'était le seul groupe d'enfants que vous faisiez traverser dans ce sens-là depuis la sortie des classes?

R. Non, ils étaient presque tous sortis.

Q. Il en était passé plusieurs?

R. Oui.

Q. Monsieur Mailhot était arrêté depuis combien de temps?

R. Environ cinquante à soixante secondes autour d'une minute.

Mailhot's evidence was that he did not see the boy at all until the impact. He testified as follows:

PAR LA COUR:

Q. Où était-il par rapport à votre automobile, par rapport à l'autobus ou par rapport au trottoir, la première fois que vous l'avez vu le jeune O'Brien?

R. La première fois que je l'ai vu, il est arrivé en avant de mon char en appuyant ses deux mains sur mon fanal.

Q. Vous ne l'avez pas vu ailleurs?

R. Je ne l'ai pas vu ailleurs.

* * *

Q. Vous avez, dans ce cas-là, aperçu l'enfant la première fois alors qu'il était devant votre véhicule?

R. Alors qu'il mettait ses mains sur le fanal droit de mon véhicule.

* * *

Q. Combien de temps à peu près avez-vous été stationnaire?

R. Peut-être 50, 50 à 60 secondes.

Q. Pendant que vous étiez stationnaire, comme ça, avez-vous vu des enfants traverser la rue?

R. Je peux en avoir vu, mais je n'ai pas remarqué, j'ai remarqué seulement le constable, en attendant mon signal.

* * *

1965

O'BRIEN v. MAILHOT

Hall J.

Q. Vous avez longé le flanc gauche de l'autobus?

R. Oui monsieur.

Q. A quelle distance, à peu près?

R. A peu près un pied et demi de l'autobus.

* * *

Q. Avez-vous d'autre chose à ajouter?

R. Parce que je n'avais pas de visibilité pour voir venir l'enfant, je ne pouvais pas voir de l'autre côté de l'autobus, en avant de l'autobus, de la manière que mon char était placé....

The boy did not, of course, come from the other side of the bus or around the front of it. He had come on the sidewalk from ahead and to the right of the bus which was stationary at all relevant times.

Section 53 of *The Motor Vehicle Act* of the Province of Quebec in force at the time reads:

Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

The learned trial judge held that in the circumstances of this case this burden of proof section did not apply. In this he was completely in error. The Court of Appeal applied the section, but by a majority judgment held that the respondent had successfully rebutted the presumption.

Owen J. dissented, saying:

On the evidence I am of the opinion that young O'Brien was at fault. He attempted to cross Notre Dame Street against the signal of the constable. If he had stopped before emerging from the protection afforded by the stationary autobus and looked to his left he could have seen Mailhot's automobile and remained in a position of safety. This he failed to do. These faults were determining causes of the accident.

The problem which has given me such difficulty is deciding whether Mailhot also committed any fault or faults which contributed to the accident. Mailhot had lived in Thetford Mines for a number of years. He was familiar with the intersection and knew that it was a school zone. In the circumstances a high standard of care was required of him when passing alongside the stationary autobus which obstructed his vision of any pedestrian who might come from his right where the school was located. After studying his testimony I am of the opinion that Mailhot placed too much dependence on the signal from the constable in charge of traffic and failed to take proper precautions by keeping his automobile under absolute control and keeping a very strict lookout for anything that might be coming from his right. In this case it was foreseeable, as far as Mailhot was concerned, that some child coming out of the school at noon-hour would cross in front of the stationary autobus even after the constable had given his signal to change the direction of the flow of traffic. I have come to the conclusion that Mailhot was at fault and that his fault contributed to the accident. In my opinion the fault of the child was greater than that of the

motorist and I would hold Mailhot liable to pay one-third of the damages suffered by young O'Brien.

I agree with Owen J., and it follows that Mailhot has not successfully rebutted the presumption that he was at fault. For myself, and with deference to contrary opinion, I am of the view that any time a driver in the situation that Mailhot was in here, i.e., in a school zone, in broad daylight, at a time when young pupils were leaving adjacent school premises and some had to cross in front of him and who admits, as Mailhot did, that he did not see any of the children who crossed in front of his car as he sat there stationary for from 50 to 60 seconds and who says further that he did not see the boy which his vehicle struck until the moment of the impact, that driver has not rebutted the presumption of fault which the statute imposes on him.

It was not, in my view, negligence *per se* for him to stop in line with the rear of the bus nor was it negligence *per se* to drive so closely (about 18 inches) to the left side of the bus as he says he did as he moved forward toward the crossing after receiving the traffic officer's signal, but having elected to stop where he did in a position where his visibility of pedestrian traffic from the west was restricted by the bus, and having elected to hug the left side of the bus when there was ample room and no other traffic between his vehicle and the centre of the street, he was under a heavy duty to be on the lookout for school children who might emerge from in front of the bus. Had he been keeping the lookout which the special circumstances then existing demanded, he would have seen the boy before the vehicle was actually in contact with him.

The traffic officer's signal did not relieve him from his duty to keep a sharp lookout for school children who might emerge from in front of the bus. The statement by Lord du Parcq in *London Passenger Transport Board v. Upson*[1] as follows:

> A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do.

is especially applicable here.

I would, therefore, allow the appeal and enter judgment for the appellant ès qualité in the sum of $8,980.60 as fixed

[1] [1949] A.C. 155 at 176.

1965
O'BRIEN
v.
MAILHOT
Hall J.

by Owen J. with interest and with costs in this Court and in the Courts below.

Appeal dismissed with costs, HALL J. *dissenting.*

Attorneys for the plaintiff, appellant: Leblanc, Delorme, Barnard, Leblanc, Bédard & Fournier, Sherbrooke.

Attorneys for the defendant, respondent: Taschereau, Dussault & Drouin, Quebec.

1965
*Oct. 25, 26
Dec. 14

N. M. PATERSON AND SONS LIMITED (*Defendant*) ..... APPELLANT;

AND

MANNIX LIMITED (*Plaintiff*) .....RESPONDENT.

APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Voyage charter agreement—Defendant to provide ship and crew —Contract to transport goods and equipment—Shipper's employees assisting with stowage of equipment—Heavy machinery included in cargo and lost overboard in storm—Liability—Civil Code, art. 2424.

The plaintiff entered into a voyage charter agreement with the defendant. The defendant supplied the ship and crew. The employees of the plaintiff assisted in loading and stowing heavy equipment which made up a part of the cargo. About three hours out of port a heavy mechanical shovel broke loose and was lost overboard. The action to recover the value of the mechanical shovel was maintained by the trial judge. The defendant appealed to this Court.

Held: The appeal should be dismissed.

The loss was occasioned by the failure of the lashings. The defendant argued that the mechanical shovel had been stowed on board by the plaintiff's own employees, and that the plaintiff was estopped from making a claim based on improper and negligent stowage. Under both the law of Quebec and of England, the primary duty of stowing cargo in a ship rests upon the owner of the ship and its master unless there is an express agreement to the contrary or the circumstances give rise to an implication that such an agreement has been made. This was a contract to carry the plaintiff's goods in the defendant's ship between specified ports and not a contract for " letting of the ship" which could have created the relationship of bailor and bailee between the parties. The absence of any provision in the charterparty making the plaintiff liable for stowage, and the inspection made by the ship's officers of the way in which the shovel was placed and secured on the deck and their approval thereof was evidence negating any implied agreement to

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

relieve the defendant of the obligation imposed upon it to receive the goods and carefully arrange and stow them in the ship.

Navigation—Contrat de charte-partie pour voyage déterminé—Le défendeur devant fournir le bâtiment et l'équipage—Contrat de transport d'effets et d'outillage—Les employés de l'affréteur aidant à l'arrimage de l'outillage—Pesante machine faisant partie de la cargaison et tombant à la mer durant une tempête—Responsabilité—Code Civil, art. 2424.

Le demandeur passa un contrat de charte-partie pour voyage déterminé avec le défendeur. Le défendeur fournissait le bâtiment et l'équipage. Les employés du demandeur ont aidé au chargement et à l'arrimage de l'outillage qui faisait partie de la cargaison. A peu près trois heures après avoir quitté le port, une pelle mécanique se détacha et tomba à la mer. Le juge au procès a maintenu l'action pour le recouvrement de la valeur de la pelle mécanique. Le défendeur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La perte a été occasionnée par un manque dans les câbles servant à attacher la pelle. Le défendeur a soutenu que la pelle mécanique avait été arrimée par les employés mêmes du demandeur, et qu'en conséquence le demandeur était empêché de faire une réclamation basée sur la négligence dans l'arrimage. En vertu de la loi du Québec et de l'Angleterre, l'obligation originelle dans l'arrimage d'une cargaison tombe sur le propriétaire du bâtiment et son maître à moins d'une entente formelle au contraire ou de circonstances donnant lieu à une implication qu'une telle entente avait été faite. Il s'agit ici d'un contrat pour le transport des effets du demandeur sur le bâtiment du défendeur entre des ports spécifiés et non pas d'un contrat pour le louage du bâtiment qui aurait pu créer une relation de déposant et de dépositaire entre les parties. L'absence de toute disposition dans le contrat de charte-partie rendant le demandeur responsable de l'arrimage, et l'inspection faite par les officiers du bâtiment de la manière dont la pelle avait été placée et attachée sur le tillac et leur approbation constituaient une preuve réfutant tout contrat tacite devant relever le défendeur de l'obligation qui lui était imposée de recevoir les effets et de les placer et arrimer avec soin dans le bâtiment.

APPEL d'un jugement du Juge Smith du district d'amirauté de Québec [1]. Appel rejeté.

APPEAL from a judgment of Smith D.J.A., for the district of Quebec [1]. Appeal dismissed.

Jean Brisset, Q.C., for the defendant, appellant.

Léon Lalande, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

[1] [1965] 2 Ex. C.R. 107.

1965

N. M. PATERSON AND SONS LTD. v. MANNIX LTD.

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Arthur I. Smith sitting as District Judge of the Exchequer Court[1] in and for the Admiralty District of Quebec, whereby he condemned the appellant in the sum of $60,925 being the agreed value of a mechanical shovel the property of the respondent which was lost at sea while being carried on board the appellant's vessel S.S. *Wellandoc* when that vessel encountered heavy, but not unseasonable, weather on a voyage between Baie Comeau and Bagotville on December 9, 1954.

It is not disputed that the shovel in question which was a heavy piece of equipment weighing approximately 87 tons was being carried pursuant to an agreement between the parties evidenced by a letter addressed by the appellant to the respondent in the following terms:

Mannix Limited, November 30th, 1954.
660 St. Catherine St. W.,
Montreal, P.Q.
Attention Mr. G. J. Pollock

Dear Sirs:

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

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

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

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

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

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

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

Yours very truly,
N. M. PATERSON & SONS LIMITED
(sgd.) I. C. McEwen
Traffic Manager.

Accepted:
Mannix Limited.

[1] [1965] 2 Ex. C.R. 107.

No bill of lading was issued with respect to this shipment and both parties agree that the provisions of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, do not affect the matter.

A great deal of the evidence at trial was devoted to describing the way in which the shovel was loaded and secured on the vessel, but I do not find it necessary to examine this evidence in detail as I agree with the learned trial judge that:

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

The italics are my own.

It was contended on behalf of the appellant that the finding of the learned trial judge with respect to improper stowage was vitiated by the fact that he allowed himself to be influenced by the evidence of Mr. Eric Crocker who was called as an expert witness on behalf of the respondent and who, in the appellant's submission, could not be impartial as he represented cargo underwriters interested in the loss. The unanimous opinion of this Court, which was expressed at the hearing of the appeal, is that this circumstance can only affect the weight to be attached to Mr. Crocker's evidence which was essentially a matter to be determined by the learned trial judge.

The main argument advanced in support of the appeal was that the improper and negligent stowage of the cargo, to which the learned trial judge attributed the loss, was the work of the respondent's own servants and that the respondent was accordingly estopped from enforcing any claim based thereon.

I am satisfied on all the evidence that the respondent's employees under the direction of their foreman, Mr. Bellfontaine, did the major part of the work of lashing and securing this heavy cargo to the deck, but it is equally clear to me that the method which they employed was approved by the owner's agents aboard the vessel.

The master of the *Wellandoc*, Captain R. M. McCurdy, did not give evidence at the trial but a statement made by

1965

N. M. PATERSON AND SONS LTD. v. MANNIX LTD.

Ritchie J.

him on the 21st of December, 1954, was admitted as part of the defendant's case and the circumstances under which the loading took place are accepted in the factum filed on behalf of the respondent as having "been carefully summarized" in the following excerpt from that statement:

> All equipment required for the stowage was supplied by Mannix Limited and we had nothing to do with the securing of the cargo. The method of stowage passed the inspection of all three mates and of the Mannix people ashore. The method of stowage was thoroughly discussed by all concerned and everybody gave his own views and the method adopted was the result of these discussions as incorporating the best ideas of everyone.

Some question was raised in the Court below as to whether the law of Quebec or the law of England should be applied in the circumstances, but as the learned trial judge has pointed out, this question does not arise in the present case it having been conceded that the same rules apply under both systems of law. It follows that nothing herein contained is to be construed as deciding this question.

Under both the law of Quebec and the law of England it appears to be established that the primary duty of stowing cargo in a ship lies on the owner of that ship and on the master as his representative unless there is an express agreement to the contrary or the circumstances give rise to an implication that such an agreement has been made. This is made plain by reference to art. 2424 of the *Civil Code* of Quebec and to the English authorities, the effect of which is in my view accurately summarized in the reasons for judgment of Lord Wright in *Canadian Transport Co. v. Court Line Ld.*[1] Article 2424 of the *Civil Code* reads as follows:

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

In the case of *Canadian Transport Co. v. Court Line Ld., supra,* there was an express agreement incorporated in the charterparty that the charterers were "to load, stow and trim the cargo at their expense under the supervision of the captain . . ." and as there was no evidence of the extent if any of the captain's supervision or approval, the charterers

[1] [1940] A.C. 934, 3 All E.R. 112.

were found liable for improper stowage, but in reviewing the law as to the respective duties of an owner and a charterer in relation to stowage of cargo, Lord Wright said at page 943:

> It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interests of the seaworthiness of the vessel, but in order to avoid damages to the goods, and also to avoid loss of space or dead freight owing to bad stowage. In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charterparty to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect.

The appellant's counsel cited a number of English cases in which the shipper was held responsible for damage resulting from faulty stowage but it will be found in each of these cases either that there was an express provision in the charterparty whereby the shipper undertook to stow the cargo or that he had participated or approved of a method of stowage, the defects in which were, or should have been, obvious to him having regard to his knowledge of the special properties of the goods which were being shipped.

The most recent case of this type that I have been able to find is *Upper Egypt Produce Exporters and others v. Santamana*[1], a decision of Hill J. in the Admiralty Division in England which was strongly relied on by the appellant's counsel. In that case the cargo was a large shipment of onions a part of which had, with the assistance and approval of the shipper, been stacked in tiers 15 or 16 feet high with the result that the lower tiers were unable to withstand the pressure from above and were squashed and spoiled. The shipper of the cargo was in a much better position to know of the likelihood of it being damaged by this method of stowage than the ship owner or the master and it appears to me to be logical that in such a case a shipper who knows or ought to know the special characteristics of his own cargo and who approves of it being stowed in a manner which is obviously likely to expose it to damage cannot later hold the ship owner responsible for the damage which ensues. In the course of his reasons for judgment, after reviewing the relevant authorities, Hill J. went on to say:

[1] (1923), 14 Ll.L. Rep. 159.

1965

N. M. PATERSON AND SONS LTD. v. MANNIX LTD.

Ritchie J.

I have considered these cases very carefully. They seem to me to carry the law at least far enough to show that a shipper who takes an active interest in the stowage and complains of some defects but makes no complaints of others *which are patent to him* cannot be heard to complain of that to which he has made no objection.

The italics are my own.

The same considerations governed the case of *Bozzo v. Moffat et al*[1] upon which the appellant also relied. This was a case in which a shipment of wool had been stowed against the skin of the ship without sufficient dunnage to protect it from dampness with the result that it was damaged by water, and it was held that under the charter-party there in question whereby the shippers reserved the right to employ and did employ their own stevedores in loading the vessel, the owner was relieved of liability. The effect of this line of cases appears to me to be accurately and succinctly summarized in art. 51 of *Scrutton on Charterparties,* 17th ed., page 148, where he says:

> A shipper who takes an active interest in the stowage cannot afterwards be heard to complain of *patent defects* in the stowage of which he made no complaint at the time.

The italics are my own.

In the present case it was not the condition of the cargo but the stability of the ship that was affected by the faulty stowage, and the loss was occasioned by the failure of the lashings which secured the shovel to withstand the strain to which they were subjected by reason of the shovel's movement in the heavy seas which were encountered. One of Mr. Crocker's main objections to the method of loading was that it was likely to increase the rapidity of the roll of the ship and his opinion that the shovel was not properly secured to the deck was predicated on the assumption that fairly rough weather would be encountered. These do not appear to me to be circumstances which should have been obvious to the respondent's employees as they were not in the same position as the master or his crew to know the extent to which the ship would roll or the seas which it would be likely to encounter.

It therefore appears to me that in the absence of any provision in the charterparty making the shippers responsible for stowage, the inspection made by the ship's officers of the way in which the shovel was placed and secured on the

[1] (1881), 11 Que. R.L. 41.

deck and their approval of it, is evidence negating any implied agreement to relieve the carrier of the obligation imposed upon it by law "to receive the goods and carefully arrange and stow them in the ship."

It was further argued on behalf of the appellant that the second paragraph of the agreement governing this shipment carried with it the implication that the charterers were to be responsible for stowage. That paragraph merely provides for the "charterers to have full use of the ship's gear as on board" and I do not consider that these words can be treated as relieving the owner of any of its responsibility for stowing the cargo.

It was further contended on the appellant's behalf that the agreement governing this shipment was a contract for the letting of the ship as distinguished from a contract for her services, and that in so far as the crew of the vessel participated in the stowage of the cargo, they were to be regarded as servants of the charterer. This contention was based in great measure on the case of *Thomas P. Beal*[1] where Wooley, Ct. Judge had occasion to say:

> Ordinarily the owner charters only the space; the ship continues in the possession, management and control of the owner and its officers and crew. But in this case of a time charterer, the charterer, in chartering the space, chartered the whole reach of the ship; the owner in terms put at 'the charterer's disposal' her 'holds, decks and usual places of loading'.

And the same judge later said:

> The terms of the charter party make it certain there was a letting of the ship, as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of carrier and shipper.

This contention appears to me to be without merit because in my opinion the agreement here in question is a voyage charter and not a time charter and it is to be construed as a contract to carry the respondent's goods in the appellant's ship between the ports specified therein and not as a contract for the "letting of the ship" which could create the relationship of bailor and bailee between the parties.

Finally, appellants contended that the loss was occasioned by "dangers of navigation" and that the circumstances were accordingly governed by art. 2433 of the *Civil Code* which reads, in part, as follows:

[1] (1926) A.M.C. 438.

1965

N. M. PATERSON AND SONS LTD. v. MANNIX LTD.

Ritchie J.

2433. The owner of a sea-going ship is not liable for the loss or damage, occasioned to any goods, wares, merchandise and article of any kind on board any such vessel or delivered to him for conveyance therein, without his actual fault or privity or the fault or neglect of his agents, servants or employees:

1. By reason of fire or the dangers of navigation; . . . .

In this regard, I think that the phrase "dangers of navigation" is to be given the meaning attached to the words "perils of the sea" by Sir Lyman Duff in *Canadian National Steamships v. Bayliss*[1], where he said, speaking on behalf of this Court:

> The issue raised by this defence (perils of the sea) was, of course, an issue of fact and it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.

In my opinion the evidence discloses that the weather which was encountered by the *Wellandoc* on the 9th of December, although it was rough, was of a kind which an experienced master should have foreseen as a probable incident of such a voyage at that time of year. I am accordingly satisfied that the provisions of art. 2433 of the *Civil Code* could have no application to these circumstances.

It should perhaps be mentioned that although Mr. Crocker expressed the opinion that the ship was unseaworthy, there is no suggestion that the loss was occasioned by unseaworthiness and the question therefore does not arise.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Beauregard, Brisset & Reycraft, Montreal.

Solicitors for the respondent: Lalande, Brière, Reeves & Paquette, Montreal.

[1] [1937] S.C.R. 261 at 263, 1 D.L.R. 545.

1965

*Nov. 24, 25

Dec. 14

HOECHST PHARMACEUTICALS OF CANADA LIMITED and FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING (*Plaintiffs*) .. APPELLANTS;

AND

GILBERT & COMPANY, GILBERT SURGICAL SUPPLY CO. LIMITED, JULES R. GILBERT LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Validity—Claims too broad—Patent Act, R.S.C. 1952, c. 203.

The plaintiff companies instituted against the defendant companies an action for infringement of ten patents, of which the first issued on a parent application and the others on divisional applications for an invention entitled "Process of Preparing Benzenesulfonyl Ureas". All the patents related to defined new sulfonyl ureas, each patent claiming a different process of producing them. Each patent contained a claim (claim 10 in all but the last patent and claim 13 in the last patent) to a specific new sulfonyl urea, tolbutamide, whenever obtained by the process claimed in claim 1 of the patent. The unexpected utility stated in the patents was the capacity of lowering blood sugar levels. The defendants contended that the process claims in each of the patents were invalid as being too broad in their terms, and, in consequence, the claim to the substance tolbutamide could not stand for that reason. The action was dismissed at trial on the ground that the patents alleged to have been infringed were invalid. The plaintiff companies appealed to this Court.

Held: The appeal should be dismissed.

Claim 1 of each of the patents in question was too wide in scope. The claimants sought to cover every conceivable sulfonyl ureas of the class, and in so doing it had overclaimed and invalidated claim 1 in each patent. Claim 10 in the first 9 patents and claim 13 in the last patent could stand only upon the foundation of a valid process claim and that foundation did not exist here.

Brevets—Contrefaçon—Validité—Revendications trop étendues—Loi sur les Brevets, S.R.C. 1952, c. 203.

Les compagnies demanderesses ont institué contre les compagnies défenderesses une action pour contrefaçon de dix brevets, dont le premier avait été délivré sur une demande originale et les autres sur des demandes divisionnaires pour une invention intitulée «Process of Preparing Benzenesulfonyl Ureas». Tous les brevets se rattachaient à

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

1965

HOECHST PHARMACEUTICALS OF CANADA LTD. *et al.* *v.* GILBERT AND CO. *et al.*

des nouvelles urées sulfoniques déterminées, chaque brevet revendiquant un procédé différent pour les produire. Chaque brevet contenait une revendication (revendication n° 10 dans tous les brevets excepté le dernier et revendication n° 13 dans le dernier brevet) d'une nouvelle urée sulfonique spécifique, tolbutamide, lorsque obtenue par le procédé revendiqué dans la revendication n° 1 du brevet. L'utilité imprévue énoncée dans les brevets consistait dans la capacité de diminuer le contenu de sucre dans le sang. Les défenderesses ont plaidé que les revendications des procédés dans chacun des brevets étaient invalides parce que trop étendues dans leurs termes, et, en conséquence, la revendication de la substance tolbutamide ne pouvait pas être supportée pour cette raison. Le juge au procès a rejeté l'action pour le motif que les brevets dont on alléguait la violation étaient invalides. Les compagnies demanderesses en appelèrent devant cette Cour.

Arrêt: L'appel doit être rejeté.

La revendication n° 1 de chaque brevet avait une portée trop étendue. Les requérants ont cherché à couvrir toutes les urées sulfoniques concevables de la classe et en ce faisant, ils ont revendiqué plus qu'ils avaient droit et ont rendu invalide la revendication n° 1 dans chaque brevet. La revendication n° 10 dans les 9 premiers brevets et la revendication n° 13 dans le dernier brevet ne pouvaient être supportées que sur la base d'une revendication de procédé valide et cette base n'existait pas.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], rejetant une action pour contrefaçon de brevets. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an action for infringement of patents. Appeal dismissed.

Christopher Robinson, Q.C., and *Russell S. Smart,* for the plaintiffs, appellants.

I. Goldsmith, for the defendants, respondents.

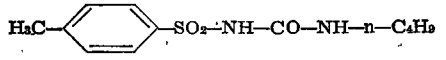
The judgment of the Court was delivered by

HALL J.:—This is an appeal from a judgment of Thurlow J. in the Exchequer Court of Canada[1], dismissing an action by the appellants for infringement of Patents No. 582,621 to 582,627 inclusive; 558,513; 558,514 and 590,201, being in respect of:

an invention entitled "Manufacture of New Sulphonyl Ureas". Each of the patents contains a claim (numbered 10 of the first 9 of the patents and numbered 13 in the last) which reads:

[1] [1965] 1 Ex. C.R. 710, 28 Fox Pat. C. 120.

The compound of the formula



whenever obtained according to claim 1 or the obvious chemical equivalent thereof

Patent No. 582,621 issued on a parent application which had its origin in what is called a priority document being an application for a patent of invention under the title "PROCESS OF PREPARING BENZENESULFONYL UREAS" filed at the Patent Office of the Federal Republic of Germany on August 8, 1955, by the appellant The Farbwerke Hoechst Aktiengesellschaft vormals Meister Lucius & Bruning. The other patents issued on divisional applications of that parent application which were filed pursuant to s. 38(2) of the *Patent Act*. In all respects material in this appeal, the disclosures of all the patents are identical.

All the patents relate to defined new sulfonyl ureas, each patent claiming a different process of producing them. Each of the processes produces the new substances by known methods from known materials, with the result that the patentability of the process depends on the possession of unexpected utility by the new substances produced. The unexpected utility stated in the patents is the capacity of lowering blood sugar levels, this being referred to as hypoglycemic activity. The process in each patent is claimed in claim 1 in relation to the production of all the new sulfonyl ureas. Each patent contains a claim (claim 10 in all but the last patent and claim 13 in the last patent) to a specific new sufonyl urea, tolbutamide, whenever obtained by the process claimed in claim 1 of the patent. It is upon this claim to tolbutamide in each patent that the appellant founded its action for infringement.

It is conceded that tolbutamide, standing by itself, could have been the subject-matter of a valid patent if claimed as such when prepared or produced by the methods or processes of manufacture particularly described and claimed in the patent or by their obvious chemical equivalent. It possessed the previously undiscovered useful quality as defined in *Re May & Baker Ltd. and Ciba Limited*[1] and adopted by this Court in *Commissioner of Patents v. Ciba*[2]. However, the

[1] (1948), 65 R.P.C. 255.

[2] [1959] S.C.R. 378, 19 Fox Pat. C. 18, 30 C.P.R. 135, 18 D.L.R. (2d) 375.

1965

HOECHST PHARMACEUTICALS OF CANADA LTD. *et al.* *v.* GILBERT AND CO. *et al.*

Hall J.

respondents say that the process claims in each of the patents in question are invalid as being too broad in their terms, and, in consequence, the claim to the substance tolbutamide cannot stand for that reason.

Thurlow J. dealt with the substance tolbutamide in his judgment as follows at p. 713:

> The value and importance of tolbutamide lies in its usefulness in the treatment of diabetes. Until shortly before its introduction in the latter part of 1956 treatment of the common form of this illness, known as diabetes mellitis, consisted mainly, if not entirely, in putting the patient on a diet designed to bring about and maintain a proper level of sugar in his blood and if this was not successful or sufficient to accomplish the desired result, to administer insulin. Insulin could not be taken orally and thus had the disadvantages associated with administration by needle including those due to the reluctance of the patient and those due to his own shortcomings when administering it himself resulting in administering at times too much and at other times too little. Insulin also had undesirable effects on the tissue adjoining the site of injections carried out over a long period. Early in 1956 a substance known as carbutamide which was known to have blood sugar lowering activity, and which had bacteriostatic activity as well, came into use as an oral antidiabetic. The bacteriostatic activity was undesirable as it tended to destroy bacteria necessary to normal body functions and in October 1956 carbutamide was withdrawn from use in Canada and the United States apparently because of reported undesirable long term effects on the livers and kidneys of patients by whom it had been used. Tolbutamide had already been synthesized and, to some extent, tested before carbutamide was introduced and shortly before the latter was withdrawn it came into use in Canada for the same purpose. The evidence of Dr. J. B. R. McKendry satisfies me that tolbutamide has proven to be a satisfactory oral antidiabetic and has been of considerable value in the treatment of many cases where dieting alone has been insufficient to establish and maintain a proper blood sugar level. Since its introduction at least two other oral antidiabetics have come into use for the same purpose one of which, chlorpropamide, has more pronounced and longer lasting blood sugar lowering activity than tolbutamide but at the same time involves increased danger of undesirable long term effects. These substances are not suitable for the treatment of all types of diabetes nor are they effective for all patients or for what I shall call the severe cases of diabetes mellitis. For these insulin remains the standard remedy. But in a considerable proportion of the cases of diabetes mellitis tolbutamide is effective as a blood sugar lowering agent, and has the advantage of oral administration, and at the same time a satisfactory record of comparatively low toxicity and freedom from harmful side effects.

He then made an exhaustive review of the combinations possible, using the substances from which tolbutamide is produced, and concluded at p. 723:

> It will be observed that the number of mathematically conceivable substances embraced in the class defined in this claim is infinite. More than one hundred substances are conceivable by taking any one of the left hand or R substituents and applying all the possible variations of the finite class defined for the right hand or R^1 group. A group many times the size of

that number is also conceivable by applying it to the various substituents embraced within the finite portions of the left hand or R group. But in using the expressions "alkyl" and "alkoxy" and in embracing both single substituents in the phenyl ring in any of three positions and combinations of any two substituents in any two positions the language places no mathematical limit whatever on the number of carbon atoms or the formations thereof which such groups can have and thus makes the number of members of the class mathematically infinite. Nor is there evidence of how many members of this class are conceivable either as a matter of practical chemistry or for the purposes of practical commercial manufacture. As a matter of interpretation however it is in my opinion clear that the claim refers to every mathematically conceivable sulphonyl urea of the class for I can see no basis upon which anyone who might contrive to make a substance of the class, however inconceivable the preparation of such a substance may have been at the time of the drafting of the claim, could successfully maintain that his substance was not within the class. But even if the claim were read as referring only to those members of the class which as a matter of chemistry or even of commercial manufacture could conceivably be made, I see no reason to doubt that it would refer to a class many thousands strong.

The appellant did not seriously contest these findings, but maintained that insofar as the one substance in issue in the litigation, namely, tolbutamide, the patents were valid and were being infringed by the respondents.

In *C. H. Boehringer Sohn v. Bell-Craig Limited*[1], Martland J., in delivering the judgment of the Court, said at pp. 414-5:

In the present case there was a claim to a process upon which the appellant relies as being a compliance with the subsection. That claim is claim 1, which is admittedly invalid because it is too broad in its terms and claims more than the appellant was entitled to claim. The question is whether a claimant can satisfy the requirements of s. 41(1) for a claim for a substance, if he has filed a broad process claim for the production of a whole genus of which the substance claimed is but one, if the process claim, because of its generality, is found to be invalid.

In my opinion, he cannot meet the provisions of that subsection in that way. The subsection was intended to place strict limitations upon claims for substances produced by chemical process intended for food or medicine. Such a substance cannot be claimed by itself. It can only be claimed when produced by a particular process of manufacture. Not only that, the claimant must claim, not only the substance, but that very process by which it is manufactured. To comply with the subsection he must, therefore, make two claims. In my opinion this means that he must make valid claims to both the process and the substance, if he is to be entitled, successfully, to claim the latter. To interpret the subsection as meaning that all that is necessary is to file a claim for the process, valid or not, would be to defeat its purpose. A person who claims a substance within the subsection, supported only by a process claim which is invalid, is in no better position then was the respondent in the *Winthrop* (1948) S.C.R. 46, 2 D.L.R. 561, 7 Fox Pat. C. 183, 7 C.P.R. 58 case, who, while referring to a

[1] [1963] S.C.R. 410, 25 Fox Pat. C. 36, 41 C.P.R. 1, 41 D.L.R. (2d) 611.

1965

HOECHST PHARMACEUTICALS OF CANADA LTD. *et al.* v. GILBERT AND CO. *et al.*

Hall J.

process, had not claimed it. In the *Winthrop* case the claimant had claimed too little. In the present case he has claimed too much. But the result in each case is the same in that there had been no claim filed which results in the claimant's obtaining a valid patented process for the production of the substance which he claims.

This statement applies to the present case. In challenging the validity of the patents in question, counsel for the respondents put his case upon the footing that no one could obtain a valid patent for an unproved and untested hypothesis in an uncharted field. This is what the appellant has tried to do in claim 1 of each of the patents. It has sought to cover, in the words of Thurlow J., "every mathematically conceivable sulphonyl urea of the class" and has consequently overclaimed, and, in so doing, invalidated claim 1 in each patent.

Accordingly, following *Boehringer* and *Winthrop*[1], claim 10 in the first nine patents and claim 13 in the last patent fall for they cannot stand except upon the foundation of a valid process claim and that foundation does not exist here.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Smart & Biggar, Ottawa.

Solicitors for the defendants, respondents: Duncan, Goldsmith & Caswell, Toronto.

1965

*Dec. 14, 15
Dec. 20

MICHAEL JOHN TOKAR .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Appeals—Habeas corpus—Leave to appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 597(1)(b), 691(2)—Supreme Court Act, R.S.C. 1952, c. 259, s. 41(3).

The appellant was found guilty of breaking and entering, and his appeal was dismissed by the Court of Appeal. His subsequent application for a writ of habeas corpus was dismissed, and an appeal from that dismissal

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

[1] [1948] S.C.R. 46, 7 Fox Pat. C. 183, 7 C.P.R. 58, 2 D.L.R. 561.

was rejected by the Court of Appeal. He appealed to this Court from that judgment and also applied for leave to appeal to this Court.

Held: Both the appeal and the application for leave to appeal should be dismissed.

The appellant is confined in a penitentiary in consequence of his conviction and sentence by a Court of competent jurisdiction. The writ was therefore properly refused.

Subsection 3 of s. 41 of the *Supreme Court Act* precludes the granting of leave to appeal to this Court under that Act.

There was no question of law raised by the appellant which would warrant the granting of leave to appeal under s. 597(1)(*b*) of the *Criminal Code*.

There was no other remedy which the appellant was entitled to seek in this Court.

Droit criminel—Appels—Habeas corpus—Demande pour permission d'appeler—Code criminel, 1953-54 (Can.), c. 51, arts. 597(1)(b), 691(2) —Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41(3).

L'appelant fut trouvé coupable d'introduction par effraction et son appel fut rejeté par la Cour d'Appel. Sa demande subséquente pour un bref d'habeas corpus fut rejetée et ce jugement fut confirmé par la Cour d'Appel. Il en appela devant cette Cour de ce jugement et en plus produisit une demande pour permission d'appeler devant cette Cour.

Arrêt: L'appel et la demande pour permission d'appeler doivent tous deux être rejetés.

L'appelant est emprisonné à la suite d'une déclaration de culpabilité et d'une sentence venant d'une Cour de juridiction compétente. Le bref a été en conséquence proprement refusé.

Le paragraphe 3 de l'art. 41 de la *Loi sur la Cour suprême* rend impossible l'octroi de la permission d'appeler en vertu de ce statut.

L'appelant n'a soulevé aucune question de droit permettant de lui accorder la permission d'appeler sous le régime de l'art. 597(1)(*b*) du *Code criminel*.

L'appelant n'a droit à aucun autre recours devant cette Cour.

APPEL d'un jugement de la Cour d'Appel de la Saskatchewan, confirmant un jugement du Juge en chef Bence qui avait rejeté une demande pour un bref d'habeas corpus. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, affirming a judgment of Chief Justice Bence dismissing an application for a writ of habeas corpus. Appeal dismissed.

No one appearing for the appellant.

S. Kujawa, for the respondent.

The judgment of the Court was delivered by

1965

TOKAR
v.
THE QUEEN

MARTLAND J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan, which dismissed an appeal by the appellant, based upon s. 691(2) of the *Criminal Code*, from the dismissal by Chief Justice Bence of the appellant's application for a writ of habeas corpus ad subjiciendum.

I have considered all of the submissions made by the appellant, and in my opinion this appeal fails. The appellant is confined in a penitentiary in consequence of his conviction and sentence by a court of competent jurisdiction, and I think the learned Chief Justice was right in refusing to grant the writ.

The appellant further requests leave to appeal to this Court under s. 41 of the *Supreme Court Act*. Subsection (3) of that section precludes the granting of such leave.

There is no question of law raised by the appellant which would warrant the granting of leave to appeal under s. 597(1)(*b*) of the *Criminal Code*.

Other than the foregoing, there is no remedy which the appellant is entitled to seek in this Court.

Appeal dismissed; leave to appeal refused.

Solicitor for the respondent: The Attorney General for Saskatchewan.

1965

*Dec. 3
Dec. 20

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE, DOMINION BRIDGE LIMITED and PROVINCIAL ENGINEERING LIMITED ..... APPELLANTS;

AND

SAINT JOHN SHIPBUILDING AND DRY DOCK CO. LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Customs and Excise—Crane imported—Whether of a class or kind not made in Canada—Customs Act, R.S.C. 1952, c. 58—Customs Tariff, R.S.C. 1952, c. 60, s. 6(10), tariff items 427(1), 427a—Order-in-Council P.C. 1618 dated July 2, 1936.

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

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

The respondent company imported into Canada in parts a travelling level luffing jib type gantry crane for use in its dry dock at Saint John, N.B. The evidence showed that at least two Canadian manufacturers were at the relevant time capable of building a crane such as the one in question and were willing to undertake its construction but that no jib type travelling crane of the capacity and dimensions of the crane in question had previously been manufactured in Canada. A similar crane was built in Canada in 1959, but with a much lower lifting capacity. The Deputy Minister ruled that the crane was of a kind or class made in Canada and therefore subject to customs duty under item 427(1) of the *Customs Tariff*, R.S.C. 1952, c. 60. The respondent contended that the crane was classifiable under item 427a and hence entitled to entry free of duty.

By a majority decision, the Tariff Board ruled that the imported crane and the one made in Canada in 1959 were the two members making up a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more, and that the fact that the 1959 crane was made in Canada was sufficient to satisfy the requirements of the opening sentence of s. 6(10) of the *Customs Tariff*. The Exchequer Court held that the Board had erred and referred the matter back to the Tariff Board for a rehearing. The Deputy Minister was granted leave to appeal to this Court and the respondent company cross-appealed.

Held: The appeal should be allowed and the cross-appeal dismissed.

In dealing with the matter, the Board was not restricted to the precise grounds on which the Deputy Minister had based his decision. Its task was to decide on the material before it under which item the imported crane should be classified. The Board made the findings necessary to support its declaration and there was no need to refer the matter back to it.

The Board did not err in law in its interpretation of s. 6(10) and P.C. 1618. Their combined effects provide that goods shall not be deemed to be of a class made in Canada unless at least 10 per cent of the normal Canadian consumption is so made. The Board's reasons show that it decided that one-half of the class was made in Canada and that this greatly exceeded the maximum fixed by the combined effect of the statute and order-in-council and rendered it unreasonable to hold that the imported crane was of a class not made in Canada.

The Board decided that the production in Canada of one crane of the class in the last fifteen years was production "in substantial quantities" within the meaning of that phrase as used in s. 6(10). Assuming that this question was one of law, the Board did not err in its answer. One is a substantial portion of two.

The dissenting opinion in the judgment of the Board was that the difference in lifting capacity between the two cranes was so great that the two could not be regarded as belonging to the same class. The view of the majority and that of the minority were both tenable, and the choice between them involved a finding of fact which it was for the Board to make and as to which its decision was not subject to review.

Revenu—Douanes et accise—Grue importée—Est-elle de la classe ou espèce non fabriquée au Canada—Loi sur les Douanes, S.R.C. 1952, c. 58—Tarif des Douanes, S.R.C. 1952, c. 60, art. 6(10), item 427(1), 427a—Arrêté ministériel C.P. 1618 en date du 2 juillet 1936.

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

La compagnie intimée importa au Canada par parties une grue portique à flèche et à portée variable pour usage dans sa cale sèche à Saint-Jean, N.-B. La preuve a démontré qu'au moins deux fabricants canadiens étaient en mesure à ce moment-là de construire une telle grue et étaient consentants d'en faire la construction, mais qu'aucune grue roulante à flèche ayant la capacité et les dimensions de la grue en question avait été fabriquée auparavant au Canada. Une grue semblable avait été construite au Canada en 1959, mais elle avait une puissance de levée beaucoup moindre. Le sous-ministre classifia la grue comme étant d'une classe ou espèce fabriquée au Canada et, en conséquence, sujette à des droits de douanes sous le régime de l'item 427(1) du *Tarif des Douanes*, S.R.C. 1952, c. 60. L'intimée a prétendu que la grue devrait être classifiée sous l'item 427a et qu'elle avait droit par conséquent d'entrer en franchise.

Par une décision majoritaire, la Commission du Tarif a jugé que la grue importée et celle fabriquée au Canada en 1959 étaient les deux membres constituant une classe de grues portiques roulantes à flèche ayant une puissance de levée de 15 tonnes ou plus, et que le fait que la grue de 1959 avait été fabriquée au Canada était suffisant pour satisfaire les dispositions de la première phrase de l'art. 6(10) du *Tarif des Douanes*. La Cour de l'Échiquier a jugé que la Commission avait erré et a déféré la question à la Commission du Tarif pour une nouvelle audition. Le sous-ministre a obtenu permission d'appeler devant cette Cour et la compagnie intimée porta contre-appel.

Arrêt: L'appel doit être maintenu et le contra-appel rejeté.

Dans le traitement de la question, la Commission n'était pas restreinte aux motifs précis sur lesquels le sous-ministre avait basé sa décision. Sa tâche était de décider sous quel item la grue importée devait être classifiée en se basant sur les faits qui lui étaient présentés. La Commission est arrivée aux conclusions nécessaires pour supporter sa déclaration et il n'y avait pas lieu de lui déférer la question.

La Commission n'a pas erré en droit dans son interprétation de l'art. 6(10) et du C.P. 1618. Par l'effet combiné de ces deux dispositions il est stipulé que les marchandises ne seront pas censées appartenir à une classe fabriquée au Canada à moins que 10 pour cent de la consommation normale canadienne ne soit ainsi fabriquée. L'opinion émise par la Commission démontre qu'elle a jugé que la moitié de la classe était fabriquée au Canada et que cela excédait grandement le maximum fixé par l'effet combiné du statut et de l'arrêté ministériel, et rendait déraisonnable le point de vue que la grue importée était de la classe non fabriquée au Canada.

La Commission a jugé que la production au Canada d'une grue de la classe, dans les derniers quinze ans, était une production «en quantités importantes» dans le sens que cette phrase est employée dans l'art. 6(10). Assumant que cette question en était une de droit, la Commission n'a pas commis d'erreur dans la réponse. Une grue est une partie importante de deux.

L'opinion dissidente dans le jugement de la Commission était à l'effet que la différence dans la puissance de levée entre les deux grues était tellement grande que les deux grues ne pouvaient pas être considérées comme appartenant à la même classe. Le point de vue de la majorité et celui de la minorité étaient tous deux soutenables, et le choix entre les deux nécessitait une conclusion de fait qui était du domaine de la Commission et dont la décision n'est pas sujette à revision.

APPEL par la Couronne et contre-appel par l'intimée d'un jugement de Juge Thurlow de la Cour de l'Échiquier du Canada[1] maintenant un appel de la décision de la Commission du Tarif. Appel maintenu et contre-appel rejeté.

APPEAL by the Deputy Minister and cross-appeal by the respondent from a judgment of Thurlow J. of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Tariff Board. Appeal allowed and cross-appeal dismissed.

C. R. O. Munro, Q.C., and *D. H. Aylen*, for the appellant, the Deputy Minister.

A. Forget, Q.C., for the appellants, Dominion Bridge Ltd. and Provincial Engineering Ltd.

E. N. McKelvey, Q.C., and *J. R. Richard*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by my brother Fauteux, from a judgment[1] of Thurlow J. allowing an appeal from a declaration of the Tariff Board made on May 1, 1964, and referring the matter back to the Tariff Board for a re-hearing.

The declaration of the Board upheld a ruling of the Deputy Minister that a crane which the respondent imported in parts from Scotland in 1961 and 1962 and erected at its dry dock at Saint John, New Brunswick, was to be classified under item 427(1) of the *Customs Tariff* and rejected the contention of the respondent that it should be classified under item 427a. It is common ground that the imported parts fall within one or other of these items which read as follows:

427(1) All machinery composed wholly or in part of iron or steel, n.o.p., parts of the foregoing.

427a. All machinery composed wholly or in part of iron or steel, n.o.p. of a class or kind not made in Canada, complete parts of the foregoing.

The question which the Board was called upon to determine was whether the crane was of a class or kind not made

[1] [1965] 1 Ex. C.R. 802.

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

Cartwright J.

in Canada. The Board decided that it was not of that class or kind and was therefore subject to duty at the rate of 10 per cent under item 427(1). If the crane had been held to fall within item 427a it would have been admitted free of duty.

The appellants ask that the declaration of the Board be restored. The respondent cross-appeals and asks for a declaration that the crane be classified under item 427a. None of the parties before us asked that there be a re-hearing by the Board.

The crane in question is a travelling electrically driven level luffing jib type gantry crane.

The Board made the following findings of fact which are supported by the evidence. The imported crane is a travelling monotower, thus described because of a single towerlike base; it has a self-contained power plant; it can negotiate, on its rails, curves as sharp as 500 feet in radius; it is equipped with a level-luffing feature whereby the load carried remains at the same level while the jib of the crane is moved up or down through its vertical arc; it has a high lift of 300 feet; it is equipped with Sta-creep control for accurate and slow movement; it is counterweighted to reduce its power requirement; it has an auxiliary hoist for the more rapid lifting of lesser loads; it weighs over 750 long tons; it has a lifting capacity ranging from 75 long tons, or 84 short tons, at 115 feet to 20 long tons at 160 feet. Cranes of this nature are not produced in large numbers of identical units as are automobiles and many other articles. In part this is due to their great cost and size; in part it is also due to the fact that each purchaser's requirements differ from those of any other. The market is essentially one of construction to well-defined requirements and specifications upon which agreement is reached before construction is begun. To increase lifting capacity or radius of carriage sturdier construction may be necessary but no basic change in the principle of design is required.

The evidence shewed that various types of cranes have from time to time been manufactured in Canada, some of which, notably those of the overhead bridge type, had lifting capacities considerably in excess of 84 tons and that at least two Canadian manufacturers were at the relevant time capable of building a crane such as the one in question

and were willing to undertake its construction but that no jib type travelling crane of the capacity and dimensions of the crane in question had previously been manufactured in Canada. Prior to 1945 a number of electrically driven jib type travelling cranes had been built in Canada for use in shipbuilding and ship repair work some of which had lifting capacities up to 40 tons at a radius of 50 feet. What the capacity of these cranes would have been at radii of 115 and 160 feet does not appear. These cranes did not have the capacity of maintaining the level of the load when luffing. An electrically driven level luffing jib type travelling crane was, however, built in Canada by Provincial Engineering Limited in 1959 and was installed for use in shipbuilding and repair work at Port Weller, Ontario. It has a maximum lifting capacity of 55 short tons at a radius of 47 feet which declines to 18 tons at 110 feet and to 5 tons at 115 feet.

The position taken by the Deputy Minister before the Tariff Board, the Exchequer Court and this Court is that the class of which the imported crane is a member is that of jib type travelling gantry cranes with a lifting capacity of 15 tons or more. In the 15 years preceding the date of the hearing before the Board only one crane of that class was made in Canada, the one at Port Weller referred to above, and only one was imported that is the crane in question.

The ruling of the Deputy Minister was set out in a letter to the respondent dated September 11, 1962, reading as follows:

> Your representations have received careful consideration but the Department considers the 75 ton electric travelling level luffing shipyard crane, per specifications submitted, to be of a class or kind made in Canada by Dominion Bridge Company Limited, Montreal and Provincial Engineering Limited, Niagara Falls.
>
> It is my understanding that these companies have manufactured and supplied cranes over the years for installation in various shipyards in Canada and are still very much interested in building such machines on receipt of firm orders.
>
> In view of the foregoing, I have no alternative other than to rule this crane of a class or kind made in Canada and dutiable under tariff item 427(1), at 10% ad valorem, under the British Preferential Tariff.

The ruling was reiterated in two subsequent letters.

The reasons of the majority of the Board conclude as follows:

> The lifting capacity of the imported crane therefore exceeds that of the Port Weller crane by 29 short tons or over 50%. This excess is substantial. However in the market of very heavy cranes built only to purchaser's

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

Cartwright J.

specifications there must be breadth in the application of criteria of similarity in the establishment of the class or kind distinction.

In the present case the Board finds that for the purposes of this appeal the capacities of these two jib travelling gantry cranes are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more.

The evidence of production and consumption, both confidential and public, may be summarized as follows. Were the class or kind to include only these two cranes, the 10 per cent of Canadian consumption fixed by Order in Council as sufficient to represent 'substantial' production in Canada within the meaning of subsection (10) of Section 6 of the Customs Tariff would be exceeded; if the class were enlarged to include cranes of lesser capacity, even as low as 6 tons, the evidence reveals that, throughout, the percentage of Canadian production would be even more substantial and consequently be more than sufficient to classify the cranes as being of a class or kind made in Canada.

The Board, therefore, declares that the imported crane is not 'of a class or kind not made in Canada'.

Accordingly, the appeal is dismissed.

Mr. Gerry, who dissented, stated that he agreed with the decision of the majority except as to the last four paragraphs. The gist of his reasons is contained in the following passage:

It seems to me to run directly contrary to the intention of the legislation to classify the imported crane as being of a class or kind made in Canada when it possesses the lifting capacity necessary to perform a task which no jib type travelling gantry crane in fact made in Canada, had anywhere near the capacity to perform.

I am of the opinion that the upper lifting capacity limit of the class or kind deemed to be made in Canada must be determined in the vicinity of the upper limit of lifting capacity of the jib type travelling gantry cranes, in fact made in Canada.

Before considering the reasons of Thurlow J. it will be convenient to set out the wording of s. 6(10) of the *Customs Tariff*, R.S.C. 1952, c. 60, and of P.C. 1618. These read as follows:

6. (10) For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to supply a certain percentage of the normal Canadian consumption and may fix such percentages.

Order in Council P.C. 1618 of July 2nd, 1936.

Articles shall not be deemed to be of a class or kind made or produced in Canada unless a quantity sufficient to supply ten per centum of the normal Canadian consumption of such article is so made or produced.

After summarizing the facts and the reasons of the majority of the Board, Thurlow J. stated that the first

ground of attack in the Board's declaration was that "because of the very substantial differences between the only Canadian made crane even remotely comparable, viz., the Port Weller crane, and the crane in question" the only reasonable determination open to the Board was that the imported crane was of a class or kind not made in Canada and consequently the Board's finding was not sustainable in point of law on the material which was before it.

Thurlow J., in my opinion correctly, would have rejected this ground of attack for the reasons which he expressed as follows:

> As the question of the limits of the class or kind of goods made in Canada into which a particular article may fall is one of fact—vide *Dominion Engineering Works Ltd. v. D.M.N.R. et al.*—to be resolved on such criteria appearing from the evidence as the Board regards as appropriate to the particular goods and as neither distinctions of size nor of capacity are necessarily conclusive on a question of this kind, I do not think that it can be said that on the material before the Board in this case the Board was necessarily required to classify cranes by sizes or by particular lifting capacities, or that a finding that the crane in question was one of a 'class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more' would be so unreasonable as to be not supportable in law.

However, having said this, the learned Judge continued:

> But I have been unable to satisfy myself that the majority of the Board has so found. What the declaration says is that the Board finds that it was not unreasonable for the Deputy Minister to include the crane in such a class and in the following paragraph the majority of the Board proceeds to consider the ratio of Canadian production to Canadian consumption of cranes of that class (which would, of course, be relevant if such a finding had been made) and the ratio of Canadian production to Canadian consumption of a different class which could not be relevant if the finding had been made. On the other hand if this finding of a class has not been made there appears to me to be no finding in the declaration, of the class or kind of cranes in fact made in Canada into which the crane in question falls and in the absence of such a finding to establish the scope of the class or kind I am unable to see how the subsequent problems which arise on s. 6(10) could have been properly resolved.

The passage in the reasons of the Board referred to by the learned Judge has already been quoted. While its wording may not be altogether free from ambiguity I am satisfied that there are implicit in it the findings (i) that the imported crane and the Port Weller crane are the two members making up a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more, and (ii) that the fact that the Port Weller crane was made in Canada was sufficient to satisfy the requirements of the opening sentence of s. 6(10). I do not think these findings

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

CartwrightJ.

are vitiated because the Board went on to say that the same result would follow if it adopted another definition of the class or because the letter from the Deputy Minister, quoted above, did not define the class in the same terms as did the Board. In dealing with the matter the Board was not restricted to the precise grounds on which the Deputy Minister had based his decision. Its task was to decide on the material before it under which item the imported crane should be classified.

It follows from what I have said that, in my opinion, the Board made the findings necessary to support its declaration and there is no need to refer the matter back to it. There remains the question whether in reaching its decision the Board erred in law. Thurlow J. was of opinion that the Board had so erred in two respects.

After quoting from the passage in the decision of the majority of the Board which has been set out above, the learned Judge continued:

> If by this the majority of the Board meant, as I think they did that the effect of the Order-in-Council is that production of 10 per cent, of the Canadian consumption is necessarily production of "substantial quantities" within the meaning of s. 6(10) I am, with respect, of the opinion that they misdirected themselves on a material point of law and that their finding therefore cannot stand. On the other hand if the majority of the Board assumed or decided that production in Canada of one crane of the class in the course of the immediately preceding period of fifteen years was production in "substantial quantities" within the meaning of the first part of s. 6(10) I would also, with respect, have little difficulty in reaching the conclusion that such an assumption or finding was erroneous in point of law as being one which if properly instructed as to the law and acting judicially the Board could not reach.

As to the first of these suggested errors, with respect, I do not think that the Board erred in law in its interpretation of s. 6(10) and P.C. 1618. It will be observed that s. 6(10) empowers the Governor in Council to provide that the quantity of a class of goods made in Canada in order to be regarded as substantial shall be sufficient to supply a percentage, fixed by His Excellency, of the normal Canadian consumption. I agree with the submission of Mr. Forget that the effect of this is to enable the Governor in Council to define the expression "substantial quantities" used in the subsection. From this it follows that the combined effect of s. 6(10) and P.C. 1618 is to require s. 6(10) to be applied as if it read:

> For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in quantities sufficient to supply ten per centum of the normal Canadian consumption of such goods.

It is true that this enactment is expressed in negative form. It provides that goods shall not be deemed to be of a class made in Canada unless at least ten per centum of the normal Canadian consumption is so made. It does not provide that if more than ten per centum is so made the goods shall of necessity be deemed to be of a class made in Canada. It might perhaps be error in law if the Board was of opinion that in the present case the production in Canada of one of the two cranes making up the class was not substantial production but considered itself bound by law to decide that it was; but I do not read the reasons of the Board as holding this. It appears to me that these reasons read as a whole shew that the Board decided that one half of the class it was considering was made in Canada and that this greatly exceeded the minimum fixed by the combined effect of the statute and Order-in-Council and rendered it unreasonable to hold that the imported crane was of a class not made in Canada.

As to the second suggested error, it is my opinion that the Board did decide that the production in Canada of one crane of the class in the last fifteen years was production "in substantial quantities" within the meaning of that phrase as used in s. 6(10). The word "substantial" as used in the subsection is a relative term. The question is whether the production in Canada during the relevant period was substantial in relation to the total Canadian consumption during that period. It in fact represented fifty per cent of that total. I incline to agree with Mr. Munro's submission that this was a question of fact for the Board to decide, but assuming that the question is one of law I do not think that the Board erred in its answer. One is a substantial portion of two.

I have already quoted from the reasons of Mr. Gerry the ground on which he disagreed with the majority. In his opinion the difference in lifting capacity between the Port Weller crane and the imported crane was so great that the two could not be regarded as belonging to the same class. The difference is large and is accentuated if expressed in terms of "overturning moment" instead of maximum lifting

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

CartwrightJ.

capacity but it is dimensional rather than functional. On this point it appears to me that the view of the majority and that of the minority were both tenable and that the choice between them involved a finding of fact which it was for the Board to make and as to which its decision is not subject to review.

I would allow the appeal, dismiss the cross-appeal and restore the declaration of the Tariff Board. The appellant the Deputy Minister of National Revenue for Customs and Excise will recover his costs in this Court and in the Exchequer Court from the respondent. There will be no order in either Court as to the costs of the other appellants.

Appeal allowed with costs; cross-appeal dismissed with costs.

Solicitor for the appellant, The Deputy Minister: E. A. Driedger, Ottawa.

Solicitors for the appellants, Dominion Bridge Ltd. and Provincial Engineering Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for the respondent: McKelvey, Macaulay, Machum & Fairweather, Saint John.

1965

*June 16, 17, 18 Dec. 14

CHEERIO TOYS AND GAMES LIMITED (*Defendant*) ..... APPELLANT;

AND

SAMUEL DUBINER (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Infringement—Injunction—YO-YO and BO-LO—Registered user agreement—Breach of agreement—Whether permitted user can infringe—Whether trade marks have become generic—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 2(f), 4, 18, 20, 49.

The defendant company was incorporated in 1938 by the plaintiff. In 1955, the company assigned all but one of its trade marks to the plaintiff. Later in the same year, the plaintiff sold control of the company to one K and at the same time granted to the company a non-exclusive licence to use the trade marks. Subsequently, the company and the plaintiff applied for registration of the company as a

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

registered user. This application was granted but subject to the condition that the company could use the trade marks only so long as the plaintiff was given free access to the premises of the company to inspect the finished wares. There was no mention of the right of inspection in the documents under which the control of the company had been sold and the trade marks assigned. The remaining trade mark Bo-Lo was subsequently dealt with in a similar manner and subject to the same conditions.

In December 1962, the plaintiff demanded the right to inspect and this was refused. He then wrote a letter to the company purporting to terminate the registered user agreement. This was followed by a demand from his solicitor that the company refrain from further use of the trade marks. Proceedings with the registrar were than commenced to cancel the company's registered user licence under s. 49(10)(*a*) of the *Trade Marks Act*. This application was still pending when the plaintiff brought the present action claiming damages for infringement and an injunction restraining the defendant company from further infringement. The Exchequer Court maintained the action for infringement and rejected the counter-claim of the defendant for the expungement of certain trade marks. In this Court the defendant limited its appeal to two trade marks Yo-Yo and Bo-Lo. The plaintiff cross-appealed in respect of trade marks containing the word "Cheerio" which the trial judge held to be invalid.

Held (Judson J. dissenting): The appeal and the cross-appeal should be dismissed.

Per Martland, Ritchie, Hall and Spence JJ.: There were no reasons to disturb the finding of the trial judge, supported by the evidence, that the defendant had breached its registered user agreement by refusing access to the plaintiff.

All the documents must be considered as part of the agreement between the parties and, therefore, the limitation on the registered user contained in the application to the registrar was a limitation enforceable on the demand of the plaintiff. The words "in accordance with the terms of his registration as such" in s. 49(2) of the Act applied directly to the limitation in the application for registration as the registered user, and this application was part of the agreement between the parties. Between the immediate parties this was simply a matter of contract and, once the application for a registered user was found to be part of the contract, then that application as a contract could be enforced as any other contract, and the plaintiff could take steps to cancel it for breach of its provisions. As between the defendant and the plaintiff the right to use the trade marks was governed by the condition of the licence and when the defendant breached the registered user agreement it forfeited whatever rights it had to use the trade marks and became an infringer, if the trade marks were valid. No rights subsisted under the agreement transferring control of the company, because that agreement and the joint application to the registrar were indivisible as part and parcel of the transaction.

The argument that the trade marks were invalid because the words Yo-Yo and Bo-Lo were generic terms which could not be appropriated as a trade mark, could not be upheld. Since it was the plaintiff's whole case that the licence to use the trade marks had been cancelled by his solicitor's letter, the plaintiff could not invoke estoppel against the defendant on the basis of the licence after the licence had been

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

terminated. However, the defendant company, having assigned the trade marks to the plaintiff, could not derogate from its own grants and was, therefore estopped as between itself and the plaintiff from disputing the validity of the trade marks.

As a result of the "Cheerio" marks having been assigned to the plaintiff and having been the subject of the licence back from the plaintiff to the defendant, it appeared that whatever the word "Cheerio" appeared to designate or distinguish, it certainly did not distinguish the wares of the plaintiff from those of others and, consequently not being distinctive, was invalid. The Court would not be justified in writing into the contract of assignment any covenant that the defendant should change its corporate name. That covenant having been omitted, then the result that the word "Cheerio" was invalid was inevitable.

Per Judson J., *dissenting*: The trial judge was in error in holding that the company was no longer a permitted user of the trade marks. According to s. 49(10) of the Act, the registration can be cancelled only by the registrar or by the Exchequer Court. There is no provision for its cancellation merely by a notice from one party to the other. If the application for the registered user is regarded as an agreement then the mere cancellation of such agreement would have to be followed by a cancellation of the registration. The rights specified in s. 49(2) and (3) of the Act flow from the registration and continue as long as the registration subsists. There can be no infringement as long as the registration subsists.

The trial judge was in error in not expunging the mark Yo-Yo. The evidence strongly supports the submission that the word Yo-Yo at the present time means the article itself. No buyer at the present day could possibly associate that word with the goods of a particular trader or think it distinguishes the goods of one person from another. The Act makes it clear that the appropriate time of examination and the propriety of a trade mark position on the register under s. 18(1)(*b*) is the time of the proceedings. This is a straight question of fact and it matters not how the lack of distinctiveness is brought about. Any other result would give the proprietor of a so-called trade mark a perpetual monopoly over the sale of the article even when the mark is in no way distinctive of the wares of the owner.

Marques de commerce—Usurpation—Injonction—YO-YO et BO-LO—Usager inscrit—Violation de l'entente—Un usager inscrit peut-il être coupable d'usurpation—Les marques de commerce sont-elles devenues génériques—Loi sur les Marques de Commerce, 1952-53 (Can.), c. 49, arts. 2(f), 4, 18, 20, 49.

En 1938, la compagnie défenderesse fut incorporée par le demandeur. En 1955, la compagnie a transféré au demandeur toutes ses marques de commerce à l'exception d'une. Plus tard dans la même année, le demandeur a vendu le contrôle de la compagnie à un nommé K et en même temps a accordé à la compagnie une licence non exclusive pour se servir des marques de commerce. Subséquemment, la compagnie et le demandeur se portèrent demandeurs en vue de l'inscription de la compagnie comme usager inscrit. Cette demande fut accordée mais sujette à la condition que la compagnie pourrait se servir des marques de commerce seulement en autant que le demandeur aurait libre entrée sur la propriété de la compagnie pour inspecter les marchandises finies. Les documents, en vertu desquels le contrôle de la compagnie avait été vendu et les marques de commerce transférées, ne

faisaient pas mention de ce droit d'inspection. L'autre marque de commerce Bo-Lo a été le sujet du même traitement et des mêmes conditions.

En décembre 1962, le droit d'inspection a été refusé au demandeur. Il a alors écrit une lettre à la compagnie dans le but de mettre fin à l'entente créant l'usage inscrit. Cette lettre a été suivie d'une demande par les avocats du demandeur que la compagnie s'abstienne de tout usage des marques de commerce. Des procédures devant le registraire furent instituées pour annuler la licence de la compagnie en vertu de l'art. 49(10)(*a*) de la *Loi sur les Marques de Commerce*. Cette demande n'avait pas encore été disposée lorsque le demandeur a institué la présente action pour réclamer des dommages pour usurpation et une injonction pour mettre fin à toute usurpation additionnelle de la compagnie. La Cour de l'Échiquier a maintenu l'action pour usurpation et a rejeté la demande reconventionnelle de la défenderesse pour faire radier certaines marques de commerce. Devant cette Cour la défenderesse a limité son appel à deux marques de commerce—Yo-Yo et Bo-Lo. Le demandeur a porté contre-appel en regard des marques de commerce contenant le mot «Cheerio» que le juge au procès avait déclarées invalides.

Arrêt: L'appel et le contre-appel doivent être rejetés, le Juge Judson étant dissident.

Les Juges Martland, Ritchie, Hall et Spence: Il n'y avait aucun motif pour changer le verdict du juge au procès, supporté par la preuve, que la compagnie avait violé son entente d'usager inscrit en refusant l'entrée au demandeur.

Tous les documents doivent être considérés comme faisant partie de l'entente entre les parties et, en conséquence, les restrictions imposées à l'usager inscrit contenues dans la demande au registraire étaient des restrictions exécutoires à la demande du demandeur. Les mots «selon les termes de son enregistrement à ce titre» dans l'art. 49(2) de la Loi s'appliquent directement à la restriction dans la demande en vue de l'inscription comme usager inscrit, et cette demande faisait partie de l'entente entre les parties. Entre les parties immédiates, ceci était simplement une question de contrat et, une fois que la demande pour l'inscription d'un usager inscrit se trouvait à faire partie du contrat, la demande comme contrat pouvait être mise en vigueur comme tout autre contrat, et le demandeur pouvait prendre les moyens de la faire annuler pour violation de ses dispositions. Entre la défenderesse et le demandeur, le droit de se servir des marques de commerce était gouverné par la condition dans la licence, et lorsque la défenderesse a violé l'entente par laquelle elle était devenue usager inscrit, elle a perdu tous les droits qu'elle pouvait avoir de se servir des marques de commerce et est devenue une usurpatrice, si les marques de commerce étaient valides. Il ne subsistait aucun droit en vertu de l'entente transférant le contrôle de la compagnie, parce que cette entente et la demande conjointe au registraire étaient indivisibles comme faisant partie intégrante de la transaction.

La proposition que les marques de commerce étaient invalides parce que les mots Yo-Yo et Bo-Lo étaient des termes génériques qui ne pouvaient pas être employés comme marque de commerce n'était pas soutenable. Puisque toute la cause du demandeur reposait sur le fait que la licence pour se servir des marques de commerce avait été annulée par la lettre de l'avocat, le demandeur ne pouvait pas opposer

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

une fin de non-recevoir à la défenderesse sur la base de la licence après que la licence avait été terminée. Cependant, la compagnie défenderesse, ayant transféré les marques de commerce au demandeur, ne pouvait pas porter atteinte à sa propre cession et était alors empêchée de mettre en dispute entre elle et le demandeur la validité des marques de commerce.

Comme résultat du fait que les marques «Cheerio» avaient été transférées au demandeur et avaient été le sujet d'une licence du demandeur à la défenderesse, il semble que quoi que ce soit que le mot «Cheerio» semble désigner ou distinguer, il ne distingue certainement pas les marchandises du demandeur de celles des autres et, conséquemment, n'étant pas distinctif, était invalide. La Cour ne serait pas justifiée d'écrire dans le contrat transférant les marques une clause à l'effet que la défenderesse devrait changer son nom de corporation. Cette clause ayant été omise, le résultat était inévitable que le mot «Cheerio» était invalide.

Le Juge Judson, *dissident*: Le juge au procès a erré en adjugeant que la défenderesse n'était plus un usager inscrit des marques de commerce. Selon l'art. 49(10) de la Loi, l'enregistrement comme usager inscrit ne peut être annulé que seulement par le registraire ou par la Cour de l'Échiquier. Il n'y a aucune disposition pour l'annuler simplement par un avis d'une des parties à l'autre. Si la demande pour inscrire comme usager inscrit est considérée comme un contrat, alors la seule annulation de ce contrat doit être suivie d'une annulation de l'enregistrement. Les droits spécifiés dans l'art. 49(2) et (3) de la Loi découlent de l'enregistrement et continuent aussi longtemps que l'enregistrement subsiste. Il ne peut y avoir aucune usurpation aussi longtemps que l'enregistrement subsiste.

Le juge au procès a erré en ne radiant pas la marque Yo-Yo. La preuve supporte fortement l'argument que le mot Yo-Yo signifie présentement l'article lui-même. Aucun acheteur aujourd'hui ne pourrait possiblement associer ce mot avec les marchandises d'un marchand particulier ou penser qu'il est distinctif des marchandises d'une personne. La Loi est claire que le moment opportun pour faire cet examen en vertu de l'art. 18(1)(*b*) est l'époque où sont entamées les procédures. Ceci est une simple question de fait et il n'importe pas de savoir comment ce manque de caractère distinctif a été soulevé. Tout autre résultat donnerait au propriétaire de la marque de commerce un monopole perpétuel sur la vente de l'article même lorsque la marque n'est d'aucune façon distinctive de la marchandise du propriétaire.

APPEL et CONTRE-APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier de Canada[1]. Appel et contre-appel rejetés, le Juge Judson étant dissident.

APPEAL and CROSS-APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1]. Appeal and cross-appeal dismissed, Judson J. dissenting.

Gordon F. Henderson, Q.C., and *David Watson*, for the defendant, appellant.

[1] [1965] 1 Ex. C.R. 524.

Donald F. Sim, Q.C., and *W. F. Green*, for the plaintiff, respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—The respondent brought action against the appellant alleging infringement of certain trade marks registered in his name with the Registrar of Trade Marks for Canada. Some 23 trade marks were involved and dealt with by Noël J. in the Exchequer Court[1], but in this Court the appellant limited the appeal to two trade marks—Yo-Yo and Bo-Lo. The respondent has cross-appealed in respect of trade marks containing the word "Cheerio" which Noël J. held to be invalid, but in this Court abandoned his claim to the trade mark "Beginners".

The history of the transactions leading to the litigation is shortly as follows. The appellant company was incorporated by the respondent Dubiner on July 6, 1938. He continued to operate the company until August 17, 1955, when by an agreement in writing one A. Krangle acquired 75 per cent of the issued shares in the company and all the issued shares in another company called Dulev Plastics Ltd. from Dubiner and Dubiner's wife Betty. One A. C. Gallo was the owner of the remaining 25 per cent of the shares in the appellant company. He continued as owner of these shares.

However, prior to this transaction, the appellant company had, on March 15, 1955, assigned to Dubiner all the trade marks in issue in this action excepting Bo-Lo, (Exhibit 7). Bo-Lo was subsequently assigned to Dubiner on April 11, 1957, (Exhibit 8). Both assignments were identical in language except that the assignment of March 15, 1955, covered a number of trade marks whereas that of April 11, 1957, covered Bo-lo only. The grant clause in each assignment reads as follows:

> FOR VALUABLE CONSIDERATION hereby acknowledged to have been received by it, CHEERIO TOYS & GAMES LIMITED, of the City of Toronto, and Province of Ontario, the Transferor, has agreed to transfer and doth hereby transfer to SAMUEL DUBINER of P.O.B. 35, Bnei Beraq, Israel, all of its right, title and interest in and to the Trade Marks hereinafter set forth and registered in the Trade Marks Office of Canada in the name of the Transferor as follows, namely:

The agreement of August 17, 1955, contained clauses reading:

[1] [1965] 1 Ex. C.R. 524.

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Hall J.

8. Samuel Dubiner doth hereby grant to Cheerio a non-exclusive licence to use the trade marks, patents, industrial designs and copy rights hereinbefore referred to.

9. In consideration of the granting of the aforesaid non-exclusive licence and Samuel Dubiner's agreement to reveal to Cheerio the systems of marketing and his knowledge in connection therewith from time to time as requested by Cheerio, and his agreement to assist Cheerio from time to time from Israel, Cheerio doth hereby covenant and agree to pay to Dubiner in each year a sum equal to five per centum (5%) of the sales price (excluding sales tax) of all bandalore tops sold by Cheerio in such year, and Cheerio doth further covenant and agree to pay to Samuel Dubiner's mother the sum of $12.00 per week in each and every week so long as she lives.

On August 31, 1955, Dubiner and the appellant company applied to the Registrar of Trade Marks to register the company as a registered user of the relevant trade marks (other than Bo-Lo) under s. 49 of the *Trade Marks Act*, c. 49, 1-2 Eliz. II, which reads in part:

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

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

On March 9, 1956, the Registrar notified Mr. Leon Arthurs, a patent and trade mark attorney who was acting for both parties in submitting the application of August 31, 1955, that the appellant company had been registered as a registered user in the form following:

September 14, 1955—CHEERIO TOYS & GAMES LIMITED, 35 Hanna Avenue, Toronto, Ontario is hereby registered as a Registered User of the trade mark registered under No. , in respect of the wares in association with which the trade mark is now registered. The Registered User is the former owner of the trade mark. The Registered User is to use the trade mark only in association with wares meeting the standards of quality and efficiency established by it while it was the owner of the trade mark, *and only so long as the Registered Owner is given free access to the premises of the Registered User to inspect the finished wares and finds them in compliance with the aforesaid standards.* The permitted use is without definite period.

(The italics are mine.)

The trade mark Bo-Lo was subsequently dealt with in a similar manner and subject to the same conditions on May 28, 1957. Henceforth, no distinction need be made in regard to Bo-Lo.

The appellant company continued to operate as a "registered user" of the relevant trade marks. Gallo, who owned 25 per cent of the issued shares in the appellant company, had been associated with the respondent from the time the company was incorporated in 1938. When Krangle acquired control in 1955 under the agreement of August 17, 1955, Gallo joined the company as an employee and as a watchdog for the respondent. Difficulties arose between Krangle and Gallo which eventually resulted in Gallo being dismissed in June of 1962.

Throughout the period 1955 to 1962, the respondent was living in Israel. He came to Canada in December 1962 to try to settle the differences between Krangle and Gallo. The parties met on several occasions, the last meeting being on December 28, 1962.

The learned trial judge summarized the events of December 27, and the final meeting on December 28, 1962, as follows:

> A number of meetings had already been held between them when on December 27, 1962, a meeting was arranged by the plaintiff and Krangle over the telephone for the next day in Krangle's office located in the premises of the defendant company at 11 Church Street, Toronto. During this conversation, Gallo entered Dubiner's room and the latter interrupted his phone call to ask Gallo the time of their appointment at the television station the next morning, for the purpose of looking at a film which Krangle erroneously took to be one produced for the purpose of selling yo-yos and bo-los but which, in fact, had nothing to do with the company's business at all as it dealt with Israeli art. This matter is mentioned merely because the meeting which took place the next day, at the defendant's premises at 11 Church Street, Toronto, would have started off on this misunderstanding with an accusation by Krangle that both Dubiner and Gallo were planning to have a television film made dealing with yo-yo return tops in competition with his business, which, however, Dubiner hastened to deny and explain. Although Krangle claims that the matter of the film script came up at the end of the meeting only, there is no question that the discussions which took place at this meeting were carried out in an atmosphere of tension and anger largely as a result of the television scripts but also because of Gallo's claims and lasted an hour, dealing chiefly with the latter's demand for salary and a share in profits from the year 1956 on which the parties could, however, not agree on and it was at this stage when it appeared that nothing more could be said that the plaintiff, as he was walking towards the door, turned to Krangle and said: "Well Albert, now I want to go into your stock room and examine the quality of your merchandise," to which Krangle replied "Sam, I won't let you in the back, I understand you have been at the T.V. Station and you have never inspected my wares before. I think there is more to this and you had better see my lawyer."

Krangle did nothing further and on January 8, 1963, the respondent sent the appellant a letter as follows:

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Hall J.

By the terms of the registered user agreement between myself and Cheerio Toys and Games Limited, dated Toronto, the 31st day of August, 1955, Cheerio Toys and Games Limited is required to give me full access to the premises of the registered user, to inspect the finished wares, to ascertain that the quality standard set by me are maintained.

On Friday December 28th, 1962 I was denied access to these facilities by you. This is to advise you that without prejudice to all other rights and causes of action which I may have against you, I do hereby terminate the registered user agreement as of December 28th, 1962.

This letter was not answered nor did Krangle get in touch with the respondent.

On January 14, 1963, the respondent had his solicitors write the appellant company as follows:

Cheerio Toys & Games Limited,
11 Church Street,
Toronto, Ontario.

Attention: A. Krangle, Esq.

Dear Sirs:

We act for Samuel Dubiner, the owner of certain trade marks under which you have, prior to December 28th, 1962, been operating as a registered user.

This registered user agreement has been terminated by Mr. Dubiner and we now request without prejudice to the other rights which Mr. Dubiner may have against you, your written undertaking to refrain from further use of any of the marks in question in respect of the wares for which they are registered and your undertaking to deliver existing stock bearing the trade marks to Mr. Dubiner or your written assurance that the trade marks will be removed from such stock.

If this undertaking is not received by January 21st, 1963, we shall take the necessary steps to protect our client's position without further notice to you.

Yours very truly,

McCarthy & McCarthy,
per Donald F. Sim.

On the same day, the respondent's solicitors instituted proceedings with the Registrar under s. 49(10) of the Act to cancel the appellant's registered user licence. This proceeding was still pending when, on March 13, 1963, the respondent, not having received the undertaking asked for in the solicitors' letter of January 14, brought this action

claiming damages for infringement and an injunction restraining the appellant company from further infringement.

The learned trial judge found as follows regarding the events of December 27 and 28, 1962:

> Now, the evidence regarding what took place at the premises of the defendant on December 28, 1962, is somewhat contradictory, Krangle contending that he did not refuse access but merely referred the plaintiff to his lawyer as he thought that there was more to the situation than a mere wish to inspect the defendant's wares for quality, that Dubiner had never inspected the wares before, and that if he had really wanted to inspect he could have done so on the above date in his office where the discussions took place and where stock comprising several samples of each item of merchandise was kept up to date.
>
> This, however, is not entirely true as it appears from the evidence that Dubiner had carried out some sort of inspection of wares of the defendant on each of his visits to Toronto and in one case, according to a witness produced by the defendant, became quite mad with Krangle because he was not satisfied with the quality of some of the tops. Furthermore, the latter did refuse to allow Dubiner to go into the back of the premises on the relevant date and, therefore, in my opinion, did not give him free access as he was obliged to under his registered user agreement and registration. As for the display of wares in Krangle's office, some of the wares were missing and, at any event, a proper and satisfactory spot check could not be made by Dubiner from such a selection, the latter being entitled to free access for inspection which, in my opinion, could not be restricted to one area only of the defendant's premises.
>
> Furthermore, although the letters sent by Dubiner and his solicitors, as we have seen, closed the door to any possibility of allowing Krangle to comply with the obligation to give free access, there is no evidence that the latter, through his lawyer or personally attempted in any manner after December 28, 1962, to comply with same and I, therefore, must of necessity find that the defendant has breached its registered user agreement.

These findings are fully supported by the evidence and I see no reason to disturb them.

The appellant company had based its defence and counterclaim on numerous grounds but in this Court relied on three grounds only, as follows:

(1) The appellant was a permitted user under the *Trade Marks Act* by entry on the Register and therefore could not infringe.

(2) The appellant was licensed and therefore did not infringe.

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Hall J.

(3) Yo-Yo and Bo-Lo were generic terms which cannot be appropriated as a trade mark and therefore the trade marks were invalid.

It was Mr. Henderson's submission that the *Trade Marks Act* of 1953, for the first time in Canada permitted an assignment of the right to use a trade mark without the assignment of the goodwill, i.e., the separation of the identity of the user of the mark from the ownership thereof. It was the appellant's argument, however, that this statutory provision did not change the basic law of contract in any way and that the contract, in this case the agreement of August 17, 1955, remained fully in effect independently of the registration of the "registered user" agreement. It should be noted that the condition upon which the respondent relied was contained in the so-called "registered user" agreement and not in the so-called "main agreement" of August 17, 1955.

Noël J. found:

> The assignment of the trade marks from Cheerio Toys and Games Limited to Dubiner and the user rights back to the defendant company must, I believe, all be read together and if this is done, it appears that as a result of the above transactions there has subsisted rights in two persons to the use of confusing trade marks and the evidence disclosing that those rights have been concurrently exercised by such persons the trade mark CHEERIO would have, therefore, become non-distinctive within the meaning of s. 47(2) of the Trade Marks Act which reads as follows:

This portion refers particularly to the Cheerio marks but the finding that the whole was one transaction is equally applicable to the Yo-Yo and Bo-Lo marks. I am also of opinion that that finding is in accordance with the evidence.

Dubiner swore that to the best of his memory all documents were executed at the same time. Moreover, the respondent pleaded in para. (4) of the Statement of Claim:

> On or about the 31st of August 1955, the Plaintiff and the Defendant entered into an agreement being an application for registration of the Defendant as a registered user of the trade marks identified . . . The said agreement provided, inter alia, as follows: (The limitations are then recited).

And in the Statement of Defence, the appellant in para. (4) admitted the allegations contained in para. (4) of the

Statement of Claim. I am, therefore, in agreement with the learned Exchequer Court judge when he found that all the documents must be considered as part of the agreement between the parties and that, therefore, the limitation on the registered user contained in the application to the Registrar was a limitation enforceable on the demand of the respondent.

The appellant submits that it is the registered user so named and it could not be an infringer as long as it remained on the register of Trade Marks. Section 20 of the *Trade Marks Act* provides that the right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under the Act who sells, distributes or advertises wares or services under the mark.

Section 49(2) of the statute provides that the use of a registered trade mark by a registered user thereof *in accordance with the terms of his registration as such* (the italics are mine) is "the permitted use" of the trade mark under this section. The appellant attempted to limit the words "in accordance with the terms of the registered use" to that referred to in s. 4(1), (2) and (3), but Noël J. held that the words applied directly to the limitation in the application for registration as the registered user, and that this application was part of the agreement between the parties. And I can see no other result possible.

It must be remembered that Mr. Arthurs, in his letter to the Registrar in which he forwarded the application for a registered user, said:

> In answer to your request for a copy of the agreement between the parties, please be advised that the entire agreement is constituted by the registered user application which was filed.

As I have said, Mr. Arthurs acted for both parties on the application.

The appellant argued very strenuously that the only method by which a registered user could be terminated was by proceeding under s. 49(10) of the statute, and that until it had been so terminated the registered user could not be an infringer. And further, that by subs. (12) the Registrar

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Hall J.

upon considering such an application was required to give every person affected a notice and therefore that had such an application been taken by the respondent Dubiner then the appellant company would have been notified and had an opportunity to make such representations as it deemed fit to the Registrar and would only have been an infringer if such representations had failed to convince the Registrar and he had cancelled the registered user. That might well be so between either of those litigants and a third party, i.e., an application by the AB company to cancel the registered user on the ground that it was contra public interest, etc. But between the immediate parties this is simply a matter of contract and once the application for a registered user is found to be part of the contract then that application as a contract may be enforced as any other contract and the respondent Dubiner may take steps to cancel it for breach of its provisions. It was not strenuously argued before us that there was no reasonable notice, and, in fact, the appellant company could have put the respondent in a very awkward position simply by notifying him on December 29, or even possibly on January 8, 1963, that he was free to make such inspection as he desired.

The appellant argued that since at the time the action was commenced it was a "registered user" on the registry of Trade Marks, it could not be an infringer while it remained on the register as a "registered user", and relied on s. 49(3) of the Act, which reads:

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

but this overlooks that the permitted use under this section is *use in accordance with the terms of the registration.*

It argued further that until it had actually been struck from the register as a "registered user" in accordance with s. 49(10), it continued to be a "registered user" and as such could not be an infringer.

Whatever validity that argument might have as between a "registered user" and a third party, and I express no opinion on the point, I am of opinion that as between the appellant and the respondent the right to use the trade

marks Yo-Yo and Bo-Lo was governed by the condition of the licence quoted above, and when, as found by the learned trial judge, that the appellant breached the "registered user" agreement by refusing the respondent "free access to the premises of the registered user to inspect the finished wares . . . ." it forfeited whatever rights it had to use the said trade marks and after receipt of the solicitor's letter of January 14, 1963, had no right to persist in using these trade marks and it was in consequence an infringer, if in fact the trade marks were valid.

No rights subsisted under the so-called "main agreement" of August 17, 1955, because that agreement and the joint application to the Registrar to register the appellant as a "registered user" were indivisible as part and parcel of one transaction, and I agree with Noël J.'s finding in this respect.

I therefore, turn to the appellant's third proposition, i.e., that Yo-Yo and Bo-Lo are generic terms which cannot be appropriated as a trade mark and the trade marks are, therefore, invalid.

Section 18(1) of the *Trade Marks Act* provides:

> 18. (1) The registration of a trade mark is invalid if
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> (*a*) the trade mark was not registrable at the date of registration;
>
> (*b*) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced; or
>
> (*c*) the trade mark has been abandoned;
>
> and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

The appellant in its pleadings pleads in para. 20:

> The defendant alleges and the fact is that the word Yo-Yo is used in Canada as and is the generic name used to describe and identify a particular type of top and as such does not indicate the wares of any particular person.

It repeats the same allegation as to the word Bo-Lo in para. 21.

Evidence was not adduced as to the registrability of the trade marks at the date of registration in reference to s. 18(1)(*a*) and the argument before the Exchequer Court judge and in this Court was restricted as to whether the

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Hall J.

trade marks were or were not distinctive at the time proceedings bringing their validity into question were commenced, i.e., at the commencement of this action on March 13, 1963.

During the argument, the point was raised that the submission that the trade marks were invalid could not be made by the registered user thereof as he held a licence from the owner of the trade marks and to deny the validity of the trade marks would be to deny his licence. However, since it was the respondent's whole case that the licence to use the trade marks had been cancelled by the letter of December 28, 1962, the respondent cannot invoke estoppel against the appellant on the basis of the licence after the licence had been terminated. The law in this regard was clearly stated by Eve J. in *Staffordshire and Worcestershire Canal Navigation v. Bradley*[1], when he said at p. 105:

> I think the answer to that is that, although the licensee cannot be heard to dispute the title of the licensor, so long as the relationship of licensee and licensor continues, there is no continuing disability affecting the licensee when the relationship has determined, and from that time he is as competent to assert his rights as any one else.

The respondent also took the position that the appellant company, having assigned the trade mark Yo-Yo to the respondent by the agreement of March 15, 1955, and similarly having assigned the trade mark Bo-Lo to the respondent by the agreement of April 11, 1957, could not in this action assert that the trade marks or either of them were invalid. This position, in my opinion, was well taken. The appellant company, having assigned the trade marks to Dubiner, cannot derogate from its own grants and is, therefore, estopped as between itself and Dubiner from disputing the validity of the trade marks; *Walton v. Lavater*[2], and the judgment of Kekewich J. in *Franklin Hocking and Co. Ltd. v. Franklin Hocking*[3].

Much reliance was placed upon the decision in the United States Circuit Court of Appeals in *Donald F. Duncan Inc. v. Royal Tops Manufacturing Company Inc. et*

[1] [1912] 1 Ch. 91, 106 L.T. 215.
[2] (1860), 8 C.B.N.S. 162 at 180, 186-7, 3 L.T. 272, 141 E.R. 1127.
[3] (1887), 4 R.P.C. 255 at 259.

al.[1], decided in March of this year. That case was decided on a mass of factual evidence adduced at the trial substantially different from the facts in evidence here, but a more important distinction is that in that case the parties challenging the validity of the trade mark were not estopped from doing so.

Having concluded that the appellant is estopped from disputing the validity of the trade marks assigned by it to the respondent, it is not necessary to go into the question as to whether the trade marks or either of them were distinctive at the date these proceedings were instituted.

I turn next to the cross-appeal as to the various Cheerio marks.

Counsel for the respondent and cross-appellant abandoned any claim as to the validity of the trade mark "Beginners" and it need not be further considered. The Cheerio marks had been assigned by Cheerio Toys and Games Ltd. to Dubiner and had been the subject of the licence back from Dubiner to the Cheerio Company. The learned Exchequer Court judge held that the separation of the marks from the company by the assignment to Dubiner had resulted in the fact that Dubiner was the owner of the trade marks and yet the company was entitled to carry on under its name "Cheerio Toys and Games Ltd.", and said:

> As a result of this situation it therefore appears that whatever the word CHEERIO now appears to designate or distinguish, it certainly does not distinguish the wares of the plaintiff from those of others and, consequently not being distinctive, is invalid. The same applies to CHEERIO Yo-Yo, CHEERIO DESIGN, CHEERIO BEGINNER, CHEERIO TOURNAMENT and CHEERIO CHAMPION.

Counsel for the respondent as cross-appellant submitted that it was the duty of the Court to ascertain the true intention of the parties at the time of the transactions and if such true intention was to give to the respondent Dubiner the property in the Cheerio trade marks then it should enforce that intention by declaring the validity of the trade marks despite the fact that the assignor company was not required in the assignment to Dubiner to alter its corporate name as the parties could not have intended to

[1] (1965), 343 F. 2nd 655.

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Hall J.

adopt a course which would result in the invalidity of the name. I am of opinion that the Court would not be justified in writing into the contract of assignment from Cheerio to Dubiner of March 1955 any covenant that Cheerio should change its corporate name. That covenant having been omitted, then the result which the learned Exchequer Court judge arrived at was inevitable.

For these reasons, I would dismiss the appeal and the cross-appeal.

The respondent is entitled to the costs of the appeal and the appellant to the costs of the cross-appeal.

JUDSON J. (*dissenting*):—This is an appeal from a judgment of the Exchequer Court[1] which allowed the action of the respondent Samuel Dubiner for infringement of trade marks and rejected the counter-claim of the appellant, Cheerio Toys & Games Limited, for the expungement of certain trade marks.

In 1955 the company was the registered owner of all the trade marks involved in this action. It was at that time controlled by Dubiner. In March 1955, the company assigned all the trade marks with one exception to Dubiner, and in April of that year, Dubiner sold control of the company to one A. Krangle and at the same time granted to the company a non-exclusive licence to use the trade marks in consideration of the payment of a royalty of 5 per cent and a small annuity to Dubiner's mother.

In August 1955, Dubiner and the company jointly applied for registration of the company as a registered user of the trade marks. After some correspondence between the Registrar and the common agent for the two parties on March 9, 1956, the Registrar informed the agent that the company was recorded as registered user of all the trade marks, except one, involved in this action. The company became the registered user of that trade mark about a year later on the same terms.

The terms of the registration are as follows:

[1] [1965] 1 Ex. C.R. 524.

September 14, 1955—CHEERIO TOYS & GAMES LIMITED, 35 Hanna Avenue, Toronto, Ontario, is hereby registered as a Registered User of the trade mark registered under No. N.S. 35-9570 in respect of the wares in association with which the trade mark is now registered. The Registered User is the former owner of the trade mark. The Registered User is to use the trade mark only in association with wares meeting the standards of quality and efficiency established by it while it was the owner of the trade mark, and only so long as the Registered Owner is given free access to the premises of the Registered User to inspect the finished wares and finds them in compliance with the aforesaid standards. The permitted use is without definite period.

The right of inspection appears for the first time in the application for registration. There was no mention of it in the documents under which the shares were sold and the trade marks assigned.

Trouble developed between Dubiner and Krangle, who had been the controlling shareholder since 1955. On December 28, 1962, after an acrimonious meeting between the two, Dubiner demanded the right to inspect. Krangle refused him this right. On January 8, 1963, Dubiner wrote a letter to the company purporting to terminate the registered user agreement as of December 28, 1962, for the denial of access. This was followed by a demand from Dubiner's solicitors that the company refrain from further use of the trade marks. On February 19, 1963, proceedings were commenced to cancel the appellant's registered user by a letter to the Registrar under s. 49(10)(*a*) of the *Trade Marks Act*. This application was still pending before the Registrar of Trade Marks at the time of trial. This action was commenced on March 13, 1963.

One of the main grounds of appeal was that the learned trial judge was in error in holding that as of December 28, 1962, the company was no longer a permitted user of the trade marks and that any use by the company of such trade marks after this date would constitute an infringement. In my opinion, the company is right in this submission. Section 49(1) permits the company's registration as a registered user. By s. 49(3) this permitted use of the trade marks has the same effect for all purposes of the Act as a use by the registered owner. Section 49(10) provides for the

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Judson J.

cancellation of the registration of a person as a registered user of a trade mark in three ways:

(*a*) by the Registrar on the application in writing of the registered owner or registered user of the trade mark;

(*b*) by the Registrar on his own motion in respect of any ware or services for which the trade mark is no longer registered;

(*c*) by the Exchequer Court upon the application of any person of which notice is served upon the registered owner and of registered users on any of certain specified grounds.

Dubiner did take proceedings on his own application before the Registrar under s. 49(10)(*a*). These proceedings, as I have said, were still pending at the time of the trial. The plaintiff framed his action as one for infringement and an injunction against the further use of the trade marks; damage or profits; and an order for the delivery up of the infringing articles. The plaintiff made no attempt to bring his case within s. 49(10)(*c*) of the Act, which gives the Exchequer Court jurisdiction to cancel.

According to s. 49(10) the registration can be cancelled only by the Registrar or by the Exchequer Court. There is no provision for cancellation of the registration merely by a notice from one party to the other. As long as the registration is in effect, the company's use is as a permitted user under s. 49(2), and under s. 49(3) has the same effect as use by the registered owner. It cannot be an infringement. If the application for the registered user is regarded as an agreement then the mere cancellation of such agreement would have to be followed by a cancellation of the registration before the use by the appellant became anything other than a use by the respondent itself. The rights specified by s. 49(2) and (3) flow from the registration and continue as long as the registration subsists.

In a contemporaneous and related case before him (*Cheerio Toys and Games Limited v. Samuel Dubiner and Cheerio Yo-Yo and Bo-Lo Company Limited*[1]) the learned

[1] [1965] 1 Ex. C.R. 579 at 583.

trial judge expressed the same opinion of the effect of s. 49 that I have just expressed. He stated it in these terms:

> Indeed, I had occasion to determine in a case in which judgment was rendered this day under No. A-1190 of the files of this Court that the registered user section being one of exception, its provisions must be strictly adhered to and as a procedure was set down in the above section to obtain cancellation of the registration of a registered user, on the grounds therein mentioned, this procedure is the only one available in such cases.

I agree with this and I cannot understand why he did not apply this principle in the present case instead of holding that the company ceased to be a permitted user the moment the inspection was denied.

On this aspect of the case, I wish to put my judgment on this narrow ground and to leave open the question of the right to cancel for the denial of the inspection. The evidence is that Dubiner sold to Krangle an almost bankrupt business which Krangle brought back to prosperity. The consideration given by Krangle was money for the shares, the royalty on sales and the annuity. In return, the company was to become a permitted user. The right to inspect came in when the application for registration was made by a common agent. This agent, in correspondence with the registrar, represented that the application contained the whole agreement between the parties. This was not true. The right of inspection was of minor importance when one looks at the deal as a whole. The important elements in the consideration were the purchase price of the shares, the royalty and the annuity. That is why I say that I am leaving the question of the right to cancel open and simply saying that there can be no infringement as long as the registration subsists.

Another ground for appeal was that the trade marks Yo-Yo and Bo-Lo were invalid and should be expunged. This is founded on the argument that these marks were not distinctive within the definition of s. 2(*f*) of the Act and that the registration offended s. 18(1), which reads:

> 18. (1) The registration of a trade mark is invalid if
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> (*a*) the trade mark was not registrable at the date of registration;
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> (*b*) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced; or

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Judson J.

(c) the trade mark has been abandoned;

and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

I agree with the opinion of the learned trial judge that the submission fails on the mark Bo-Lo but on the mark Yo-Yo I am of the contrary opinion. Counsel made it clear that he was not arguing that Yo-Yo was not registrable at the date of registration. He said that he had no concern with this and that it was sufficient for him to show that the word Yo-Yo at the present time means the article itself. The evidence fully supports this submission. I cannot conceive of any person, whether adult or child, going into a shop to buy this article and asking for a Bandalore top. He asks for a Yo-Yo, and everybody knows what this article is. It may well be that those in the toy trade know that Yo-Yos were associated with and made by the company; that there was a registered trade mark in the name of Dubiner with a licence to the company; and that some steps had been taken, although they never reached the court, to restrain infringements. The dominating fact is that this trade mark was and is used by the public as the name of the article. I think that I know why this is so. It was the name of the article when the toy was first introduced into this country. It has always been the name of the article and this has been so found by the United States Circuit Court of Appeals in *Donald F. Duncan Inc. v. Royal Tops Manufacturing Company, Inc. et al.*[1], decided in March of this year.

The learned trial judge in upholding the trade mark put his reasons on very narrow grounds:

> It would seem that a trade mark can be lost because it has become to mean the ware itself *only* when the owner has been careless in its use and has allowed extensive piracy of the mark by others.

What the Court is concerned with under s. 18(1)(*b*) is the actual state of facts at the time of the commencement of the proceedings. Distinctiveness may have been lost many years ago for reasons and because of usage which cannot now be traced or ascertained. The mere fact that at

[1] (1965), 343 F. 2nd 655.

times the proprietor or permitted user has identified the word "Yo-Yo" as a trade mark does not mean that there could not be a loss of distinctiveness, if, in fact, there is a loss of distinctiveness. Careless user or the permission of extensive piracy of the mark by others, two of the factors relied upon by the judge, are merely two possible ways in which distinctiveness may be lost. If the Court concludes that at the time of the proceedings the mark is not distinctive, it is error to hold that this conclusion must be wrong because those two particular causes mentioned by the trial judge are absent. In my opinion, no buyer, at the present day, could possibly associate the word Yo-Yo with the goods of a particular trader or think that Yo-Yo distinguishes the goods of one person from another.

The test of whether a word that was originally a trade mark has become *publici juris* was stated by Mellish L.J. in *Ford v. Foster*[1]:

> There is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successor in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited as *Harvey's Sauce* (Lagenby v. White (1871) 41 L.J. Ch. 354 n). . . . I think the test must be whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone.

The effect of the decision of this Court in *The Bayer Company, Limited v. The American Druggists' Syndicate, Limited*[2], has been legislated away. That case was decided under the old Act and it held that a trade mark properly registered cannot be expunged if it ceases to be used as a trade mark and becomes merely descriptive of the article to which it has been applied. The case held that the authority to expunge "any entry made without sufficient cause"

[1] (1872), 7 Ch. App. 611 at 628, 27 L.T. 219. [2] [1924] S.C.R. 558.

1965

CHEERIO TOYS AND GAMES LTD. v. DUBINER

Judson J.

means without sufficient cause at the time of registration. The legislation on which this judgment was based was amended by s. 52 of the *Unfair Competition Act* and this amendment appears under slightly different wording in s. 56 of the present Act. The present Act makes it clear that the appropriate time of examination and the propriety of a trade mark's position on the register under s. 18(1)(*b*) is the time of the proceedings (See Fox, Canadian Law of Trade Marks, 2nd ed., 463-5). This is a straight question of fact and it matters not how the lack of distinctiveness is brought about.

There is a public interest in this matter. There should be no judicial watering-down of s. 18(1)(*b*). Any other result would give the proprietor of a so-called trade mark a perpetual monopoly over the sale of the article even when the mark is in no way distinctive of the wares of the owner.

I would allow the appeal and order that the mark Yo-Yo, registered No. 94 N.S. 24465, is invalid and should be expunged. I would dismiss the action for infringement and declare that the appellant is and has been permitted to use the marks in question in this action at all material times. On the mark Cheerio I would dismiss the cross-appeal for the reasons given by the trial judge. The appellant should have its costs in all proceedings in the Exchequer Court and in this Court.

Appeal and cross appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitors for the defendant, appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the plaintiff, respondent: McCarthy & McCarthy, Toronto.

THOMAS LAMB (*Applicant*) ..... APPELLANT;

AND

THE MANITOBA HYDRO-ELECTRIC BOARD (*Respondent*) ..... RESPONDENT.

1965
*Oct. 14, 15
1966
Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Expropriation—Minimum of evidence upon which to fix value—Potentiality of land at time of taking—Compensation payable—The Expropriation Act, R.S.M. 1954, c. 78.

Certain lands and buildings belonging to the appellant and located in an area consisting partly of lowlying land and partly of high land were expropriated by the Manitoba Hydro-Electric Board, pursuant to *The Manitoba Hydro Act,* 1961 (Man.), c. 28. The expropriation of the lowlying lands was essential to the carrying out of a major hydro-electric project, and that part of the appellant's property which consisted of high land was acquired as a townsite for people who were displaced by the flooding of the lowlands. The appellant was not satisfied with the amount offered as compensation and arbitration proceedings followed. The parties having reached an agreement as to the compensation payable for injurious affection, the arbitrator had to concern himself only with fixing compensation for the value of the lands and buildings. He awarded $8,350 for the lands together with compensation for the buildings. On appeal to the Court of Appeal the Court affirmed the values allowed on the land and allowed the respondent's cross-appeal excluding any allowance for two of the buildings.

Held (Fauteux and Judson JJ. dissenting): The appeal should be allowed in part.

Per Martland, Hall and Spence JJ.: The fact that there was, from the very nature of things in a case of this kind where lands in a remote area were being valued, a minimum of evidence upon which the arbitrator could fix values did not relieve him of the responsibility of determining the value to be placed on the lands taken, having regard to the evidence that was actually before him and all the circumstances surrounding the taking of the lands and the potentialities of the land at the time of taking. *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam,* [1939] A.C. 302, applied.

Accordingly, taking into consideration the potentiality of the appellant's high ground as a townsite along with the other evidence that was before the arbitrator, it was concluded that the values fixed by him and approved by the Court of Appeal were much too low. The highlands should be valued at $1,800 an acre and the lowlands at $600 an acre, making a total of $26,484.

Per curiam: The appeal as to the buildings, which were located on a road allowance and not on property owned by the appellant or expropriated from him, should be dismissed.

Per Fauteux and Judson JJ., *dissenting*: The appellant's high land was taken to resettle a local population that could not help itself. There

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

1966

LAMB
v.
MANITOBA
HYDRO-
ELECTRIC
BOARD

was no market for this land in the locality, and there was no evidence that any outsider would come in to develop it. A reasonable value was attributed to it in the assessments of the arbitrator and the Court of Appeal for the purpose of the proposed townsite.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal and allowing a cross-appeal from an arbitration award in expropriation proceedings. Appeal allowed in part, Fauteux and Judson JJ. dissenting.

W. C. Newman, Q.C., and *L. Baird*, for the appellant.

A. S. Dewar, Q.C., and *J. P. Funnell*, for the respondent.

The judgment of Fauteux and Judson JJ. was delivered by

JUDSON J. (*dissenting in part*):—Both the learned arbitrator and a unanimous Court of Appeal[1] are in agreement on the compensation to be awarded for the high land in this expropriation. The figures are:

Parcel No. 1, 11.22 acres	$ 5,800.00
Parcel No. 3, 1.44 acres	750.00
Total	$ 6,550.00

The land was taken to resettle a local population that could not help itself. Their modest dwellings had been taken for the purpose of flooding and they were in no position to purchase lots on the high land and to build on them. There was no market among them for land of any kind. The claimant asked to have applied a novel principle of valuation,—what it would cost the Manitoba Hydro-Electric Board to develop a townsite at some other location to accommodate the displaced persons.

As the Manitoba Court of Appeal pointed out, we are concerned here only with waste land or virgin farm land. There was no market for it in the locality. There was no evidence that any outsider would come in to develop it. A reasonable value was attributed to it for the purpose of the proposed townsite. It was not expropriated as waste land or virgin land. The Court of Appeal said:

So far as the high land of the applicant here is concerned it, in itself, has no physical value or special adaptability or potentiality such as had the land with the spring or the land with the rock. Indeed it seems obvious

[1] (1965), 50 W.W.R. 231, 48 D.L.R. (2d) 229.

that in the *Indian* case and the *Fraser* case the primary objective of the expropriations was in the one case to acquire the rock and the other the spring. The taking of the land was incidental. Here we have simply waste land or virgin farm land, but increased to the value attributed to it by the learned County Court Judge by reason of the proposed townsite development.

I can see no error either in principle or in amount in the assessments of the arbitrator and the Court of Appeal. There is no ground for interference. I would dismiss the appeal with costs and affirm the disallowance in the Court of Appeal of the compensation of $3,250 for a garage, boat-shed and storage-shed which were not on land owned by the claimant.

The judgment of Martland, Hall and Spence JJ. was delivered by

HALL J.:—Early in the year 1960 the Government of Manitoba decided to build a major hydro-electric project at Grand Rapids where the Saskatchewan River empties into Lake Winnipeg some 15 miles north of Latitude 53°. The project was to be executed by the respondent, the Manitoba Hydro-Electric Board, a public body exercising the powers conferred on it by *The Manitoba Hydro Act*, 1961 (Man.), c. 28.

Completion of the project would involve flooding a considerable area of land to the west and northwest of Grand Rapids. The water level of the area to be flooded would cover all land below the 848-feet contour level.

The area or location involved in this appeal lies some 60 miles northwest of Grand Rapids in a settlement known as Moose Lake located on the southwest shore of Moose Lake which is a part of the Saskatchewan River watershed. It is a settlement 40 miles east of The Pas, Manitoba, accessible only by air or by water. It is of some local importance with educational and religious amenities and a population of approximately 600, consisting principally of Métis, Treaty Indians and some whites. It was originally a Hudson's Bay Company trading post. The two most important industries in the area are fishing and trapping.

The appellant Lamb is the son of a pioneer trader in the district. He grew up and remained in Moose Lake to be, in succession, the operator of a saw mill, a muskrat ranch and a cattle ranch. At the time in question in this action, he was carrying on a freighting business by air and tractor

1966

LAMB
v.
MANITOBA HYDRO-ELECTRIC BOARD

Hall J.

(winter) and by boat and barge as well as a general store. In 1916 appellant's father acquired the land in question in this action from the Hudson's Bay Company. Appellant bought it from his father in 1926 or 1927. The Moose Lake settlement site consists of a lowlying area adjacent to the lake and an area of high ground unaffected by the level of the lake and well above the 848-feet contour level.

Completion of the Grand Rapids project necessarily involved raising the level of Moose Lake and flooding the lowlying lands of the settlement adjacent thereto. These lowlying lands were occupied mainly by Métis and Treaty Indians, who, on being flooded out or on being advised that they would be flooded out, had to find other lands to move to or leave the settlement. The respondent Board had the right to expropriate these lands and did so by means of registration of a plan that was filed in Neepawa Land Titles Office on October 17, 1962, at 9:35 a.m. as Plan No. 4799.

The respondent had no legal responsibility towards those displaced by the flooding of the lowlying lands other than to compensate them for any loss occasioned to them. However, instead of leaving them to fend for themselves, a humane and enlightened approach was adopted towards the Métis and Indians so displaced. The Government of Manitoba, acting through the respondent and by virtue of the power contained in s. 16(*b*) of *The Manitoba Hydro Act*, decided to acquire the high ground in the Moose Lake settlement as a townsite for these displaced people and it proceeded to expropriate lands belonging to the appellant Lamb by a Notice of Expropriation filed in the Neepawa Land Titles Office on October 12, 1962, at 9:25 a.m. as No. 129044. Notice of the expropriation was given to the appellant by a notice dated November 14, 1962. Subsequently a second Notice of Expropriation dated January 24, 1963, was served upon the appellant in which compensation was offered in the sum of $18,725 made up as follows:

Lot B and Lots 1 to 3 both inclusive, 10 to 13 both inclusive, 18, 19 and 27 of Parcel 1	$ 2,150.00
Parcel 2	725.00
Parcel 3	75.00
Parcel 4	250.00
Cost of re-locating sewage disposal field	525.00
Injurious affection or consequential damage	15,000.00
	$18,725.00

The appellant notified the respondent that he was not satisfied with the amount offered, thus bringing into operation the provisions of *The Expropriation Act*, R.S.M. 1954, c. 78. His Honour Frank W. Newman, County Court Judge, was appointed arbitrator to fix the compensation payable to the appellant. Meanwhile, as a result of negotiations between the parties, an agreement had been reached whereby compensation payable under the heading of injurious affection or consequential damage and the cost of relocating the sewage disposal field was agreed upon in the sum of $18,000. The arbitrator had, therefore, to concern himself only with fixing compensation for the value of the lands taken and for certain buildings belonging to the appellant. Section 65 of *The Expropriation Act* under which the arbitrator had to proceed reads as follows:

65. (1) In estimating the amount to which the claimant is entitled, the arbitrator shall consider and find separately as to the following,

(*a*) the value of the land and all improvements thereon;

(*b*) the damage, if any, to the remaining property of the claimant; and

(*c*) the original cost only of any extra fencing that may be necessary by reason of the taking of the land.

(2) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance.

(3) Where the value of the remaining land of the claimant is increased by the construction of the works through his land, by the extension of the same in any direction, or by the construction of any other works in connection therewith, the increase in value shall be deducted from the amount to which the claimant would otherwise be entitled, and the balance, if any, shall be the amount awarded to him.

The area of lowlying land was 6.16 acres and the highland contained 11.22 acres. In addition, the appellant claimed an interest in 36 lots of an area of 4.3 acres, being lots which he had sold and agreed to transfer to employees for a nominal sum under a special form of agreement, Exhibit 7. This claim and the appellant's claim for buildings will be dealt with separately.

The appellant Lamb asked for compensation in the sum of $150,000 for the 17.38 acres of high and low land in addition to the agreed compensation of $18,000 for injurious affection as stated above. The basis upon which the appellant arrived at this figure was that it would cost the expropriating authority $150,000 to develop a similar townsite elsewhere on the assumption that there would be a comparable townsite available. There is, of course, no basis

1966

LAMB
v.
MANITOBA HYDRO-ELECTRIC BOARD

Hall J.

in law for estimating the value of the lands in this way. The arbitrator had evidence from a Mr. Farstad, a qualified appraiser called on behalf of the appellant, who testified that $34,580 would be a fair and reasonable valuation to place upon the lands taken and $5,000 for the buildings. For the respondent, Mr. Townsend, who was also a qualified appraiser, testified that in his opinion the lands should be valued at $3,950 and the buildings at $3,250. Jock McAree, the appellant's son-in-law, valued the lands at $74,050 and the buildings at $8,600. The arbitrator properly disregarded McAree's valuation of the lands as unrealistic.

There was a dearth of evidence as to values obtainable from sales of land in the area in question. There was evidence of one sale in April 1956, of .89 acres by the appellant to the Government of Canada shown as Lot "R" on Plan 4413 at a price of $400 or about $480 an acre. There was also evidence of a sale by one Alex Knight to John Bodnar, a storekeeper and business rival of the appellant whose property had also been expropriated and who needed a new storesite in January 1964, of part of Lot 14, Plan 522, being about one-quarter acre in area for $1,500 or at the rate of $6,000 an acre. This sale was more than a year after the appellant's land had been taken, but it was a *bona fide* sale from one business man to another in the Moose Lake settlement. The arbitrator gave no weight to this sale, saying he "assumed that Lamb would not sell him (Bodnar) a site at any price." There was no evidence to this effect. This Knight-Bodnar sale cannot be taken as being any more decisive in fixing land values at the relevant time than the sale to the Government in 1956, but neither should it have been ignored by the arbitrator, and in my view he was in error in so doing.

The arbitrator awarded the appellant the sum of $8,350 for the lands.

The fact that there is, from the very nature of things in a case of this kind where lands in a remote area are being valued, a minimum of evidence upon which the arbitrator can fix values does not relieve him of the responsibility of determining the value to be placed on the lands taken, having regard to the evidence that is actually before him and all the circumstances surrounding the taking of the lands and the potentialities of the land at the time of the taking.

The official announcement of the decision to undertake the Grand Rapids project that inevitably involved the flooding of the lowlying land in question was announced by the Premier of Manitoba in the Speech from the Throne in the Manitoba Legislature on January 19, 1960, some 2½ years before the actual expropriation proceedings were undertaken.

The expropriation of the lowlying lands was essential to the carrying out of the Grand Rapids hydro-electric project. However, the expropriation of the high ground was a collateral act arising out of the Grand Rapids project but not necessarily essential thereto.

Once the Grand Rapids project was embarked upon and it was known that the lowlying areas up to the 848-feet level were to be flooded, the appellant's high ground at Moose Lake acquired a potentiality as a townsite, in fact the only one in the Moose Lake settlement area.

In these circumstances, the observations of Lord Romer in *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam*[1] are relevant here. In that case a harbour was being constructed at Vizagapatam. Land acquired by the harbour authorities on the south of the harbour was allocated by them to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was to the south of this land, contained a spring which yielded a constant and abundant supply of good drinking water which could easily be made available for the oil companies and people engaged in the harbour works. The appellant's land was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the footing of the potentialities of the land as a building site. The Land Acquisition Officer disallowed this claim and awarded compensation on a valuation of the land as partly waste and partly cultivated with an allowance for some buildings and trees.

On the appellant's application, the matter was, under the Act, referred to the Subordinate Judge. Before him the appellant made a further claim on the footing of potentialities as a source of water supply.

The Subordinate Judge held that the water could be sold to the oil companies and others at a profit, that the only

[1] [1939] A.C. 302.

1966

LAMB v. MANITOBA HYDRO-ELECTRIC BOARD

Hall J.

possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded, even where the only possible buyer is the acquiring authority, and he assessed the value of the potentialities and made his award accordingly. He found against the potentialities of the land as a building site.

On appeal, the High Court set aside the award of the Subordinate Judge and restored that of the Land Acquisition Officer, holding that the supply of drinking water had no value apart from the scheme for which the acquisition was made and the Harbour Authorities were the only possible purchasers, and that the land had no potentialities as a building site.

On a further appeal to the Judicial Committee of the Privy Council, Lord Romer said at p. 313:

> In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4, sub-s. I), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in s. 24, sub-s. 5, of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

and at pp. 329-330:

> It remains to deal with s. 24, sub-s. 5, of the Land Acquisition Act. That sub-section as applied to the present case means no more than this: that in valuing the appellant's land on February 13, 1928, it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The Harbour Authority would otherwise be made to pay for the water twice over. But the sub-section does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's* case [1914] 1 K.B. 339, for instance, the house after

being added to the nurses' home was no doubt more valuable than it was before. That, indeed, was the reason why the trustees of the home paid 250£. more than any other purchaser would have paid. The house in that case was held to be of the value of 1000£., not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case the land must be valued not at the sum it would be worth after it had been acquired by the Harbour Authority and used for anti-malarial purposes, but at the sum that the Authority "in a friendly negotiation" (to use Lord Johnston's words) would be willing to pay on February 13, 1928, in order to acquire it for those purposes.

Accordingly, taking into consideration the potentiality of the appellant's high ground as a townsite along with the other evidence that was before the arbitrator, I conclude that the values fixed by him and approved by the Court of Appeal[1] are much too low. In my opinion the highlands should be valued at $1,800 an acre for an amount of $22,788 for the 12.66 acres, the lowlying lands at $600 an acre for an amount of $3,696 for the 6.16 acres, making a total of $26,484.

The appellant's claim for compensation in respect of an interest in the 36 lots previously sold to employees for a nominal amount under Exhibit 7 previously referred to is too indefinite and speculative. The arbitrator was right in disallowing that claim.

The buildings claimed for remain to be dealt with. The arbitrator awarded $3,250 for them. In the Court of Appeal the respondent cross-appealed against this allowance for the buildings on the ground that the buildings in question were located on a road allowance and not on property owned by the appellant or expropriated from him. The appellant conceded that the buildings were in fact on the road allowance. Miller C.J.M. dealt with the buildings claim as follows:

The garage and boat-shed valued at $3,000 and the storage-shed valued at $250 by the learned County Court Judge are built almost entirely on a road allowance although encroaching slightly on adjoining parcels, but these adjoining parcels were not expropriated from or owned by Lamb. Therefore, counsel contends, the buildings thereon cannot be considered in these proceedings, or, if they are to be considered, they would come under the heading of a claim for consequential damage or injurious affection, which has already been settled at the sum of $18,000 as above set out. *The Expropriation Act*, s. 12(1), requires the Minister to pay compensation to the *owner* of the *land entered upon*, but as the Manitoba Hydro-Electric Board is not, as against Lamb as owner, entering upon any of the land on which the buildings or any part thereof are located, then the buildings are

[1] (1965), 50 W.W.R. 231, 48 D.L.R. (2d) 229.

1966

LAMB v. MANITOBA HYDRO-ELECTRIC BOARD

Hall J.

not "land being expropriated" and do not have to be paid for by the Minister. This argument is virtually unanswerable, and, much as I would like to maintain for the owner the value of these buildings as awarded to him by the learned County Court Judge, yet the statute law is against such a finding. I therefore conclude that the cross-appeal must be allowed. As to whether Lamb is entitled to any other relief in respect of these buildings outside these proceedings need not presently be determined.

I agree with this finding. The appeal, therefore, fails as to the buildings. The award of the arbitrator should be varied by substituting an award of $26,484 for the lands taken with interest as provided in *The Expropriation Act* from the date of taking.

The appellant is entitled to his costs in this Court and in the Court of Appeal. The respondent is entitled to its costs of the cross-appeal in the Court of Appeal. The appellant must pay the costs of the arbitration proceedings as ordered by the arbitrator.

Appeal allowed in part with costs, FAUTEUX *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: Newman, MacLean & Associates, Winnipeg.

Solicitors for the respondent: Thompson, Dilts & Co., Winnipeg.

1965

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1966

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ALLEN MANN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Criminal law—Provincial offence of careless driving—Whether conflict with offence of dangerous driving defined by Criminal Code—Highway Traffic Act, R.S.O. 1960, c. 172, s. 60—Criminal Code, 1953-54 (Can.), c. 51, s. 221(4).

The appellant was convicted on a charge of careless driving, contrary to s. 60 of the *Highway Traffic Act, R.S.O* 1960, c. 172. By way of a stated case brought by the appellant, the magistrate submitted for the opinion of the Supreme Court of Ontario the questions whether he erred in law in (1) finding that s. 60 of the *Highway Traffic Act* was not *ultra vires,* and (2) finding that there was no conflict between that section and s. 221(4) of the *Criminal Code.* Mr. Justice Haines ruled that s. 60 was valid provincial legislation but in conflict with s. 221(4) of the *Criminal Code,* and set aside the conviction. The Court of

*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

Appeal answered both questions in the negative and restored the conviction. The appellant was granted leave to appeal to this Court. Leave to intervene in this appeal was granted to the Attorney General of Canada, the Attorney General for Quebec and the Attorney General for Manitoba.

Held: The appeal should be dismissed.

Per Cartwright and Spence JJ.: The decision of this Court in *O'Grady v. Sparling*, [1960] S.C.R. 804, which dealt with a similar legislation in Manitoba, makes it clear that s. 60 of the *Highway Traffic Act* was within the powers of the provincial legislature. In enacting s. 221 of the *Criminal Code*, Parliament has not defined "inadvertent negligence" as a crime. Consequently since parliament has not occupied the field covered by s. 60, that section does not cease to be operative. The present case was undistinguishable from *O'Grady v. Sparling*.

Per Fauteux, Abbott and Judson JJ.: The provisions of s. 60 of the *Highway Traffic Act* and s. 221(4) of the *Criminal Code* differ in legislative purpose and legal and practical effect. The provincial enactment imposes a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with the federal enactment. There were no obstacles preventing both enactments living together and operating concurrently.

Per Martland, Judson and Ritchie JJ.: The purpose and effect of s. 221(4) is to make it a criminal offence for any one to drive to the public danger, but there is a type of careless and inconsiderate driving which falls short of being "dangerous" within the meaning of that section, and the purpose of s. 60 of the *Highway Traffic Act* is to provide appropriate sanctions for the regulation and control of such driving in the interests of the lawful users of the highways.

Section 60 of the *Highway Traffic Act* and s. 221(4) of the *Criminal Code* deal with different subject matters and were enacted for different purposes, and this case is therefore governed by *O'Grady v. Sparling*.

Per Spence J.: By the enactment of s. 221(4) of the *Criminal Code*, Parliament has not moved into the field of inadvertent negligence and therefore there is no repugnancy between that section and s. 60 of the *Highway Traffic Act* which would render the latter section inoperative. Although there may be overlapping between the two sections, the consequence is not repugnance. The two sections deal with different subjects and therefore they may stand together.

Droit constitutionnel—Droit criminel—Offense provinciale de conduite négligente d'automobile—Y a-t-il conflit avec l'offense de conduite dangereuse telle que définie par le Code criminel—Highway Traffic Act, S.R.O. 1960, c. 172, art. 60—Code criminel, 1953-54 (Can.), c. 51, art. 221(4).

L'appelant fut trouvé coupable sous un chef d'accusation d'avoir conduit une automobile de façon négligente, contrairement à l'art. 60 du *Highway Traffic Act*, S.R.O. 1960, c. 172. En vertu d'un dossier soumis par l'appelant, le magistrat a saisi la Cour suprême de l'Ontario des questions de savoir s'il avait erré en droit (1) en jugeant que l'art. 60 du *Highway Traffic Act* n'était pas *ultra vires*, et (2) en jugeant qu'il n'y avait pas conflit entre cet article et l'art. 221(4) du *Code criminel*. Le Juge Haines a jugé que l'art. 60 était une législation provinciale valide mais qu'il y avait conflit avec l'art. 221(4) du *Code*

1966

MANN
v.
THE QUEEN

criminel, et a mis de côté le verdict de culpabilité. La Cour d'Appel a répondu négativement aux deux questions et a rétabli le verdict de culpabilité. L'appelant a obtenu permission d'appeler devant cette Cour. La permission d'intervenir dans cet appel a été accordée au procureur général du Canada, au procureur général du Québec et au procureur général du Manitoba.

Arrêt: L'appel doit être rejeté.

Les Juges Cartwright et Spence: Le jugement de cette Cour dans la cause de *O'Grady v. Sparling,* [1960] R.C.S. 804, qui a traité d'une législation semblable venant du Manitoba, démontre clairement que l'art. 60 du *Highway Traffic Act* était de la compétence de la Législature provinciale. En décrétant l'art. 221 du *Code criminel,* le Parlement n'a pas défini "la négligence inattentive" comme étant un crime. En conséquence, puisque le Parlement n'a pas pris possession du domaine couvert par l'art. 60, cet article ne cesse pas d'avoir effet. On ne peut pas distinguer la cause présente de *O'Grady v. Sparling.*

Les Juges Fauteux, Abbott et Judson: Les dispositions de l'art. 60 du *Highway Traffic Act* et de l'art. 221(4) du *Code criminel* diffèrent dans leur but législatif et dans leur effet légal et pratique. La Loi provinciale tente d'obtenir des fins *bona fide* non autrement atteintes par et non en conflit avec la Loi fédérale. Il n'y a aucun obstacle qui empêche les deux lois d'exister côte à côte et d'opérer concurremment.

Les juges Martland, Judson et Ritchie: L'article 221(4) a pour but et effet d'ériger en offense criminelle la conduite d'une façon dangereuse pour le public, mais il y a un genre de conduite négligente et sans égards qui est moindre que la conduite dangereuse au sens de cet article, et le but de l'art. 60 du *Highway Traffic Act* est de pourvoir à des sanctions appropriées pour la réglementation et le contrôle d'une telle conduite dans l'intérêt des usagers de la route. L'art. 60 du *Highway Traffic Act et* l'art. 221(4) du *Code criminel* traitent de différents sujets et ont été décrétés pour des buts différents, et la présente cause est gouvernée par *O'Grady v. Sparling.*

Le Juge Spence: En décrétant l'art. 221(4) du *Code criminel,* le Parlement n'a pas envahi le domaine de la négligence inattentive et il n'y a en conséquence aucune incompatibilité entre cet article et l'art. 60 du *Highway Traffic Act* au point de rendre ce dernier article sans effet. Quoiqu'il puisse y avoir double emploi entre les deux articles, la conséquence n'est pas l'incompatibilité. Les deux articles traitent de sujets différents et en conséquence peuvent exister ensemble.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], rétablissant un verdict de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], restoring a conviction. Appeal dismissed.

John Weingust, for the appellant.

T. D. MacDonald, Q.C., and *Jon van der Woerd,* for the Attorney General of Canada.

[1] [1965] 1 O.R. 483, 2 C.C.C. 338, 48 D.L.R. (2d) 481.

1966

MANN
v.
THE QUEEN

R. A. Cormack, Q.C., and *C. M. Powell*, for the respondent.

Gérald Le Dain, Q.C., for the Attorney General for Quebec.

CARTWRIGHT J.:—This appeal raises the question whether s. 60 of the *Highway Traffic Act*, R.S.O. 1960, c. 172, has ceased to be operative since the enactment by Parliament of s. 221(4) of the *Criminal Code*.

On May 12, 1964, the appellant was convicted by Deputy Magistrate Hamilton on the charge that he did on February 14, 1964, at Toronto, commit the offence of driving carelessly a vehicle on a highway contrary to s. 60 of the *Highway Traffic Act*.

On the application of the appellant the learned Magistrate stated a case submitting for the opinion of the Court the questions whether he erred in law in:

1. Finding that section 60 of the *Highway Traffic Act* was not ultra vires;

2. Finding that there was no conflict between section 60 of the *Highway Traffic Act* and section 221(4) of the *Criminal Code*.

The matter came before Haines J. The operative part of the formal order of that learned Judge reads as follows:

IT IS ORDERED that section 60 of the *Highway Traffic Act* R.S.O. 1960 is valid Provincial Legislation but in conflict with Section 221(4) of the *Criminal Code* of Canada, and the appeal is, therefore, allowed and the appellant's conviction for careless driving be hereby set aside.

Haines J. at the end of his careful and elaborate reasons summarized his conclusions as follows:

(1) The careless driving provision is valid provincial legislation in relation to the regulation of highway traffic, and thus within the competence of the provincial legislature.

(2) The dangerous driving provision is valid federal legislation in relation to criminal law and thus within the competence of the federal parliament.

(3) The physical conduct proscribed by the two sections is, in general substance and purpose, identical.

(4) *Mens rea* is not required to convict an accused under either section.

(5) Since both sections deal with inadvertent negligence, which does not admit of varying degrees of inattention, the mental element required to convict of either offence is the same.

Applying the principles of constitutional law referred to earlier, it follows that the two sections cannot stand together. Parliament having 'occupied the field', the federal legislation must take precedence and the operation of the careless driving section is precluded by reason of the dangerous driving provisions of the *Criminal Code*.

1966

MANN v. THE QUEEN

CartwrightJ.

In considering paragraph (4) of this summary it is important to understand the sense in which the learned Judge employed the term *"mens rea"*. Earlier in his reasons he had itemized as follows three classes of conduct in the driving of an automobile in respect of which criminal liability may be imposed:

(1) Conduct characterized by the actor's intention to bring about the result;

(2) Conduct characterized by the actor's recklessness as to the result;

(3) Conduct which is distinguished from acting intentionally or recklessly in that it does not involve a state of awareness.

In his view the existence of *mens rea* is an essential ingredient of an offence under items (1) and (2) but not of an offence under item (3); that is to say *mens rea* consists of intention or recklessness.

Pursuant to leave the Crown appealed to the Court of Appeal[1]. The appeal was allowed, the Court directed that both of the questions submitted in the stated case should be answered in the negative and that the conviction should be restored.

Porter C.J.O. delivered the unanimous reasons of the Court of Appeal. In his opinion the provincial section differs materially from s. 221(4) of the *Criminal Code* in that each section defines a different offence because a person could be convicted under s. 60 without proof that his manner of driving was in fact dangerous while such proof would be essential for a conviction under s. 221(4). He also held that the two sections differed in purpose, that of s. 60 being to control the flow of traffic in a safe and orderly manner and that of s. 221(4) being to punish dangerous driving. He concluded his reasons as follows:

I am of the opinion that the two sections before us differed both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide ends not otherwise secured and in no way conflicting with section 221(4) of the *Criminal Code*.

The appellant was granted leave to appeal to this Court from the judgment of the Court of Appeal. Leave to intervene in this appeal was granted to the Attorney General of Canada who supports the appeal, and to the Attorney General for Quebec and the Attorney General for Manitoba who oppose it.

[1] [1965] 1 O.R. 483, 2 C.C.C. 338, 48 D.L.R. (2d) 481.

The decision of this Court in *O'Grady v. Sparling*[1] dealt with s. 55(1) of the *Manitoba Highway Traffic Act*. There is no difference in substance between the wording of that section and that of s. 60 of the Ontario Act. The reasons of the majority of the Court delivered by Judson J. make it clear that s. 60 is within the powers of the provincial Legislature. He said in part, at page 810:

> The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted. (*Provincial Secretary of the Province of Prince Edward Island v. Egan*). The legislation under attack here is part and parcel of this regulation. Rules of conduct on highways have been established by similar legislation in every province and the careless driving section is no different in character from the specific rules of the road that are laid down.

and at page 811:

> My conclusion is that s. 55(1) of the Manitoba *Highway Traffic Act* has for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation.

In the present appeal no counsel argues that s. 60 is *ultra vires* of the provincial legislature. Such an argument would be clearly untenable in view of the decision in *O'Grady v. Sparling*. The main argument in support of the appeal is that since the enactment of s. 221(4) of the *Criminal Code* which came into force on September 1, 1961, that sub-section has fully occupied the field covered by s. 60 and consequently s. 60 ceases to be operative. It is argued that the basis of the judgment in *O'Grady v. Sparling*, on this branch of the matter, was the finding that the provincial section dealt with "inadvertent negligence" while the relevant provisions of the *Criminal Code* dealt only with "advertent negligence". Stress is laid on the following paragraph of the reasons of Judson J. at page 809:

> What the Parliament of Canada has done is to define 'advertent negligence' as a crime under ss. 191(1) and 221(1). It has not touched 'inadvertent negligence'. Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as 'crime', it is not crime.

The argument continues that by s. 221(4) Parliament has now defined "inadvertent negligence" as a crime.

In determining whether or not this is so it will be of assistance to consider the history of the legislation.

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

1966

MANN v. THE QUEEN

CartwrightJ.

The predecessor of s. 221(4) was enacted by 1938 Statutes of Canada, c. 44, s. 16 as s. 285(6) of the *Criminal Code*. It reads as follows:

(6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

(*a*) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; or

(*b*) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars or to both such imprisonment and fine.

When the new *Criminal Code* was enacted by 2-3 Eliz. II, c. 51, the dangerous driving section was omitted.

In the new Code s. 191 defines criminal negligence. It reads as follows:

191 (1) Every one is criminally negligent who

(*a*) in doing anything, or

(*b*) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section 'duty' means a duty imposed by law.

Section 192 defines the offence of causing death by criminal negligence, the maximum punishment being life imprisonment. Section 193 defines the offence of causing bodily harm by criminal negligence, the maximum punishment being imprisonment for ten years.

Subsection (1) of s. 221 is as follows:

221(1) Every one who is criminally negligent in the operation of a motor vehicle is guilty of

(*a*) an indictable offence and is liable to imprisonment for five years, or

(*b*) an offence punishable on summary conviction.

Section 221(4) was enacted by Statutes of Canada 1960-61, c. 43, s. 3, and is as follows:

(4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of

(*a*) an indictable offence and is liable to imprisonment for two years, or

(*b*) an offence punishable on summary conviction.

It will be observed that the words "recklessly or" which appeared in s. 285(6) do not appear in s. 221(4) and that, subject only to that omission, the wording of the two subsections is substantially identical.

In my opinion, s. 285(6) created two offences of which the driver of a motor vehicle on a highway or other public place might be guilty, (i) driving recklessly and (ii) driving in a manner dangerous to the public. The first of these offences continues to exist under the new Code by the combined effect of ss. 191 and 221(1). The second of these offences was reintroduced into the criminal law by the enactment of s. 221(4), and in ascertaining the intention of Parliament as to whether that sub-section was intended to render inadvertent negligence a crime it will be of assistance to consider the view taken by the Courts in the case of charges of dangerous driving laid under s. 285(6).

In *Loiselle v. The Queen*[1], Casey J. reviewed some of the earlier decisions in the courts of other provinces and in this Court and said at page 332:

> As I read these cases, each automobile accident presents two problems —Was there any negligence?—and if so, was the driver negligent to a degree over and above that which would be required to engage his civil responsibility? If the second question be answered affirmatively then it becomes necessary, having regard to the exact degree of negligence present, to decide what offence had been committed. But in all cases, and each must be treated on its own merits, it must first be found that there was negligence of sufficient gravity to lift the case out of the civil field into that of the Criminal Code. Both of the acts envisaged by s. 285(6) imply, as has been said elsewhere (*Rex v. Karasick* (1950) 2 W.W.R. 399, 195 Can. Abr. 184) 'something more than mere inadvertence or mere thoughtlessness or mere negligence or mere error of judgment'. They imply a knowledge or wilful disregard of the probable consequences or a deliberate failure to take reasonable precautions. It is this extra element which I think Mr. Justice Taschereau must have had in mind when he used (*American Automobile Ins. Co. v. Dickson*) the words 'a moral quality carried into the act'. Unless the record discloses some evidence from which the existence of this extra element can be inferred, the conviction cannot stand.

In my view this passage accurately stated the law. It negatived the suggestion that proof of mere inadvertent negligence would support a conviction on a charge of either of the crimes defined by s. 285(6). Had it been the intention of Parliament in enacting s. 221(4) to define inadvertent negligence as a crime it appears to me unlikely that it would have employed the very words which had been held, in *Loiselle v. The Queen* and the cases there referred to, not

[1] (1953), 17 C.R. 323, 109 C.C.C. 31.

1966

MANN
v.
THE QUEEN

Cartwright J.

to accomplish that purpose. In this connection I have not overlooked s. 21(4) of *The Interpretation Act*, R.S.C. 1952, c. 158, which reads as follows:

> (4) Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction that has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language.

In *Studer v. Cowper*[1], Kerwin J., as he then was, considered the effect of a similar sub-section and after quoting from the judgments of the Court in *Canadian Pacific Railway v. Albin*[2] and *Orpen v. Roberts*[3], went on to hold at page 454 that the effect of this sub-section of the *Interpretation Act* is that it

> merely removes the presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it.

This view was approved and acted upon by the majority in this Court in *Canadian Acceptance Corporation Ltd. v. Fisher*[4].

The reasoning of Casey J. in the passage from his judgment quoted above appears to me to be applicable to a charge of dangerous driving under s. 221(4) of the *Criminal Code*, and I am of opinion that the argument that by that sub-section Parliament has defined "inadvertent negligence" as a crime must be rejected.

In the course of the argument reference was made to a number of decisions in other jurisdictions where the Courts have reached a different conclusion in construing enactments worded similarly to s. 221(4). I do not think it necessary to examine these decisions in detail; they are collected and discussed by Coffin J. in *Regina v. Jeffers*[5]. I agree with his conclusion that the principle stated in the judgment of Casey J. in *Loiselle v. The Queen* should be acted upon in interpreting s. 221(4). I agree also with his reasons for reaching that conclusion.

Having reached the conclusion that in enacting s. 221(4) Parliament has not defined "inadvertent negligence" as a

[1] [1951] S.C.R. 450, 2 D.L.R. 81.
[2] (1919), 59 S.C.R. 151 at 166.
[3] [1925] S.C.R. 364 at 374, 1 D.L.R. 1101.
[4] [1958] S.C.R. 546 at 553, 554, 14 D.L.R. (2d) 225.
[5] (1965), 45 C.R. 177.

1966

MANN
v.
THE QUEEN

CartwrightJ.

crime, I find the present case indistinguishable from *O'Grady v. Sparling* and would dismiss the appeal.

Several other points were argued before us but, in view of the conclusion at which I have arrived on the point dealt with above, it becomes unnecessary to discuss them and I propose to follow the advice which Lord Macnaghten referred to as "often quoted but not perhaps always followed" and to refrain from "entering more largely upon an interpretation of the *British North America Act* than is necessary for the decision of the particular question in hand" (vide *A. G. of Manitoba v. Manitoba Licence Holders' Association*[1] and *Citizens Insurance Co. of Canada v. Parsons*[2]).

I would dismiss the appeal but would make no order as to costs.

Abbott and Judson JJ. concurred with the judgment delivered by

FAUTEUX J.:—On May 12, 1964, the appellant was tried, by Deputy Magistrate D. F. Hamilton in the Magistrates' Court in Toronto, for driving carelessly. This offence is described in s. 60 of *The Highway Traffc Act,* R.S.O. 1960, c. 172:

> 60. Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and is liable to a fine of not less than $10 and not more than $500 or to imprisonment for a term of not more than three months, and in addition his licence or permit may be suspended for a period of not more than two years.

In limine litis, counsel for the accused submitted that s. 60 had become inoperative in view of subs. (4), recently added by Parliament to s. 221 of the *Criminal Code.* Sub-section (4) provides that:

> 221.....
>
> (4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for two years, or
>
> (*b*) an offence punishable on summary conviction.

[1] [1902] A.C. 73 at 77. [2] (1881), 7 App. Cas. 96 at 109.

1966

MANN
v.
THE QUEEN

Fauteux J.

This submission was rejected and on the evidence the accused was found guilty.

The appellant appealed, by way of a stated case, to the Supreme Court of Ontario. The questions of law submitted, by the Deputy Magistrate, for the opinion of the Court were:

> Did I err in law in
>
> (i) finding that Section 60 of The Highway Traffic Act was not ultra vires,
>
> (ii) finding that there was no conflict between Section 60 of The Highway Traffic Act and Section 221(4) of the Criminal Code of Canada.

Mr. Justice Haines, who heard the appeal, held that both s. 60 and s. 221(4) are valid legislation, the first as being legislation in relation to the regulation of highway traffic and, as such, within the competence of a Legislature, and the second as being legislation in relation to criminal law and, as such, within the competence of Parliament. To determine whether, as contended for by the appellant, these two sections were in collision or conflict, the learned Judge proceeded to analyse and compare, from the point of view of *actus reus* and of *mens rea,* the components of each of the two offences. With respect to *actus reus,* he reached the view that the use, in s. 60, of the words "*due* care and attention" and "*reasonable* consideration for other persons using the highway" contemplates a manner of driving that is *dangerous* to the public or that it is so similar as to be undistinguishable for practical purposes from the manner of driving prescribed by s. 221(4) of the *Criminal Code.* He thus found that s. 60 and s. 221(4), respectively defining the offence of *driving carelessly* and the offence of *dangerous driving,* are designed to embrace the same conduct and that under both provisions *actus reus* is similar. With respect to *mens rea,* the learned Judge relied mainly on certain statements in the judgment of this Court in *O'Grady v. Sparling*[1], found that under neither section was *mens rea* a requisite to convict and hence that there was also, in this respect, similarity under both sections. The learned Judge then concluded that Parliament having occupied the field, the federal legislation must take precedence and the operation of the careless driving provision of

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

The Highway Traffic Act is precluded by reason of the dangerous driving provision of the *Criminal Code*. The appeal was allowed and the conviction of the appellant for the offence of driving carelessly was set aside.

From this decision respondent appealed to the Court of Appeal of Ontario[1]. By a unanimous judgment, the Court, composed of Porter C.J.O., Roach, Gibson, MacKay and Kelly JJ.A., allowed the appeal and set aside the Order of Mr. Justice Haines.

The appellant now appeals, with leave, to this Court. Leave to intervene was granted to the Attorney General of Canada, the Attorney General of the Province of Quebec and the Attorney General of the Province of Manitoba.

It cannot be disputed that the responsibility for the regulation of highway traffic, including the authority to prescribe the conditions and the manner of the use of motor vehicles on the highways, in the province, is primarily committed to local Legislatures (*Provincial Secretary of the Province of P.E.I. v. Egan*[2]). Nor can it be challenged that an enactment of a nature such as that of s. 60 of the Ontario *Highway Traffic Act* is legislation in relation to the regulation of highway traffic in the province (*O'Grady v. Sparling, supra*). The sole issue in the present appeal stems from the fact that, since the decision of this Court in the latter case, Parliament has enacted s. 221(4); and this issue is whether, as contended for by appellant with the support of the Attorney General of Canada but contested by respondent with the concurrence of the Attorney General of the Province of Quebec and the Attorney General of the Province of Manitoba, s. 60 is in conflict, in the technical sense, with s. 221(4), with the consequence that s. 60 would now be suspended or inoperative. Rejecting as ill-founded the suggestion of conflict, Porter C.J.O., who delivered the judgment for the Court of Appeal, quoted, as also obtaining in this case, the test adopted as well as the conclusion reached by this Court in *O'Grady v. Sparling*. This test was whether the two pieces of legislation considered in that case to wit s. 55(1) of the *Highway Traffic Act*, R.S.M. 1954, c. 112, which is couched in terms similar to those of s. 60 and s. 221(1) of the *Criminal Code* which deals with the offence of criminal negligence in the operation of a motor vehicle,

[1] [1965] 1 O.R. 483, 2 C.C.C. 338, 48 D.L.R. (2d) 481.
[2] [1941] S.C.R. 396, 76 C.C.C. 227, 3 D.L.R. 305.

1966

MANN
v.
THE QUEEN

Fauteux J.

differed both in legislative purpose and legal and practical effect; and the conclusion reached was that the provincial enactment was imposing a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with the federal enactment. With these views of the Court of Appeal I am in respectful agreement. Notwithstanding the able argument of Counsel for the Attorney General of Canada, I am quite unable to read, in what constitutes the essence of the *ratio decidendi* in the *O'Grady* case, anything supporting the theory of conflict advanced in the present case. When a question of conflict arises with respect to the criminal law power of Parliament and the provincial regulatory power, it appears to me that one must be mindful that broadly as the criminal law power of Parliament has been construed—as is illustrated by the classic statement of Lord Atkin in *Proprietary Articles Trade Association v. Attorney General of Canada*[1]—it has never been authoritatively suggested that the construction of this power could be validly extended to a point leading to the gradual and eventual absorption or virtual extinction of the provincial regulatory power. Indeed, both these powers must be rationalized in principle and reconciled in practice whenever possible. I do not think that because the circumstances of a particular case may bring it within the scope of both s. 221(4) and s. 60 one may validly conclude that s. 60 does not impose a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with s. 221(4). In the present case, I see no obstacle preventing both enactments living together and operating concurrently.

Being of opinion that the provisions of s. 221(4) and those of s. 60 differ with respect to subject-matter as well as with respect to legislative purpose and legal and practical effect, I would dismiss the appeal but make no order as to costs.

Martland and Judson J.J. concurred with the judgment delivered by

RITCHIE J.:—I have had the advantage of reading the reasons for judgment of my brothers Cartwright and Spence and I agree with them that this appeal should be dismissed and that the provisions of s. 221(4) of the

[1] [1931] A.C. 310 at 324, 1 W.W.R. 552, 55 C.C.C. 241, 2 D.L.R. 1.

Criminal Code are not to be construed as creating a crime of "inadvertent negligence".

It appears to me to be obvious that everyone who drives a motor vehicle in a manner contrary to the provisions of s. 221(4) of the *Criminal Code* is driving "without due care and attention or without consideration for other persons using the highway" (contrary to s. 60 of the *Highway Traffic Act*, R.S.O. 1960, c. 172), but I do not consider that the converse is necessarily the case.

The purpose and effect of s. 221(4) is to make it a criminal offence for anyone to drive to the public danger but, notwithstanding the careful argument to the contrary addressed to us on behalf of the Attorney General of Canada, I am satisfied that there is a type of careless and inconsiderate driving which falls short of being "dangerous" within the meaning of that section and that the purpose of s. 60 of the *Highway Traffic Act* is to provide appropriate sanctions for the regulation and control of such driving in the interests of the lawful users of the highways of Ontario.

I am accordingly of the opinion that s. 60 of the *Highway Traffic Act* and s. 221(4) of the *Criminal Code* deal with different subject matters and were enacted for different purposes and that this case is therefore governed by the decision of this Court in *O'Grady v. Sparling*[1].

I would dispose of the appeal as proposed by my brother Cartwright.

SPENCE J.:—I have had the privilege of reading the reasons of Mr. Justice Cartwright and, with respect, I agree that the appeal should be dismissed for the reasons set out by my brother. I think it proper, however, to add certain further considerations.

Judson J. in *O'Grady v. Sparling*[1] said:

> What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as "crime", it is not crime.

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

1966

MANN v. THE QUEEN

Spence J.

We would therefore be assisted in the solution to our problem if we were able to determine whether by the enactment of s. 221(4) of the *Criminal Code* Parliament has moved into the field of inadvertent negligence by the enactment of a provision which is repugnant to s. 60 of the *Highway Traffic Act* of the Province of Ontario and, therefore, render the latter inoperable. I accept as a standard of repugnance that adopted by Martland J. in this Court in *Smith v. The Queen*[1]:

> The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.

Surely a practical test is to consider whether there may be cases in which the accused's conduct would justify a conviction under the provisions of s. 60 of the *Highway Traffic Act* of Ontario but where no conviction would be possible under the provisions of s. 221(4) of the *Criminal Code*.

Haines J., in giving judgment upon the application to quash in the present case, said:

> It is true that the careless driving section makes no express reference to creating an element of danger to the safety of members of the public. However, the use of the words "due care and attention and reasonable consideration for other persons using the highway" clearly contemplates a manner of driving that is dangerous to the public or that is so similar as to be indistinguishable for practical purposes from the manner of driving prescribed by the corresponding section of the Criminal Code.

With respect, I am unable to agree with that statement. It is true that in many cases upon the prosecution for a breach of s. 60 of the *Highway Traffic Act* of Ontario the Crown may be able to demonstrate that the driving of the accused either created a danger or at any rate was in circumstances where danger was probable. In my view, however, that danger was not a necessary ingredient of the offence charged under s. 60 of the *Highway Traffic Act* of Ontario.

Judson J. in *O'Grady v. Sparling, supra,* said at p. 810:

> The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted. (*Provincial Secretary of the*

[1] [1960] S.C.R. 776 at 800, 33 C.R. 318, 128 C.C.C. 145, 25 D.L.R. (2d) 225.

Province of Prince Edward Island v. Egan, 1941 S.C.R. 396). The legislation under attack here is part and parcel of this regulation. Rules of conduct on highways have been established by similar legislation in every province and the careless driving section is no different in character from the specific rules of the road that are laid down.

LeBel J.A., in giving one of the judgments for the Court of Appeal of Ontario in *Regina v. Yolles*[1], said at p. 228:

> In the absence of such a compendious rule, (the present s. 60 of the Highway Traffic Act) the Province could not exercise effective control of traffic on its highways in the general interest of the safety; it would be quite impossible to do so in my opinion, and I think it is equally impossible to expect the Province to enact specific rules of the road to cover all contingencies that might call for the exercise of caution.

The history of motor vehicle legislation over the past decades has shown the inclusion in the statute of an ever-increasing number of statutory "Rules of the Road". The present *Highway Traffic Act* of Ontario, R.S.O. 1960, c. 172, has a Part devoted to such Rules which commences at s. 62A and proceeds through to s. 100. Many of those sections have a considerable number of subsections.

As said by LeBel J.A., it is "impossible to expect the province to enact specific rules of the road to cover all contingencies".

There are many situations where the action of a driver might endanger no other person upon the highway or where there may be no probable situation of danger but there could be inconvenience to other users of the highway, obstruction of the free use of the highway, or other interference with the rights of other users of the highway. In my view, the person guilty of that kind of conduct would be, to use the words of s. 60 of the *Highway Traffic Act* of Ontario, "driving without due care and attention or without reasonable consideration for other persons using the highway". Under such circumstances, there could be a conviction for breach of the provisions of s. 60 of the *Highway Traffic Act* of Ontario. However, no conviction for a breach of s. 221(4) of the *Criminal Code* could have resulted as the driving was not "in a manner dangerous to the public".

With respect, I adopt the words of Porter C.J.O. in giving the judgment in the Court of Appeal in the present case when he said:

[1] [1959] O.R. 206, 30 C.R. 93, 123 C.C.C. 305, 19 D.L.R. (2d) 19.

1966

MANN
v.
THE QUEEN

Spence J.

To succeed in a prosecution under the section it would be sufficient to prove that the accused was driving in a manner which would answer either one of these descriptions. And this would suffice whether or not the manner of driving were also dangerous. The accused would be liable to conviction whether the driving were dangerous or not. The section contemplates, not only that the highways should be made safe, but that travellers on the highways should conduct themselves in a civilized and considerate manner toward their fellow travellers. Thus the Provincial section differs materially from the section of the Code. Each section defines a different offence.

It is also worthy of note that s. 60 of the *Highway Traffic Act* of Ontario is by its terms confined to the highway which is restrictively defined in s. 1(1), para. 10, of the *Highway Traffic Act* while s. 221(4) of the *Criminal Code* applies, *inter alia*, to "a public place" which may be much broader than any area included in the definition in the *Highway Traffic Act*.

It follows, therefore, that although there may be overlapping the consequence is not repugnance. The two sections deal with different subjects and therefore they may stand together. Section 221(4) of the *Criminal Code* has not made inoperable s. 60 of the *Highway Traffic Act*.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Weingust & Halman, Toronto.

Solicitor for the Attorney General of Canada: E. A. Driedger, Ottawa.

Solicitor for the respondent: W. C. Bowman, Toronto.

Solicitor for the Attorney General of Quebec: G. LeDain, Montreal.

1965

*Nov. 4

1966

Jan. 25

LOUIS PATRICK McIVER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Criminal law—Provincial offence of careless driving—Collision with parked vehicle—Whether conflict with offence of dangerous driving defined by Criminal Code—Highway Traffic Act, R.S.O. 1960, c. 172, s. 60—Criminal Code, 1953-54 (Can.), c. 51, s. 221(4).

*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

The appellant was convicted on a charge of careless driving, contrary to s. 60 of the *Highway Traffic Act*, R.S.O. 1960, c. 172. The evidence established that he drove his motor vehicle into the rear portion of a vehicle parked on the shoulder of the highway off the pavement. On appeal by way of a stated case, his conviction was affirmed and a further appeal to the Court of Appeal was dismissed. He was granted leave to appeal to this Court on the following grounds: (1) Did the Court of Appeal err in holding that there was a *prima facie* case of careless driving; and (2) Did the Court of Appeal err in finding that s. 60 of the *Highway Traffic Act* was not in conflict with s. 221(4) of the *Criminal Code*? The first ground of appeal was rejected by this Court without written reasons at the conclusion of the argument of counsel for the appellant on that ground, and judgment was reserved on the second ground of appeal.

Held: The appeal should be dismissed.

The second ground of appeal was the same as that dealt with by this Court in *Mann v. The Queen* (ante p. 238) and should be rejected for the reasons given therein.

Droit constitutionnel—Droit criminel—Offense provinciale de conduite négligente d'automobile—Collision avec un véhicule stationnaire—Y a-t-il conflit avec l'offense de conduite dangereuse telle que définie par le Code criminel—Highway Traffic Act, S.R.O. 1960, c. 172, art. 60 —Code criminel, 1953-54 (Can.), c. 51, art. 221(4).

L'appelant a été trouvé coupable sous un chef d'accusation d'avoir conduit une automobile de façon négligente, contrairement à l'art. 60 du *Highway Traffic Act*, S.R.O. 1960, c. 172. La preuve a démontré que son automobile avait frappé l'arrière d'une voiture stationnée sur l'accotement de la route hors de la portion pavée. Sur appel en vertu d'un dossier soumis, le verdict de culpabilité fut confirmé et un appel subséquent à la Cour d'Appel fut rejeté. Il a obtenu permission d'appeler devant cette Cour sur les motifs suivants: (1) La Cour d'Appel a-t-elle erré en adjugeant qu'il s'agissait d'un cas *prima facie* de conduite négligente; et (2) La Cour d'Appel a-t-elle erré en adjugeant que l'art. 60 du *Highway Traffic Act* n'était pas en conflit avec l'art. 221(4) du *Code Criminel*? A la fin de la plaidoirie de l'avocat de l'appelant sur le premier motif d'appel, ce motif fut rejeté par la Cour sans notes écrites, et le jugement sur le second motif d'appel fut pris en délibéré.

Arrêt: L'appel doit être rejeté.

Le second motif d'appel était semblable à celui qui a été traité par cette Cour dans la cause de *Mann v. The Queen* (voir p. 238) et doit être rejeté pour les motifs qui ont été donnés dans cette dernière cause.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction. Appeal dismissed.

[1] [1965] 2 O.R. 475, 45 C.R. 401.

1966

McIVER
v.
THE QUEEN

John O'Driscoll, for the appellant.

T. D. MacDonald, Q.C., and *Jon van der Woerd,* for the Attorney General of Canada.

R. A. Cormack, Q.C., and *C. M. Powell,* for the respondent.

The judgment of Cartwright and Spence JJ. was delivered by

CARTWRIGHT J.:—The appellant was convicted by a magistrate on February 19, 1964, on the charge of driving a motor vehicle on a highway carelessly contrary to s. 60 of the *Highway Traffic Act* of Ontario.

On appeal by way of a stated case his conviction was affirmed by McRuer C.J.H.C. and an appeal from the order of McRuer C.J.H.C. was dismissed by the Court of Appeal for Ontario[1].

Pursuant to leave granted by this Court the appellant appeals from the judgment of the Court of Appeal on the following grounds:

(1) The Court of Appeal for Ontario erred in holding that there was a prima facie case of careless driving made out by the Crown at the trial in the first instance before the Magistrate;

(2) The Court of Appeal for Ontario erred in finding that Section 60 of the *Highway Traffic Act* of Ontario, R.S.O. 1960, Chapter 172, was not in conflict with Section 221(4) of the *Criminal Code* of Canada.

It will be observed that the second of these grounds is the same as that dealt with in the case of *Mann v. The Queen,* ante p. 238, in which judgment is being delivered at the same time as the judgment in the case at bar. On this ground all counsel relied on the arguments addressed to us in the *Mann* appeal and did not repeat them.

At the conclusion of the argument of counsel for the appellant dealing with the first ground of appeal the Court were unanimously of opinion that that ground must be rejected and counsel for the respondent were not called upon in regard to it. Judgment was reserved to enable the Court to consider the second ground.

For the reasons which I have given in the case of *Mann v. The Queen,* I am of opinion that the second ground of appeal must be rejected.

[1] [1965] 2 O.R. 475, 45 C.R. 401.

1966

McIVER v. THE QUEEN

CartwrightJ.

I would dismiss the appeal but would make no order as to costs.

Abbott and Judson JJ. concurred with the judgment delivered by

FAUTEUX J.:—The only issue remaining for consideration at the close of the hearing of this appeal being identical to the one raised in the case of *Mann v. The Queen,* I would, for the reasons I gave in that case, dismiss the appeal but make no order as to costs.

Martland and Judson JJ. concurred with the judgment delivered by

RITCHIE J.:—For the reasons which I have given in the case of *Mann v. The Queen* I would dispose of this appeal in the manner proposed by my brother Cartwright.

Appeal dismissed, no order as to costs.

Solicitors for the appellant: O'Driscoll, Kelly & McRae, Toronto.

Solicitor for the Attorney General of Canada: E. A. Driedger, Ottawa.

Solicitor for the respondent: W. C. Bowman, Toronto.

1966

*Feb. 3

Feb. 3

GERARD FREDERICK .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Accused in custody—Notice of appeal requesting that counsel be appointed by Court—Request refused—Accused notified only after hearing of appeal.

The appellant, who was in custody, completed a notice of appeal to the Court of Appeal on a form prescribed by the rules whereby he requested that his case be presented "through counsel to be assigned by the Court". The Court of Appeal dismissed his appeal in his absence and without assigning counsel. He was not notified of the date set for the hearing. The case came before the Court of Appeal on May 7. He was advised by a letter dated May 28 that his appeal had been dismissed and by a further letter dated June 24 that his request for counsel had been refused. He appealed to this Court.

* PRESENT: Taschereau C.J. and Cartwright, Fauteux, Martland and Judson JJ.

1966

FREDERICK v. THE QUEEN

Held: The appeal should be allowed and the record should be referred back to the Court of Appeal for a hearing in accordance with the *Criminal Code*.

The failure to notify the appellant that no counsel had been appointed by the Court and the failure to notify him of the date of the hearing of the appeal and to give him an opportunity to present his case either in writing or in person was fatal to the validity of the order of the Court of Appeal.

Droit criminel—Accusé sous détention—Avis d'appel demandant qu'un avocat soit nommé par la Cour—Demande refusée—Accusé notifié seulement après l'audition de l'appel.

L'appelant, qui était sous détention, a complété un avis d'appel à la Cour d'Appel sur une formule prescrite par les règles dans laquelle il demandait que sa cause soit présentée par l'entremise d'un avocat assigné par la Cour. La Cour d'Appel a rejeté l'appel en son absence et sans lui avoir assigné un avocat. Il n'a pas été notifié de la date fixée pour l'audition. La cause fut entendue par la Cour d'Appel le 7 mai. Il fut notifié par une lettre en date du 28 mai que son appel avait été rejeté et par un autre lettre en date du 24 juin que sa demande pour la nomination d'un avocat avait été refusée. Il en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le dossier renvoyé à la Cour d'Appel pour une audition conformément au *Code criminel*.

Le défaut de notifier l'appelant qu'aucun avocat n'avait été nommé par la Cour et le défaut de le notifier de la date de l'audition de l'appel et de lui donner l'occasion de présenter sa cause, soit par écrit, soit en personne, avait été fatal à la validité de l'ordonnance rendue par la Cour d'Appel.

APPEL d'un jugement de la Cour d'Appel de l'Ontario. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for Ontario. Appeal allowed.

Brian Crane, for the appellant.

R. A. Cormack, Q.C., for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—In this case, the appellant, who is in custody, completed a notice of appeal to the Court of Appeal for Ontario on Form B prescribed in the Rules respecting Criminal Proceedings which came into force in Ontario on March 1, 1965.

This form reads in part as follows:

I desire to present my case and argument whether it be for leave to appeal or by way of appeal where leave is not necessary[5].

(*a*) in writing
(*b*) in person
(*c*) through counsel to be assigned by the court.

Marginal note [5] reads as follows:

[5] Stroke out two of (*a*), (*b*) or (*c*).

The appellant struck out items (*a*) and (*b*).

The notice was dated April 14, 1965.

The appellant received no notice of the date set for the hearing of his appeal.

On May 7, 1965, the Court of Appeal made an order dismissing his appeal. The appellant was not present and no counsel had been assigned to present the appeal.

Some time in May the appellant was informed by the Governor of the jail that his appeal had been dismissed. By letter of May 28, 1965, from the Registrar of the Court of Appeal, he was sent a copy of the order of the Court of Appeal made on May 7, 1965. By letter dated June 24, 1965, from the Registrar, he was advised that his request to have his appeal argued through counsel to be assigned by the Court had been refused.

It is obvious that the appellant having completed his notice of appeal in the manner set out above would assume until he was advised to the contrary that counsel would be assigned to present his appeal. The failure to notify the appellant that no counsel was appointed by the Court and the failure to notify him of the date of the hearing of the appeal and to give him an opportunity to present his case either in writing or in person is fatal to the validity of the order of the Court of Appeal.

The Appeal is allowed, the order of the Court of Appeal of May 7, 1965, is set aside and it is directed that the record be returned to that Court to hear and determine the application of the appellant in accordance with the provisions of the *Criminal Code*.

Appeal allowed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: W. C. Bowman, Toronto.

1965
*Dec. 9
1966
Jan. 25

HER MAJESTY THE QUEEN ..... APPELLANT;

AND

BERNARD RANDOLPH and WORLD WIDE MAIL SERVICES CORPORATION ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Interim order suspending postal service—Whether party affected entitled to be heard before order made—Post Office Act, R.S.C. 1952, c. 212, ss. 7, 40—Crown Liability Act, 1952-53 (Can.), c. 30—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(e).

On April 22, 1965, the postal service of the corporate respondent, whose business consisted in sending by mail, on behalf of its customers, merchandise, documents, correspondence and other things that they asked it so to send, was temporarily suspended by the Post Office Department for the purpose of an investigation. Samples of the material which the other respondent offered for sale by means of the facilities of the corporate respondent were submitted to the Department for inspection. On April 28, 1965, the postal service of both respondents was suspended by interim orders signed by the Acting Postmaster General, pursuant to s. 7 of the *Post Office Act*, R.S.C. 1952, c. 212. These orders were made without the respondents having been previously heard and without having had any opportunity to object or present a defence. The Exchequer Court granted the respondents' petition of right and declared that the interim orders were invalid. The Crown appealed to this Court.

Held: The appeal should be allowed.

The two interim prohibitory orders were validly made. Section 7 of the *Post Office Act* authorizes the making of an interim prohibitory order without prior notice to the party affected. It would be inconsistent with the terms of the section to hold that before making an interim order the Postmaster General must hold a hearing. If such were the case, the hearing prescribed by s. 7(2) would be an unnecessary repetition. The maxim *audi alteram partem* has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2(*e*) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44. Section 7(1) enables the Postmaster General to act swiftly in performing the duty of protecting the public, while s. 7(2) gives protection to the person affected by conferring the right to a hearing before any order made against him becomes final.

The corporate respondent was not entitled to have the mail detained during the six-day period, before the interim order was made, delivered to it. Once the order was made, to deliver the mail accumulated during that period would have been to disobey the order.

Any claim for damages for the detention of the corporate respondent's mail during that six-day period was precluded by the terms of s. 40 of

* PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

the *Post Office Act*, a special statutory provision which would constitute an exception to the general terms of the *Crown Liability Act*, 1952-53 (Can.), c. 30.

Couronne—Pétition de droit—Ordre provisoire suspendant le service postal —La personne concernée a-t-elle le droit d'être entendue avant que l'ordre soit émis—Loi sur les Postes, S.R.C. 1952, c. 212, arts. 7, 40—Loi sur la Responsabilité de la Couronne, 1952-1953 (Can.), c. 30—Loi sur la Déclaration canadienne des droits, 1960 (Can.), c. 44, art. 2(e).

Le 22 avril 1965, le service postal de la corporation intimée, dont le commerce consistait à envoyer par la poste, au nom de ses clients, toutes les marchandises, documents, correspondance et autres effets que ces derniers lui demandaient d'adresser ainsi, a été temporairement suspendu par le Ministère des Postes pour fins d'enquête. Des échantillons du matériel que l'autre intimé offrait en vente par l'entremise de la corporation intimée ont été remis au Ministère pour être soumis à un examen. Le 28 avril 1965, sous l'autorité de l'art. 7 de la *Loi sur les Postes*, S.R.C. 1952, c. 212, le service postal des deux intimés a été suspendu par un ordre provisoire signé par le Ministre agissant comme Ministre des Postes. Ces ordres ont été rendus sans que les intimés aient été préalablement entendus et sans qu'ils aient eu l'opportunité de s'y objecter ou de présenter une défense. La Cour de l'Échiquier a accordé la pétition de droit des intimés et a déclaré que les ordres provisoires étaient invalides. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

Les deux ordres prohibitifs provisoires ont été validement émis. L'article 7 de la *Loi sur les Postes* autorise l'émission d'un ordre prohibitif provisoire sans avis préalable à la personne concernée. Ce ne serait pas consistant avec les termes de l'article que de dire que le Ministre des Postes doit tenir une audience avant d'émettre un ordre provisoire. Si tel était le cas, l'audience prescrite par l'art. 7(2) serait une répétition non nécessaire. La maxime *audi alteram partem* réfère à l'émission de décisions affectant les droits des parties et qui de leur nature sont définitives, et ceci est vrai aussi pour ce qui concerne l'art. 2(*e*) de la *Loi sur la Déclaration canadienne des droits*, 1960 (Can.), c. 44. L'article 7(1) permet au Ministre des Postes d'agir rapidement dans l'exécution de son devoir de protéger le public, alors que l'art. 7(2) protège la personne concernée en lui conférant le droit à une audition avant que tout ordre émis contre elle devienne définitif.

La corporation intimée n'avait pas droit à la livraison du courrier qui avait été retenu durant la période de six jours qui s'est écoulée avant que l'ordre provisoire soit émis. Une fois que l'ordre a été émis, la livraison du courrier accumulé durant cette période serait une désobéissance à l'ordre.

En vertu des termes de l'art. 40 de la *Loi sur les Postes*, une disposition statutaire spéciale constituant une exception aux termes généraux de la *Loi sur la Responsabilité de la Couronne*, 1952-1953 (Can.), c. 30, aucune réclamation pour dommages résultant de la rétention du courrier de la corporation intimée durant cette période de six jours ne peut être entretenue.

1966

THE QUEEN v. RANDOLPH et al.

APPEL de la Couronne d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada, accordant une pétition de droit. Appel maintenu.

APPEAL by the Crown from a judgment of Jackett P. of the Exchequer Court of Canada, granting a petition of right. Appeal allowed.

Paul Ollivier, Q.C., for the appellant.

Jean-Paul Ste-Marie, Q.C., and *Conrad Shatner*, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the President of the Exchequer Court declaring the respondent Randolph entitled to have delivered to him the mail not delivered to him in due course of mail during the period from April 28, 1965, to the filing of the Petition of Right, making a similar declaration in favour of the other respondent covering the period from April 22, 1965 to the filing of the Petition, and declaring each respondent entitled to be paid damages in respect of the detention of the aforesaid mail and directing a reference to assess the damages.

No oral testimony was given at the trial. From the pleadings and statements made by counsel the learned President found the facts, so far as relevant, to be as follows.

1. The suppliant Randolph does business in the city and district of Montreal and elsewhere under the registered firm name of 'Al Brino Services Reg'd.'

2. The corporate suppliant does business in the city and district of Montreal and elsewhere.

3. Randolph's business consists in offering to sell and selling films, books, photographs and similar objects.

4. The corporate suppliant's business consists in sending by mail, on behalf of its customers, merchandise, documents, correspondence and other things that they ask it so to send.

5. On Thursday, April 22, 1965, officers of the Post Office Department in Montreal suspended temporarily the postal service of the corporate suppliant for the purpose of an investigation.

6. On Friday, April 23, 1965, the suppliant Randolph, at the request of officers of the Department, agreed to submit to them samples of films, books and photographs that he offered for sale by means of the facilities of the corporate suppliant. These samples were immediately sent to higher

officers of the Department in Ottawa with a view to determining whether there were grounds, on the basis of such samples, for recommending to the Postmaster General that he exercise, in respect of the suppliants, the powers conferred upon him by section 7 of the *Post Office Act*, R.S.C. 1952, chapter 212. In the meantime, the corporate suppliant's postal services remained suspended by authority of the Deputy Postmaster General.

7. On Monday, April 26, 1965, the aforesaid samples were seen and examined by the Deputy Postmaster General and two other officers of the Post Office Department.

8. On Wednesday, April 28, 1965, the Deputy Postmaster General wrote a memorandum to the Postmaster General recommending that an interim prohibitory order be made against the suppliants under section 7 of the *Post Office Act* and, on the same day, the Acting Postmaster General signed two documents purporting to be interim orders under that section prohibiting the delivery of mail directed to them or deposited by them in the Post Office. These orders were made without the suppliants having been previously heard and without the suppliants having had any opportunity of objecting thereto or presenting evidence.

9. The mail to which these orders relate, and mail that was not delivered as a result of the action taken by the Montreal Post Office officials on April 22, is detained by officers of the Post Office Department in a safe place.

Section 7 of the *Post Office Act* is as follows:

7. (1) Whenever the Postmaster General believes on reasonable grounds that any person

(*a*) is, by means of the mails,

(i) committing or attempting to commit an offence, or

(ii) aiding, counselling or procuring any person to commit an offence, or

(*b*) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an 'interim prohibitory order') prohibiting the delivery of all mail directed to that person (in this section called the 'person affected') or deposited by that person in a post office.

(2) Within five days after the making of an interim prohibitory order the Postmaster General shall send to the person affected a registered letter at his last known address informing him of the order and the reasons therefor and notifying him that he may within ten days of the date the registered letter was sent, or such longer period as the Postmaster General may specify in the letter, request that the order be inquired into, and upon receipt within the said ten days or longer period of a written request by the person affected that the order be inquired into, the Postmaster General shall refer the matter, together with the material and evidence considered by him in making the order, to a Board of Review consisting of three persons nominated by the Postmaster General one of whom shall be a member of the legal profession.

(3) The Board of Review shall inquire into the facts and circumstances surrounding the interim prohibitory order and shall give the person affected a reasonable opportunity of appearing before the Board of Review, making representation to the Board and presenting evidence.

1966

THE QUEEN v. RANDOLPH et al.

Cartwright J.

(4) The Board of Review has all the powers of a commissioner under Part I of the *Inquiries Act*, and, in addition to the material and evidence referred to the Board by the Postmaster General, may consider such further evidence, oral or written, as it deems advisable.

(5) Any mail detained by the Postmaster General pursuant to subsection (8) may be delivered to the Board of Review, and, with the consent of the person affected, may be opened and examined by the Board.

(6) The Board of Review shall, after considering the matter referred to it, submit a report with its recommendation to the Postmaster General, together with all evidence and other material that was before the Board and upon receipt of the report of the Board, the Postmaster General shall reconsider the interim prohibitory order and he may revoke it or declare it to be a final prohibitory order, as he sees fit.

(7) The Postmaster General may revoke an interim or final prohibitory order when he is satisfied that the person affected will not use the mails for any of the purposes described in subsection (1), and the Postmaster General may require an undertaking to that effect from the person affected before revoking the order.

(8) Upon the making of an interim or final prohibitory order and until it is revoked by the Postmaster General,

(*a*) no postal employee shall without the permission of the Postmaster General

(i) deliver any mail directed to the person affected, or

(ii) accept any mailable matter offered by the person affected for transmission by post,

(*b*) the Postmaster General may detain or return to the sender any mail directed to the person affected and anything deposited at a post office by the person affected, and

(*c*) the Postmaster General may declare any mail detained pursuant to paragraph (*b*) to be undeliverable mail, and any mail so declared to be undeliverable mail shall be dealt with under the regulations relating thereto.

(9) Where no request that an interim prohibitory order be inquired into is received by the Postmaster General within the period mentioned in subsection (2), the order shall, at the expiration of the said period, be deemed to be a final prohibitory order.

The interim prohibitory order made in respect of the respondent World Wide Mail Services Corporation reads as follows:

IN THE MATTER OF SECTION 7 OF THE POST OFFICE ACT
INTERIM PROHIBITORY ORDER

Whereas I have reasonable grounds to believe and do believe that the Company hereinafter named is by means of the mails, committing or attempting to commit offences, namely offences under Section 323 of the Criminal Code and offences under Section 324 of the Criminal Code.

I, therefore, by virtue of the authority vested in me under the provisions of Section 7 of the Post Office Act, prohibit the delivery of all mail directed to World Wide Mail Service Corp. 265 Craig Street West, Room 205, Montreal, Quebec, or directed to it by any other

name at any other address, or deposited by the said World Wide Mail Service Corp. in a Post Office.

The particulars of the said offences are as follows:

Section 323 Criminal Code—by deceit, falsehood and other fraudulent means, defrauding or attempting to defraud the public of money by misrepresenting the character of motion picture films, books and photographs offered for sale.

Section 324 Criminal Code—making use of the mails for the purpose of transmitting circulars devised and intended to deceive or defraud the public or obtain money under false pretences by misrepresenting the character of motion picture films, books and photographs offered for sale.

Dated at Ottawa, Ontario, this 28th day of April, 1965.

(Sgd.) J. R. Nicholson
Acting Postmaster General.

The interim prohibitory order made in respect of the respondent Randolph is similarly worded and bears the same date.

On April 30, 1965, a registered letter was sent to each of the respondents in compliance with the provisions of subs. (2) of s. 7. It is said in the Statement of Defence that the respondents requested that the interim prohibitory orders be inquired into and that the Postmaster General referred the matter to a Board of Review but that the Board has not proceeded with the inquiry pending the disposition of the Petition of Right.

The learned President was of opinion that, while his action is primarily the exercise of an administrative and executive authority, the Postmaster General when deciding whether or not to issue an interim prohibitory order is under a duty to act judicially so that the maxim *audi alteram partem* is applicable and his failure to give the respondents an opportunity to be heard before issuing the interim orders was fatal to their validity.

I do not find it necessary to decide the exact nature of the authority which the Postmaster General was exercising because it appears to me that on its true construction s. 7 of the *Post Office Act* authorizes the making of an interim prohibitory order without prior notice to the party affected. There is no doubt that Parliament has the power to abrogate or modify the application of the maxim *audi alteram partem*. In s. 7 it has not abrogated it. Rather it has provided that before any final prohibitory order is made, the party affected shall have notice and a right to an expeditious hearing and has defined the procedure to be

1966

THE QUEEN v. RANDOLPH et al.

Cartwright J.

followed. It would, in my opinion, be inconsistent with the scheme of the section to hold that before making an interim order the Postmaster General must hold a hearing. If such a duty existed it would be a duty to notify the party affected of what was alleged against him and to give him a reasonable opportunity to answer. If this were done the hearing prescribed by subs. (2) would be an unnecessary repetition. Generally speaking the maxim *audi alteram partem* has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2 (*e*) of the *Canadian Bill of Rights* upon which the respondents relied.

The following passage in Broom's Legal Maxims, 10th ed., at p. 117 is in point:

> Although cases may be found in the books of decisions under particular statutes which at first might seem to conflict with the maxim, it will be found on consideration that they are not inconsistent with it, for the rule, which is one of elementary justice, only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard.

The main object of s. 7 is to enable the Postmaster General to take prompt action to prevent the use of the mails for the purpose of defrauding the public or other criminal activity. That purpose might well be defeated if he could take action only after notice and a hearing. Sub-section (1) enables him to act swiftly in performing the duty of protecting the public while subs. (2) gives protection to the person affected by conferring the right to a hearing before any order made against him becomes final.

In my opinion, the two interim prohibitory orders in question were validly made.

Two subsidiary questions remain. The first is as follows. The mail of the corporate respondent was admittedly detained during the period from April 22, 1965, to April 28, 1965. The learned President was of opinion that even if the orders made on April 28, 1965, were valid the corporate respondent was entitled to have the mail detained during that period delivered to it. I am unable to agree with this view. The order of April 28, 1965, in regard to the corporate respondent has already been quoted. By its terms the delivery of all mail addressed to that respondent was prohibited. Its operation was not restricted to mail posted on or after the day of the making of the order. Once the order

1966

THE QUEEN v. RANDOLPH et al.

Cartwright J.

was made, to deliver the mail accumulated during the period mentioned would have been to disobey the order.

The second subsidiary question is whether the corporate respondent is entitled to damages for the detention of its mail during the six day period. The claim for such damages is against Her Majesty and would seem to be precluded by the terms of s. 40 of the *Post Office Act* which reads as follows:

> 40. Neither Her Majesty nor the Postmaster General is liable to any person for any claim arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

This is a special statutory provision which would constitute an exception to the general terms of the *Crown Liability Act*. For this reason I am of opinion that this claim for damages cannot be sustained.

I would allow the appeal with costs, set aside the judgment of the Exchequer Court and direct that judgment be entered dismissing the Petition of Right with costs.

Appeal allowed with costs.

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

Solicitor for the respondents: J. P. Ste.-Marie, Montreal.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

CALVIN WILLIAM GEORGE .....RESPONDENT.

1965

*Nov. 12

1966

Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indians—Hunting for food on Reserve out of season—Treaty rights—Whether exempt from provisions of the Migratory Birds Convention Act, R.S.C. 1952, c. 179—Indian Act, R.S.C. 1952, c. 149, s. 87.

The respondent, an Indian, shot two migratory wild ducks on a Reserve at a time not during the open season for such birds. They were to be used for food and were not to be sold. He was acquitted at trial on a charge of unlawfully hunting laid pursuant to s. 12(1) of the

* PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

1966

THE QUEEN v. GEORGE

Migratory Birds Convention Act, R.S.C. 1952, c. 179, on the ground that the Act did not apply to him. On appeal by the Crown to the Supreme Court of Ontario, the dismissal of the charge was affirmed and a further appeal to the Court of Appeal was dismissed by a majority judgment. The Crown was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and a verdict of guilty should be entered.

Per Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.: The object and intent of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, is to make Indians, who are under the exclusive legislative jurisdiction of Parliament by virtue of s. 91(24) of the *B.N.A. Act*, 1867, subject to provincial laws of general application.

Section 87 was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation. The provisions of s. 87 do not prevent the application to Indians of the *Migratory Birds Convention Act*. There was no valid distinction between the present case and that of *Sikyea v. The Queen*, [1964] S.C.R. 642, which should be followed.

Per Cartwright J., *dissenting:* The Treaty of 1827 was a treaty within the meaning of that word as used in s. 87 of the *Indian Act*. That Treaty assured to the Indians the right to hunt and fish on the Reserve. That right has not been effectively destroyed by the *Migratory Birds Convention Act* and the Migratory Birds Regulations so far as wild ducks are concerned. The *Migratory Birds Convention Act* is a law of general application in force in Ontario and applicable to the respondent, but by s. 87 its application to him is made subject to the terms of the Treaty of 1827. Section 87 of the *Indian Act* shows that Parliament was careful to preserve the rights solemnly assured to the Indians by the Treaty of 1827. Section 87 makes the Indians subject to the laws of general application in force in the province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail. The question as to whether the right assured by the Treaty of 1827 has been destroyed by the *Migratory Birds Convention Act* has not been decided in favour of the Crown by the decision of this Court in *Sikyea v. The Queen*, *supra*.

Droit criminel—Indiens—Chasse pour nourriture dans la Réserve en temps prohibé—Droits en vertu des Traités—Sont-ils exempts des dispositions de la Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179—Loi sur les Indiens, S.R.C. 1952, c. 149, art. 87.

L'intimé, un Indien, tira et tua deux canards sauvages migrateurs dans une Réserve alors que la chasse de ces oiseaux était prohibée. Les oiseaux devaient servir de nourriture et ne devaient pas être vendus. Lors de son procès, il fut acquitté d'avoir chassé illégalement, contrairement à l'art. 12(1) de la *Loi sur la Convention concernant les oiseaux*

migrateurs, S.R.C. 1952, c. 179, pour le motif que la loi ne s'appliquait pas à lui. Sur appel par la Couronne à la Cour suprême de l'Ontario, le renvoi de l'acte d'accusation fut confirmé et un appel subséquent à la Cour d'Appel fut rejeté par un jugement majoritaire. La Couronne a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et une déclaration de culpabilité doit être enregistrée, le Juge Cartwright étant dissident.

Les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Hall: L'article 87 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149, a pour objet et but d'assujettir aux lois provinciales d'application générale les Indiens qui tombent sous la juridiction législative exclusive du Parlement en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique*, 1867.

Ce n'était pas le but de l'art. 87 de déclarer la prééminence des traités sur la législation fédérale. La référence aux traités a été incorporée dans un article dont le but était de rendre les lois provinciales applicables aux Indiens, pour empêcher toute interférence avec les droits donnés par traités résultant d'une collision avec la législation provinciale. Les dispositions de l'art. 87 n'empêchent pas l'application aux Indiens de la *Loi sur la Convention concernant les oiseaux migrateurs*. On ne peut faire aucune distinction valide entre le cas présent et celui de *Sikyea v. The Queen*, [1964] S.C.R. 642, qui doit être suivi.

Le Juge Cartwright, *dissident:* Le Traité de 1827 était un traité dans le sens de ce mot tel qu'employé dans l'art. 87 de la *Loi sur les Indiens*. Ce Traité assurait aux Indiens le droit de chasser et de faire la pêche dans la Réserve. Ce droit n'a pas été effectivement détruit par la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements concernant les oiseaux migrateurs en autant que les canards sauvages sont concernés. La *Loi sur la Convention concernant les oiseaux migrateurs* est une loi d'application générale en vigueur dans l'Ontario et applicable à l'intimé, mais par le jeu de l'art. 87 l'application de cette loi à l'intimé est sujette aux dispositions du Traité de 1827. L'art. 87 de la *Loi sur les Indiens* démontre que le Parlement a pris soin de conserver les droits assurés solennellement aux Indiens par le Traité de 1827. L'art. 87 rend les Indiens sujets aux lois d'application générale en vigueur dans la province où ils résident, mais en même temps l'article conserve inviolés aux Indiens tous les droits qu'ils ont en vertu des dispositions de tout traité, de telle sorte qu'en cas de conflit entre la loi et le traité, ce dernier aura préséance. La question de savoir si le droit assuré par le Traité de 1827 a été détruit par la *Loi sur la Convention concernant les oiseaux migrateurs* n'a pas été décidée en faveur de la Couronne par la décision de cette Cour dans *Sikyea v. The Queen, supra.*

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], rejetant un appel de la Couronne. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal by the Crown. Appeal allowed, Cartwright J. dissenting.

[1] [1964] 2 O.R. 429, 45 D.L.R. (2d) 709.

1966

THE QUEEN v. GEORGE

D. H. Christie, Q.C., for the appellant.

B. J. MacKinnon, Q.C., and *Hugh D. Garrett, Q.C.*, for the respondent.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from an order of McRuer C.J.H.C. which dismissed an appeal from an order of Magistrate Dunlap acquitting the respondent on a charge that he did on the 5th day of September 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during the open season specified for that bird in violation of s. 5(1)(*a*) of the Migratory Bird Regulations thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. Gibson J.A., dissenting, would have allowed the appeal.

There is no dispute as to the facts. The respondent is an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c. 149. He is a member of the Chippewa Band residing on the Kettle Point Reserve. On the date stated in the charge he shot two ducks, which were migratory birds, as defined in the *Migratory Birds Convention Act* and the Regulations made thereunder, in an area described in Schedule A of the Regulations at a time not during the open season for such birds. The ducks were to be used for food and were not to be sold.

On these facts it would appear that the respondent was guilty of the offence charged unless, because he is an Indian and shot the ducks for food on the reserve on which he resided, he is exempt from the provisions of the *Migratory Birds Convention Act* and *Migratory Bird Regulations* under which he was charged.

The learned Magistrate was of opinion that s. 87 of the *Indian Act* made laws of general application applicable to Indians, subject to the terms of any treaty, that the *Migratory Birds Convention Act* was such a law, that the treaty of July 10, 1827, with the Chippewa Indians to be referred to hereafter reserved to them the right to hunt at any time on the lands reserved in that treaty and, conse-

[1] [1964] 2 O.R. 429, 45 D.L.R. (2d) 709.

quently, that the *Migratory Birds Convention Act* did not apply to the respondent.

McRuer C.J.H.C. agreed with the view of the learned Magistrate and was further of opinion that the right of the respondent to hunt for food on Kettle Point Reserve was preserved not only by the treaty of 1827 but also by the proclamation of 1763 and that if it is within the power of Parliament to abrogate that right, a point which the learned Chief Justice left open, that power could be exercised only by legislation expressly and directly extinguishing the right and that it certainly could not be extinguished by order-in-council.

After discussing the case of *Dominion of Canada v. Province of Ontario*[1], the learned Chief Justice said:

> This case clearly recognizes that the 'overlying Indian interest' in the lands reserved to the Indians is not something to be disposed of by any general Act of Parliament applicable to all citizens.

He also said:

> I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

The judgment of the majority in the Court of Appeal was delivered by Roach J.A., with whom McLennan J.A. agreed. The learned Justice of Appeal construed the treaty of 1827, in the light of its historical background including the terms of the Proclamation of 1763, as preserving and confirming to the Indians their right to the use of the lands reserved including those in the Kettle Point Reserve as their "Hunting Grounds". He held that the *Migratory Birds Convention Act* is a law of general application in force in the Province within the meaning of s. 87 of the *Indian Act* so that its application to the respondent is subject to the terms of the treaty. The reasons of Roach J.A. conclude as follows:

> The treaty does not refer to the Proclamation in terms but historical implication impels the conclusion that what was surrendered and conveyed to the Crown by the treaty were the rights granted to them by the Proclamation to and in respect of the lands described in the treaty as

[1] [1910] A.C. 637, 103 L.T. 331.

1966

THE QUEEN v. GEORGE

Cartwright J.

being intended to be thereby conveyed. What was preserved and confirmed to them were those same rights to and in respect of the lands reserved by the treaty and without any time limitation thereon.

Since the *Migratory Birds Convention Act* is subject to the treaty and since the treaty preserved and confirmed to the Indians the *use* of lands, including those in the Kettle Point Reserve, as their 'Hunting Grounds', giving to those words their wide historical significance, it follows that an Indian while hunting on those lands for food is not subject to the restrictions or prohibitions contained in that Act or the regulations.

The essential difference of opinion between Gibson J.A. and the majority was as to the construction of the treaty of 1827. As to this, after quoting s. 87 of the *Indian Act*, Gibson J.A. says:

> On behalf of the accused it is argued that the Treaty of 1827 reserved to the Indians the land of the reserve for their 'exclusive use and enjoyment', and that by implication that included the perpetual right to fish and hunt on the lands. As I have stated before, nothing contained in the Treaty indicates that questions of hunting and fishing were ever dealt with or considered when the Treaty was entered into.

With the greatest respect to Gibson J.A. I am unable to accept this view. For the reasons given by Roach J.A. I agree with his interpretation of the terms of the treaty. I find it impossible to suppose that any of the signatories to the treaty would have understood that what was reserved to the Indians and their posterity was the right merely to occupy the reserved lands and not the right to hunt and fish thereon which they had enjoyed from time immemorial.

The question to be decided is whether the right to hunt on the reserve assured by the treaty to the band of which the respondent is a member has been effectively destroyed by the *Migratory Birds Convention Act* and the *Migratory Bird Regulations* so far as wild ducks are concerned.

Counsel for the appellants submits that this question should be answered in the affirmative on three main grounds, (i) that the point has been decided in favour of the appellant by the decision of this Court in *Sikyea v. The Queen*[1], (ii) that the words "laws of general application from time to time in force in any province" in s. 87 of the *Indian Act* mean provincial laws and not federal laws and (iii) that the treaty of July 10, 1827, did not reserve to the Indians the right to hunt and fish on the reserve. I will deal with these three grounds in reverse order.

[1] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

As to the third ground, counsel for the appellant concedes that the document of July 10, 1827, is a treaty within the meaning of that word as used in s. 87 of the *Indian Act*. I think he was clearly right in making this concession. In my opinion it is the very sort of treaty contemplated by the section. On the question of the true construction of the treaty I have already indicated my agreement with the reasons and conclusion of Roach J.A. on this branch of the matter. It follows that I would reject this ground of appeal.

As to the second ground, s. 87 of the *Indian Act* reads as follows:

> 87. Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The laws of general application in force in the Province of Ontario are made up of the common law, pre-confederation statutes which have not been repealed, Acts of Parliament and Acts of the Legislature. I can find nothing in the words of the section to permit the meaning of the phrase "laws of general application from time to time in force in any province" being restricted to provincial statutes or to laws in relation to matters coming within the classes of subjects assigned to the Legislature by s. 92 of the *British North America Act*. To determine whether any particular law is applicable to an Indian in Ontario only two questions need be answered, (i) is it a law of general application? and (ii) is it in force in the Province? If the answer to both of these questions is in the affirmative the source of the law is of no importance. In my opinion the *Migratory Birds Convention Act* is a law of general application in force in Ontario and applicable to the respondent but by s. 87 its application to him is made subject to the terms of the treaty of July 10, 1827. I would reject this ground of appeal.

The first ground presents more difficulty. In *Sikyea's* case, the judgment of Sissons J. acquitting Sikyea after a trial de novo was pronounced on November 1, 1962, and written reasons for that judgment were delivered on November 8, 1962. The unanimous judgment of the Court of

1966

THE QUEEN v. GEORGE

Cartwright J.

Appeal of the Northwest Territories was delivered on January 24, 1964. The reasons of the Court were written by Johnson J.A. The unanimous judgment of this Court upholding that of the Court of Appeal was delivered on October 6, 1964.

In the case at bar the judgment of McRuer C.J.H.C. was delivered on May 29, 1963. The learned Chief Justice referred to the judgment of Sissons J., which had not then been reversed, as follows:

> In *Reg. v. Sikyea,* 40 W.W.R. 494, Sissons J.T.C. held that the *Migratory Birds Convention Act* did not apply to Indians hunting for food in the Northwest Territories. At page 504 he said:
>
> > There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act,* abrogating, abridging, or infringing upon the hunting rights of the Indians.
>
> With this I agree but I would go further. Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an order-in-council passed under the *Migratory Birds Convention Act.*

The appeal to the Court of Appeal in the case at bar was argued on October 15, 1963, prior to the delivery of judgment by the Court of Appeal in *Sikyea's* case, but judgment was not delivered until June 24, 1964. The reasons delivered in the Court of Appeal contain no reference to the judgments in *Sikyea's* case.

In order to ascertain whether the question to be decided in the case at bar has been determined in *Sikyea's* case it is necessary to examine the reasons delivered in that case in some detail but before doing so it will be convenient to state in summary form the grounds on which Mr. Mackinnon submits that the cases are distinguishable. These are, (i) In *Sikyea* the question was as to the right of Indians to hunt on lands which they had surrendered while in the present case it is as to their right to hunt on lands which they reserved and have never surrendered, (ii) In *Sikyea* the treaty in question was entered into four years after the *Migratory Birds Convention Act* came into force while that in the present case was almost one hundred years earlier, and (iii) the reasons in *Sikyea* give no consideration to the effect of s. 87 of the *Indian Act* which in the

present case was held by the Court of Appeal to be decisive. It is to the last of these three grounds of distinction that Mr. Mackinnon attaches particular importance.

Sissons J. in the course of his reasons reviewed the legislation which he regarded as applicable. He said in part:

By Sections 1 and 2 of Chapter 20 of the Statutes of Canada, 1960, assented to 9th June, 1960 the *Northwest Territories Act* was amended to provide that Ordinances by the Commissioner in Council in relation to the preservation of game in the Territories are applicable to and in respect of Indians and Eskimos; that this should not be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, other than game declared by the Governor in Council to be game in danger of becoming extinct, that from the day on which this Act comes into force the provisions of the various game ordinances including Chapter 42 R.O. 1956 and Chapter 2 of the Ordinances of 1960, Second Session, have the same force and effect in relations to Indians and Eskimos as if on that day they had been re-enacted in the same terms; that all laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

Section 1(3) of Chapter 20 reads as follows:

> 1(3) Nothing in Subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

The following Order in Council, P.C. 1960-1256, was passed the 14th day of September, 1960:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of Section 14 of the *Northwest Territories Act,* is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct.

It is only necessary for the Governor in Council to 'declare' that game is in danger of becoming extinct. This may be fact or fiction, and may well be fiction.

There is here a recognition and a preservation by Parliament of the hunting rights of Indians and Eskimos, unrestricted except as to game in danger of becoming extinct. There is no mention of the *Migratory Birds Convention Act* or migratory birds.

This has the effect of nullifying any application of the *Migratory Birds Convention Act* to Indians and Eskimos.

Section 2 of Chapter 20 reads:

> 17(2) All laws of general application in force in the Territories, are, except where otherwise provided applicable to and in respect of Eskimos in the Territories.

It is 'otherwise provided', so far as Indians are concerned, by Section 87 of the *Indian Act.*

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to

1966

THE QUEEN v. GEORGE

CartwrightJ.

time in force in any province are applicable to and in respect of Indians in the province...

I dealt with these amendments to the *Northwest Territories Act* in the case of *Re Noah Estate*, (1961) 36 W.W.R. 577:

The learned Judge does not make any other reference to s. 87 of the *Indian Act* and does not appear to found his judgment on its terms. The true ratio of his decision is found later in the following passage with which his reasons conclude:

> The real defence and the important issue in this case is that the *Migratory Birds Convention Act* has no application to Indians engaged in the pursuit of their ancient right to hunt, trap and fish game and fish for food at all seasons of the year, on all unoccupied Crown lands.
>
> Reference was made to the Royal Proclamation of October 7, 1763, cited in the Revised Statutes of Canada, Vol. VI, 6127, as the first of Canada's Constitutional Acts and Documents, and commonly spoken of as the Charter of Indian Rights; and to Treaty No. 11, made and concluded in 1921 between His Most Gracious Majesty George V, and the Slave, Dogrib, Loucheux, Hare and other Indians, inhabitants of the Territory; and to *Rex v. Wesley*, (1932) 58 C.C.C. 269, *Regina v. Kogogoluk* (1959) 28 WWR 376 and other cases.
>
> Indians still have their ancient hunting rights unless, adopting the words used by the Honourable Mr. Justice Gwynne of the Supreme Court of Canada, in the *Ontario Mining Company v. Seybold*, (1902) 32 S.C.R. 1, 'unless the proclamation of 1763 and the pledge of the Crown therein are considered now to be a dead letter; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians are to be regarded now as a delusive mockery'.
>
> The solemn proceedings surrounding Treaty No. 11 and the pledge given by the Crown and incorporated in the Treaty would indeed be delusive mockeries and deceitful in the highest degree if the *Migratory Bird Convention*, made just five years previously, had curtailed the hunting rights of the Indians.
>
> There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians.
>
> The various references in the Convention and in the *Migratory Birds Convention Act* and in the Regulations to Indians and Eskimos and their hunting rights indicate recognition of these hunting rights.
>
> The fact that Indians and Eskimos are particularly entitled to take certain migratory game birds and migratory nongame birds does not indicate an intention to abrogate, abridge or infringe the hunting rights of these Indians and Eskimos.
>
> I find that the *Migratory Birds Convention Act* has no application to Indians hunting for food, and does not curtail their hunting rights.
>
> I find the accused Not Guilty. The Appeal is allowed.

On a consideration of the whole of the reasons of the learned Judge it appears to me that the ground of his decision is that the general words of the *Migratory Birds*

Convention Act and *Regulations* should not be construed to take away the special rights to hunt enjoyed by the Indians from time immemorial and assured to them by the Proclamation of 1763 and by treaty. He does not say that the provisions of the *Migratory Birds Convention Act* and *Regulations* are, by force of s. 87 of the *Indian Act,* in respect of Indians made subject to the terms of any treaty. In other words, the learned Judge did not find it necessary to deal with the argument based on s. 87 which was addressed to us in the case at bar.

In the Court of Appeal Johnson J.A. makes no reference to s. 87. He differs from Sissons J. as to the true construction of the *Migratory Birds Convention Act.* He says:

> Sissons J. in his reasons for judgment says:
>
> > There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging or infringing upon the hunting rights of the Indians.
>
> I have quoted section 5(1) of the regulations which says that 'no person shall...kill...a migratory bird at any time except during an open season...'. It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the regulations to what kind of birds an Indian and Eskimo may 'take' at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated, abridged or infringed upon.
>
> It is, I think, quite clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its regulations. How are we to explain this apparent breach of faith on the part of the government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done.
>
> * * *
>
> I can come to no other conclusion than that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its regulations from shooting migratory birds out of season.

The questions of law decided by Johnson J.A. (and therefore by this Court since it adopted his reasons as well as his conclusion) in so far as they are relevant to the case at bar were (i) that it is within the power of Parliament to abrogate the rights of Indians to hunt whether arising from treaty or under the Proclamation of 1763 or from user from time immemorial and (ii) that on its true construction the

1966

THE QUEEN v. GEORGE

Cartwright J.

Migratory Birds Convention Act shews that it was the intention of Parliament to prohibit Indians from hunting during the closed seasons subject only to the exceptions in their favour set out in the Act as, for example, the right to take scoters for food. I think it clear from reading the whole of the reasons of Johnson J.A. that he did not direct his mind to the question, so fully argued before us in the case at bar, whether accepting his decision on these two questions the effect of s. 87 of the *Indian Act* was to preserve the Indian's right to hunt notwithstanding the provisions of the *Migratory Birds Convention Act* in so far as that right was assured to them by "any treaty". I think that if the view of the effect of s. 87 which appears to me to be decisive in the case at bar had been considered in the Court of Appeal or in this Court in *Sikyea's* case it would have been examined and dealt with in the reasons delivered. I do not propose to enter on the question, which since 1949 has been raised from time to time by authors, whether this Court now that it has become the final Court of Appeal for Canada is, as in the case of the House of Lords, bound by its own previous decisions on questions of law or whether, as in the case of the Judicial Committee or the Supreme Court of the United States, it is free under certain circumstance to reconsider them. I find it unnecessary to do this. Assuming for the purposes of this appeal that we are governed by the rule of *stare decisis*, it appears to me that the judgment in *Sikyea* falls within one of the exceptions to that rule in that it was given *per incuriam*.

In *Young v. Bristol Aeroplane Co. Ltd.*[1], Lord Greene M.R., giving the unanimous judgment of the full Court, said at pages 728 and 729:

> It remains to consider the recent case of *Lancaster Motor Co. (London) v. Bremith Ld.*, in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J. declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J. in *Gerard v. Worth of Paris Ld.* This was clearly a case where the earlier decision was given per incuriam. It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier

[1] [1944] K.B. 718, 2 All E.R. 293.

decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.

I do not suggest that in *Sikyea's* case either the Court of Appeal or this Court was ignorant of the existence of s. 87 of the *Indian Act* but, to use the words of Lord Greene, I am satisfied that that section was not present to the mind of either Court when rendering judgment, although it does appear to have been dealt with in the argument of counsel.

Having reached this conclusion it is not necessary for me to consider the other grounds on which Mr. Mackinnon argued that *Sikyea's* case could be distinguished.

In *St. Saviour's Southwark (Churchwardens)*[1] case, Lord Coke said:

> If two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant, and therewith agrees *Sir J. Moleyn's* case in the sixth part of my reports.

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty. Johnson J.A., with obvious regret, felt bound to hold that Parliament had taken away those rights, but I am now satisfied that on its true construction s. 87 of the *Indian Act* shews that Parliament was careful to preserve them. At the risk of repetition I think it clear that the effect of s. 87 is two-fold. It makes Indians subject to the laws of general application in force in the province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail.

[1] (1613), 10 Co. Rep. 366 at 66b and 67b, 77 E.R. 1025 at 1027.

1966

THE QUEEN v. GEORGE

Cartwright J.

For the reasons given by Roach J.A. and those stated above I would dismiss this appeal with costs.

The judgment of Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ. was delivered by

MARTLAND J.:—I have had the opportunity to read the reasons stated by my brother Cartwright. The facts giving rise to this appeal are there reviewed and it is unnecessary to repeat them here. With great respect, I am unable to agree with his interpretation of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which provides as follows:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

I cannot construe this section as making the provisions of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, subordinate to the treaty of July 10, 1827. In my opinion, it was not the purpose of s. 87 to make any legislation of the Parliament of Canada subject to the terms of any treaty. I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that *Act*, do not apply.

The incorporation in the section of the words italicized to me makes it clear that when the section refers to "laws of general application from time to time in force in any province" it did not include in that expression the statute law of Canada. If it did, the section, in so far as federal legislation is concerned, would provide that the statute law of Canada applies to Indians, subject to the terms of any *Act* of the Parliament of Canada, other than the *Indian*

1966

THE QUEEN v. GEORGE

Martland J.

Act. This would be a rather unusual provision, particularly in view of the fact that it did not require any express provision in the *Indian Act* to make Indians subject to the provisions of federal statutes. In my view the expression refers only to those rules of law in a province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a province, as, for example, in the provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

This section was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*. I can see no valid distinction between the present case and that of *Sikyea v. The Queen*[1] and, for the reasons given in that case, I think that this appeal should be allowed. The judgment of the learned magistrate should be reversed and a fine of ten dollars be imposed upon the respondent. The Attorney-General of Canada does not ask for costs, and accordingly there should be no costs in this Court or in the Courts below.

Appeal allowed, CARTWRIGHT J. *dissenting; no order as to costs.*

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

Solicitor for the respondent: H. D. Garrett, Sarnia.

[1] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

1965
*Dec. 6
1966
Jan. 25

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL No. 468, and MATTI SALMI and SVEND NIELSEN (*Defendants*) .. APPELLANTS;

AND

WHITE LUNCH LIMITED (*Prosecutor*) .. RESPONDENT;

AND

THE LABOUR RELATIONS BOARD OF BRITISH COLUMBIA (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour relations—Order certifying local as trade union for unit of company's employees—Unfair practices and reinstatement orders issued—Voluntary liquidation of company—Orders amended by substituting related company as named employer—Jurisdiction of Labour Relations Board—Labour Relations Act, R.S.B.C. 1960, c. 205, s. 65(3) [am. 1961, c. 31].

The respondent corporation was engaged in the restaurant business and by itself or related companies carried on the business of a bakery as well as retail outlets. The respondent and C Ltd. were closely related companies in that the ownership and management of each were the same and their operations were interrelated. On September 26, 1962, the appellant union local applied to the Labour Relations Board (B.C.) for certification for bakers employed by the respondent. On receipt of notice of this application, the respondent, by its solicitors, advised the Board that it did not have a bakery department, that the bakery was owned and operated by C Ltd. Thereupon the Board notified C Ltd. that the local had applied for certification for all employees employed in its bakery department. On October 16, 1962, the Board certified the local as the trade union for the said employees. Notice was then given by the local to C Ltd. to commence collective bargaining and such bargaining was commenced and continued until November 24, 1962, when the employees were discharged. Meanwhile, the Board on November 8, 1962, ordered C Ltd. to cease the coercion or intimidation of its employees and on the same date ordered the company to reinstate two employees, the appellants S and N.

On November 24, 1962, C Ltd. went into voluntary liquidation, and, when so advised, the local along with S and N applied to the Board to have the order of October 16 and the three orders of November 8 amended by substituting the respondent as the named employer. The orders were accordingly amended by the Board on February 13, 1963, purportedly under s. 65(3) of the *Labour Relations Act*, R.S.B.C. 1960,

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

c. 205, as amended by 1961 (B.C.), c. 31. Subsequently, in *certiorari* proceedings, the four orders dated February 13, 1963, were quashed. An appeal from the judgment of the judge of first instance was dismissed by the Court of Appeal and the appellants then appealed to this Court.

Held: The appeal should be allowed.

If the Board had jurisdiction to make the orders in question, this Court would not inquire into the merits of the decisions made. By s. 65(3) of the *Labour Relations Act* the Board was given power to vary or cancel any decision or order made under the provisions of the section. The procedure of the Board under s. 65(3) was correct and the orders were properly made. The Board was free to act or not act on the evidence before it as it saw fit and by statute the Board's decision was final and conclusive. This Court would not and must not interfere in what has been done within the Board's jurisdiction. *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 referred to; *Labour Relations Board et al. v. Oliver Co-operative Growers Exchange,* [1963] S.C.R. 7, applied.

The view expressed in the Court below that the word "vary" in s. 65(3) cannot apply retroactively was not accepted. It has not such a limited meaning and circumstances will frequently arise where it must have a retroactive effect. The present case was a classical example.

The Board had jurisdiction to entertain the application to vary. Nothing in the record or in the affidavits showed that it lost jurisdiction for any of the reasons which the law recognizes as ousting jurisdiction, *i.e.*, bias, interest, fraud, denial of natural justice or want of qualification.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Sullivan J. quashing four orders of the British Columbia Labour Relations Board. Appeal allowed.

A. B. Macdonald, for the appellants.

Hon. C. H. Locke, Q.C., and *H. S. Mahon,* for the respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal of British Columbia[1] which sustained an order by Sullivan J. in *certiorari* proceedings quashing four orders of the Labour Relations Board dated February 13, 1963. These orders purport to have been made under s. 65(3) of the *Labour Relations Act,* R.S.B.C. 1960, c. 205, as amended by 1961, c. 31. That section reads:

> (3) The Board may, upon the petition of any employer, employers' organization, trade-union, or other person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or cancel any such decision or order, and for the purposes of the Act the certification of a trade-union is a decision of the Board.

[1] (1965), 51 D.L.R. (2d) 72, *sub nom. Regina v. B.C. Labour Relations Board, Ex parte White Lunch Ltd.*

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL No. 468 *et al.* *v.* WHITE LUNCH LTD. *et al.*

Hall J.

The original orders which the orders of February 13, 1963, purported to amend were made on October 16, 1962, and November 8, 1962. The effect of the amendment in each case was to substitute as the employer named in each order the respondent, White Lunch Limited, in place of Clancy's Pastries Limited which had gone into voluntary liquidation on November 24, 1962, in the circumstances later set out.

It is necessary to follow closely the events as they occurred to determine if the Labour Relations Board had jurisdiction to amend the said orders as it purported to do on February 13, 1963.

The respondent, White Lunch Limited, is a corporation engaged in the restaurant business, and by itself or related companies carried on the business of a bakery as well as retail outlets for bakery products. Clancy's Pastries Limited was incorporated on June 24, 1947. It was closely related to the respondent company in that:

(*a*) Their shares were owned by the same individuals.

(*b*) They had the same general manager, Keith T. Sorensen and the same president, Clarence L. Sorensen.

(*c*) Their operations were interrelated, as bakers, retail stores or restaurants.

From December 30, 1949, to September 18, 1962, the Cafeteria and Coffee Shop Employees Association had been certified as the bargaining authority for a unit of employees of Clancy's Pastries Limited. On September 18, 1962, the Labour Relations Board (hereinafter referred to as the "Board") cancelled that certification upon being satisfied that said Association had ceased to represent the employees of the unit. This terminated any collective bargaining agreement then in effect.

That was the situation when on September 26, 1962, the appellant Local 468 applied to the Board for certification

for bakers employed by the respondent. Due notice of the application was given to the respondent. That notice read as follows:

(COAT OF ARMS)
THE GOVERNMENT OF THE
PROVINCE OF BRITISH COLUMBIA
LABOUR RELATIONS BOARD
DEPARTMENT OF LABOUR

White Lunch Limited,
(Bakery Department)
124 West Hastings St.,
Vancouver, B.C.

September 26th, 1962,
Victoria, B.C.

Dear Sir:

This is to advise you that the Bakery and Confectionery Workers' International Union of America, Local No. 468
has applied to be certified for a unit of employees of White Lunch Limited, (Bakery Department)
being all employees
employed in the bakery department at 124 West Hastings Street Vancouver, B.C.

An officer of the Department of Labour will investigate to learn the merits of this application, and will apply to you for certain information. Your co-operation in assisting him is solicited.

Written submission concerning the above application will be considered by the Labour Relations Board if received in this office within ten (10) days of the date of this notice.

Enclosed is a copy of a notice which you are required to post and keep posted for five (5) consecutive working days in a conspicuous place in your establishment, so that all employees affected thereby have ready access to and see the same.

Yours truly,
(s) "W. B. Marvey"
for D. W. Coton,
Registrar.

No question arises as to the jurisdiction of the Board to entertain this application nor is the validity of the *Labour Relations Act* challenged in any way. Everything that transpired subsequent to this time is relevant only on the question as to whether the Board lost jurisdiction or acted

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL No. 468 *et al.* *v.* WHITE LUNCH LTD. *et al.*

Hall J.

in excess of its jurisdiction in the steps it subsequently took or the orders it made which are now the subject of this litigation.

On receipt of the notice quoted above, the respondent by its solicitors, Messrs. Rae & Mahon, wrote the Board under date of October 1, 1962, as follows:

Registrar,
Department of Labour,
Labour Relations Board,
Parliament Buildings,
Victoria, B.C. October 1st, 1962.

Dear Sir:—

Re: White Lunch Limited, Bakery Department and Bakery & Confectionery Workers' International Union of America, Local No. 468

Your letter of September 26th to White Lunch Limited, Bakery Department, has been received and the notice required to be posted on the notice board has been so posted.

You already have had an investigation into Clancy's Pastries Limited for which bargaining authority was issued to Clancy's Pastries Limited. I understand this has been decertified.

White Lunch Limited has no Bakery Department. The bakery and the outlets are owned and operated by Clancy's Pastries Limited.

Collective agreement was entered into between the Cafeteria and Coffee Shop Employees Association of Vancouver, B.C. and Clancy's Pastries Limited on June 6th, 1961, which agreement is still in force.

It would appear that this application should have to do with Clancy's Pastries Limited, not White Lunch Limited, Bakery Department.

Yours truly,
RAE & MAHON
Per _____
H. S. Mahon

Thereupon the Board notified Clancy's Pastries Limited on October 2, 1962, as follows:

Clancy's Pastries Limited,
133 West Pender Street,
Vancouver, B.C.

October 2nd, 1962
Victoria, B.C.

Dear Sir:

This is to advise you that the Bakery and Confectionery Workers International Union of America, Local No. 468
has applied to be certified for a unit of employees of Clancy's Pastries Limited

being all employees employed in the bakery department at 124 West Hastings St., Vancouver, B.C.
An officer of the Department of Labour will investigate to learn the merits of this application, and will apply to you for certain information. Your co-operation in assisting him is solicited.
Enclosed is a copy of a notice which you are required to post and keep posted for five (5) consecutive working days in a conspicuous place in your establishment, so that all employees affected thereby have ready access to and see the same.

Yours truly,
(s) "D. W. Coton"
D. W. Coton,
Registrar.

There is no evidence that the original application for certification, notice of which had been given the respondent, was withdrawn or abandoned. That application and the notice of October 2, 1962, were considered by the Board on October 16, 1962, when it made the following order:

(COAT OF ARMS)
THE GOVERNMENT OF THE
PROVINCE OF BRITISH COLUMBIA
DEPARTMENT OF LABOUR
LABOUR RELATIONS ACT

CERTIFICATION

The LABOUR RELATIONS BOARD has determined that the employees of

Clancy's Pastries Limited,
133 W. Pender Street, Vancouver, B.C.

EMPLOYED in the bakery department at 124 West Hastings Street, Vancouver, B.C.
except those excluded by the Act,
are a unit appropriate for collective bargaining, and is satisfied that the Bakery and Confectionery Workers' International Union of America, Local No. 468,
has complied with the requirements of the Act, and for the purposes of collective bargaining

THEREFORE HEREBY CERTIFIED

it . . . as the trade union(s) for all the employees in the said unit.
Given at Victoria, B.C. this 16th day of October, A.D. 1962.

LABOUR RELATIONS BOARD
By "W. H. SANDS"
Chairman

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL No. 468 *et al.* *v.* WHITE LUNCH LTD. *et al.*

Hall J.

Upon this order having been made, notice was given by Local 468 on October 10, 1962, to Clancy's to commence collective bargaining. Bargaining was commenced, some wage increase being offered but nothing else. Bargaining continued until November 24, 1962, when the employees were discharged.

Meanwhile differences had arisen. On October 10, 1962, the Secretary of Local 468 complained to the Board under s. 4(2)(*c*) of the *Labour Relations Act* that Clancy's was seeking by intimidation, by dismissal, by threat of dismissal, or by any other kind of threat to prevent the employees from organizing into a union. The Board heard this complaint and on November 8, 1962, made the following order:

(COAT OF ARMS)
THE GOVERNMENT OF THE
PROVINCE OF BRITISH COLUMBIA
DEPARTMENT OF LABOUR
LABOUR RELATIONS BOARD
VICTORIA

ORDER

Pursuant to Section 7 of the Labour Relations Act, the Labour Relations Board directs Clancy's Pastries Limited to cease using coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing any person to refrain from becoming or continuing to be a member of a trade-union.

Made and Given at Victoria, B.C., this 8th day of November, A.D. 1962.

LABOUR RELATIONS BOARD
By "W. H. SANDS"
Chairman

In this same period other conflicts arose. Two employees, the appellants Salmi and Nielsen, complained to the Board that they had been discharged in contravention of s. 4(2)(*d*) of the *Labour Relations Act*. Their complaints were heard by the Board which also on November 8, 1962, made the following order in respect of the appellant Nielsen:

(COAT OF ARMS)
THE GOVERNMENT OF THE
PROVINCE OF BRITISH COLUMBIA
DEPARTMENT OF LABOUR
LABOUR RELATIONS BOARD
VICTORIA

ORDER

WHEREAS on inquiry the Labour Relations Board is satisfied that Clancy's Pastries Limited, an employer, has done an act prohibited by Section 4(2)(*d*) of the Labour Relations Act, in that it discharged Svend Nielsen, an employee, contrary to the provisions thereof;

NOW THEREFORE, pursuant to Section 7(4) of the said Act, the Labour Relations Board hereby orders Clancy's Pastries Limited to cease doing the act prohibited, and directs it to rectify the act by forthwith reinstating the said Svend Nielsen, and further directs Clancy's Pastries Limited to pay to Svend Nielsen a sum equal to the wages lost by reason of his discharge.

Made and Given at Victoria, B.C., this 8th day of November, A.D. 1962.

LABOUR RELATIONS BOARD
By "W. H. SANDS"
Chairman

and on the same day made an identical order in respect of the appellant Salmi.

These three orders of November 8 and the order of October 16 are the orders which the Board purported to amend on February 13, 1963. The jurisdiction of the Board to make the three orders of November 8, 1962, has not been questioned.

The applications to amend were made after the appellants became aware that Clancy's had gone into voluntary liquidation.

It is relevant to review the events which relate particularly to Clancy's going into voluntary liquidation.

When the first steps were being taken by Local 468 to organize the employees in question here into a bargaining unit and to be certified as the trade union for all the employees of the said unit, which was in August 1962, some rumour gained credence that Clancy's would go out of business. This acquires some significance when considered

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL NO. 468 *et al.* *v.* WHITE LUNCH LTD. *et al.*

Hall J.

along with the respondent's reply to the application for certification that Clancy's was the employer and not the respondent. The solicitors for the respondent were at some pains to deny that any such step was being contemplated in their letter of October 12, 1962, to the Board. That letter read in part:

> My instructions are that some time in August a rumor circulated through Clancy's Pastries Limited that the bakery was to be closed. As a result of this, one of the managers was instructed to inform the bakery employees that the rumor was untrue, that the bakery was not to be closed. Where the rumor originated is unknown, but apparently it originated with some company supplier.

The fact is that very soon after the certification order of October 16 was made, steps were instituted to wind up Clancy's. The resolution to go into voluntary liquidation was passed by the shareholders of the company at a meeting on November 24. That meeting required shareholders to have not less than 14 days' notice of the special resolution. (*Companies Act*, R.S.B.C. 1960, c. 67, s. 173(4)). Yet nothing was said about this impending voluntary liquidation when the parties were before the Board on November 8. Nothing was said to the employees about the company going into liquidation when the employees were discharged on November 24. The first intimation to the Board and to the employees of the liquidation proceedings was contained in the solicitors' letter of December 13, 1962, when the fact of being in liquidation was given as a defence to a complaint that the employees dismissed on November 24 had been discharged unlawfully. The reason for liquidation was stated by Keith T. Sorensen, the company's general manager at pp. 95 and 96 of the case as follows:

98 Q. When you say that Clancy's Pastries Limited voluntarily wound up in paragraph 11 of your affidavit, by special resolution. Who initiated that winding up? How did it come up?

A. Well, a meeting of the shareholders was called.

99 Q. When was that? On the date this resolution was passed?

A. Yes.

100 Q. Was the meeting called for this purpose, to consider winding up?

A. Yes. It was called to decide whether the company, Clancy's Pastries Limited, should continue operation or not, and at the

meeting it was decided that in view of the fact that the offer which we had made which we considered to be the highest offer we could make and still make a profit, that when that was refused, we decided, the shareholders decided that there was no point in continuing in business, so that—

When advised of the liquidation of Clancy's, Local 468, along with the appellants Salmi and Nielsen applied to the Board to have the order of October 16 and the three orders of November 8 amended by substituting the respondent as the named employer and for variance of the certificate of October 16, 1962, to name the employer as White Lunch Limited.

The Board fixed Wednesday, February 13, 1963, at 2:00 p.m. in the Board Room in Vancouver as the date, time and place of the hearing to amend the orders. The respondent was represented at this hearing both by counsel and by its general manager.

After hearing evidence including Exhibit W to the affidavit of Clarence L. Sorensen which produced a T4 Income Tax slip in respect of the appellant Nielsen which read as follows:

CANADA
T4-1960
Supplementary

Svend Nielsen 3081 East 8th Ave. Vancouver, B.C.			White Lunch Limited 133 West Pender St. Vancouver, B.C.
238-165	2500	12	4174.83

WHITE LUNCH LIMITED
Clarence L. Sorensen President
Thomas Sorensen Vice President
Gunde E. Frostrup Sec. Treas.
Keith Sorensen General Manager

and a letter dated June 15, 1962, as follows:

June 15, 1962

TO WHOM IT MAY CONCERN:

This is to verify that the bearer of this letter Svend Nielsen of 3081 East 8th Avenue, is an employee of our Company. He is a baker in our bakery and has worked there since October 27, 1958.

WHITE LUNCH LIMITED
"Frances E. Reynolds"
(Miss) Frances E. Reynolds
Interviewer

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL No. 468 *et al.* *v.* WHITE LUNCH LTD. *et al.*

Hall J.

the Board made the orders in question here.

If the Board had jurisdiction, this Court will not inquire into the merits of the decisions made. Section 65 under which the Board purported to act contains a privative clause which reads in part:

> 65. (1) If in any proceeding before the Board a question arises under this Act as to whether
>
> (*a*) a person is an employer or employee;
>
> * * *
>
> (*e*) A person is or what persons are parties to a collective agreement;
>
> the Board shall decide the question, and its decision shall be final and conclusive.

The provisions of s. 65(3) read:

> (3) The Board may, upon the petition of any employer, employers' organization, trade-union, or other person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or cancel any such decision or order, and for the purposes of the Act the certification of a trade-union is a decision of the Board.

The respondent's main contention is that s. 65(3) does not give the Board jurisdiction to amend the orders previously made in the manner done on February 13, 1962. Counsel for the respondent, citing well-known authorities, emphasized that the provisions of the *Labour Relations Act* being in derogation of common law rights should be strictly construed. On the other hand, counsel for the appellants urged that the *Labour Relations Act* was remedial legislation and should be liberally construed.

Whatever merit the arguments of the respondent had at the beginning of labour relations legislation, it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called

right of the individual to bargain individually with the corporate employer of the mid-twentieth century.

The language of s. 65(3) is clear. The Board has been given power to vary or cancel any decision or order made under the provisions of the section. The remarks of Judson J. in *Labour Relations Board et al. v. Oliver Co-operative Growers Exchange*[1] are applicable here. In that case, some nine Union Locals had been certified for a unit employed by twenty-three employers in thirty packing houses in the Okanagan Valley. The nine Locals resolved to merge and became part of one new Union under the name of Oliver Co-operative Growers Exchange. The new Union applied under s. 65(2) (now 65(3)) of the *Labour Relations Act* to amend the certificate to substitute its name for that of the locals of the old Union. It followed the result would necessarily be the substitution of a new party in the Certificate of Bargaining Authority. In these circumstances, Judson J. said at p. 11:

> The majority in the Court of Appeal held that the Board's power under s. 65(2) and regulation 9(*a*) was limited to the substitution of a new name for an old and that the word "vary" in s. 65(2) could not support the substitution of another union for that set out in a Certificate of Bargaining Authority. That would amount to a new and different certification, a replacement of one union by another, a change that could only be brought about by following the procedure laid down by ss. 10 and 12. The decision is that Local 1572, being a new union, should have applied for certification and not variation of an existing certificate and that variation of a certificate in the circumstances of this case was beyond the powers of the Board. The learned judge of first instance and Davey J.A., in the Court of Appeal, were of a contrary opinion and held that the Board had jurisdiction under s. 65(2). I am of the opinion that this is the correct view to take of the Act.
>
> There is no dispute that the procedure of the Board under s. 65(2) was correct. Every interested party had knowledge of what was being done and was given an opportunity to be heard. It is of some significance that out of 23 employers, only this particular respondent-employer opposed the application. That, of course, does not cure a defect if it is one of lack of jurisdiction.
>
> It is equally beyond dispute that no attempt was made to proceed under ss. 10 and 12 of the Act dealing with certification and decertification. The gist of the decision of Davey J.A., with which I fully agree, is that it was unnecessary to proceed under ss. 10 and 12 and that the certification

[1] [1963] S.C.R. 7.

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL 468 *et al.* *v.* WHITE LUNCH LTD. *et al.*

Hall J.

procedures of s. 10 and s. 12 of the Act were appropriate when a union seeks initial certification or contending unions seek certification but not to the case of a successor union resulting from a merger or reorganization. He held that s. 65(2) conferred upon the Board an entirely independent power to vary or revoke a former order in appropriate circumstances and that this included power to deal with cases not specifically provided for by the Act and which were outside the ordinary operation of s. 10 and s. 12.

This recognition of a plenary independent power of the Board under s. 65(2) of the Act has the support of two prior decisions, that of Clyne J. on the British Columbia Act in *In re Hotel and Restaurant Employees' International Union, Local 28 et al.*, (1954) 11 W.W.R. (N.S.) 11 at 17, [1954] 1 D.L.R. 772, and that of McRuer C.J.H.C. and the Court of Appeal in *Regina v. Ontario Labour Relations Board, Ex parte Genaire Ltd.*, [1958] O.R. 637, affd. (1959) 18 D.L.R. (2d) 588, *sub nom. International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board*, where the corresponding section of the Ontario *Labour Relations Act* was considered. It is, in my opinion, a very necessary power to enable the Board to do its work efficiently and the present case affords an illustration of the need for it. Employees in a certain industry, organized in nine locals, decide to combine in one local of a new union, which performs the same function as the fragmented union and presents a continuity of interest, property, management, representation and personnel.

I may paraphrase Judson J.'s remarks by pointing out that here the orders of February 13 were properly made. Every interested party had notice of the applications and was given an opportunity to be heard. Cogent evidence was led that the employees in question had at all times been the employees of the respondent. The Board had knowledge that the original application named the respondent as the employer and that the substitution of Clancy's as the employer in the subsequent proceedings came as the result of the solicitors' letter of October 1. It had also evidence of the move to put Clancy's into voluntary liquidation at the very time officers of Clancy's who were also president and general manager of the respondent were purporting to be bargaining collectively under the order of October 16. The Board was free to act or not act on that evidence as it saw fit and by statute its decision is final and conclusive. This Court will not and must not interfere in what has been done within the Board's jurisdiction for, as stated by Lord Sumner in *Rex v. Nat Bell Liquors Ltd.*[1], in so doing:

[1] [1922] 2 A.C. 128 at 156.

. . . it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

Bull J.A. in the Court of Appeal recognized the wide effect of s. 65(3) when he said:

> It is clear that Section 65(3) confers the power to vary or cancel a former order or decision in appropriate circumstances, that this power is intended to cover situations which are not specifically dealt with in the Statute, and that the Board is not restricted merely to the facts as they existed when the original order or decision was made: *In re Hotel and Restaurant Employees' International Union, Local 28 et al* (1954) 11 W.W.R. (N.S.) 11; *Regina v. Ontario Lab. Rel. Bd.; Ex parte Genaire Ltd.* [1958] O.R. 637, approved on appeal (1959) 18 D.L.R. (2d) 588.
>
> Similarly, it is well established law that when there is a privative clause such as Section 65(1) the Court in *certiorari* proceedings is restricted to determining whether or not the tribunal, in this case the Board of Labour Relations, acted within its jurisdiction, including matters such as denial of natural justice, bias, fraud, etc., or whether there is error on the face of the record. In the disposition of issues within its jurisdiction, the Board's decision, including certification of a trade-union, is not open to judicial review, unless the Court determines that the Board's error goes to jurisdiction as opposed to an error within its jurisdiction. The decision of the Board as to who are employees and who are employers is a finding solely within the jurisdiction of the Board and is "final and conclusive" and not open to judicial review: *Labour Relations Board et al. v. Traders' Service Ltd.* [1958] S.C.R. 672.

However, he limited the effect of s. 65(3) by holding that the word "vary" in the section "cannot be used as an excuse for bringing retroactively into being a new unit of employees for which the Union stands certified...". I cannot read the section as narrowing the plain meaning of the word "vary". It is defined in the Shorter Oxford Dictionary as: "to cause to change or alter; to adapt to certain circumstances or requirements by appropriate modifications" nor do I accept the view that the word "vary" cannot apply retroactively. It has not such a limited meaning and circumstances will frequently arise where it must have a retroactive effect. The present case is a classical example.

The Board had jurisdiction to entertain the application to vary. Nothing in the record or in the affidavits shows

1966

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA LOCAL 468 *et al.* v. WHITE LUNCH LTD. *et al.*

Hall J.

that it lost jurisdiction for any of the reasons which the law recognizes as ousting jurisdiction, *i.e.*, bias, interest, fraud, denial of natural justice or want of qualification.

The appeal should accordingly be allowed with costs here and in the Courts below and the application to quash the orders in question should be dismissed.

Appeal allowed with costs.

Solicitor for the appellants: Alex B. Macdonald, Vancouver.

Solicitor for the respondent: S. H. Mahon, Vancouver.

1965

*Nov. 23, 24

1966

Jan. 25

RADIO CORPORATION OF AMERICA (*Plaintiff*) ..... APPELLANT;

AND

PHILCO CORPORATION (DELAWARE) (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Practice and procedure—Application to strike out part of statement of claim filed in Exchequer Court—Whether proceedings before that Court must be confined to the claims in conflict before the Commissioner of Patents—Patent Act, R.S.C. 1952, c. 203, s. 45—Exchequer Court Act, R.S.C. 1952, c. 98, s. 21.

In proceedings before him concerning conflicting claims in respect of patents for inventions relating to coloured television, the Commissioner of Patents awarded some of the claims to the plaintiff and the others to the defendant. Pursuant to s. 45(8) of the *Patent Act*, R.S.C. 1952, c. 203, the plaintiff filed a statement of claim in the Exchequer Court in which it included claims other than those in conflict before the Commissioner of Patents. The defendant filed a notice of motion to strike out the parts of the statement of claim which were not confined to the claims in conflict before the Commissioner. The motion was granted by the Exchequer Court. The plaintiff appealed to this Court.

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

1966

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE)

Held: The appeal should be dismissed.

Proceedings under s. 45(8) of the *Patent Act* are restricted to a determination of the respective rights of the parties in respect of the subject matter of the claims put in conflict by the Commissioner of Patents.

Section 21 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, does not confer upon the plaintiff the right to the relief which was sought by the impugned parts of the statement of claim. The conclusion which is to be drawn from the legislative history of the provisions of the *Patent Act* respecting conflicting applications is that, although jurisdiction is conferred upon the Exchequer Court by s. 21 of the *Exchequer Court Act* in cases of conflicting applications for a patent, the right of a party involved in such a conflict to attack the patent application of another party is governed by s. 45 of the *Patent Act*, and such party is restricted to such rights as are conferred by that section.

Brevets—Procédure—Requête pour faire radier partie de la déclaration produite devant la Cour de l'Échiquier—Les procédures devant cette Cour doivent-elles être restreintes aux revendications qui sont en conflit devant le Commissaire des Brevets—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 45—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 21.

Lors de procédures concernant des revendications en conflit au sujet de brevets pour inventions se rapportant à la télévision en couleurs, le Commissaire des Brevets a accordé certaines des revendications à la demanderesse et les autres à la défenderesse. En vertu de l'art. 45(8) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, la demanderesse a produit une déclaration devant la Cour de l'Échiquier dans laquelle elle a inclus d'autres revendications que celles qui étaient en conflit devant le Commissaire des Brevets. La défenderesse a présenté une requête pour faire radier les parties de la déclaration qui n'étaient pas restreintes aux revendications en conflit devant le Commissaire. La requête a été accordée par la Cour de l'Échiquier. La demanderesse en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Les procédures sous le régime de l'art. 45(8) de la *Loi sur les Brevets* sont limitées à la détermination des droits respectifs des parties relativement à la matière en litige des revendications qui ont été mises en conflit par le Commissaire des Brevets.

L'art. 21 de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, c. 98, ne donne pas à la demanderesse le droit au recours qu'elle a recherché par les parties de la déclaration qui sont attaquées. La conclusion que l'on doit tirer de l'historique législatif des dispositions de la *Loi sur les Brevets* concernant les demandes en conflit est à l'effet que, quoique l'art. 21 de la *Loi sur la Cour de l'Échiquier* confère à la Cour de l'Échiquier la juridiction dans les cas de demandes pour brevets qui sont en conflit, le droit de la partie engagée dans un tel conflit d'attaquer la demande de brevets d'une autre partie est gouverné par l'art. 45 de la *Loi sur les*

1966

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE)

Brevets et cette partie est restreinte aux seuls droits qui sont conférés par cet article

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], radiant certains paragraphes de la déclaration. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], striking out certain paragraphs of the statement of claim. Appeal dismissed.

Christopher Robinson, Q.C., and *Russell S. Smart*, for the plaintiff, appellant.

David Watson and *Edwin A. Foster*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:— This appeal is from a judgment of the learned President of the Exchequer Court[1] which, upon a motion brought by the respondent, struck out paragraphs 10 to 19 inclusive of the appellant's amended statement of claim and also paragraph (*a*) of the prayer of that statement of claim. The question in issue on the appeal involves the interpretation of s. 45 of the *Patent Act*, R.S.C. 1952, c. 203, and of s. 21 of the *Exchequer Court Act*, R.S.C. 1952, c. 98.

The action was brought by the appellant, as plaintiff, against the respondent, as defendant, following a decision of the Commissioner of Patents, dated December 13, 1963, in a conflict between patent application Serial Number 606,877, filed on October 17, 1950, by C. W. Hansell, as inventor, and assigned to the appellant, and patent application Serial Number 609,764, filed on December 29, 1950, by Wilson P. Boothroyd and Edgar M. Creamer, and assigned to the respondent. The former is entitled "Color Transmission System" and the latter "Electrical Intelligence Transmission System".

Section 45 of the *Patent Act*, which is headed "CONFLICTING APPLICATIONS", provides as follows:

[1] [1965] 2 Ex. C.R. 197.

45. (1) Conflict between two or more pending applications exists

(a) when each of them contains one or more claims defining substantially the same invention, or

(b) when one or more claims of one application describe the invention disclosed in the other application.

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in, things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

(a) the date at which the idea of the invention described in the conflicting claims was conceived;

(b) the date upon which the first drawing of the invention was made;

(c) the date when and the mode in which the first written or verbal disclosure of the invention was made; and

(d) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

1966

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE)

Martland J.

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

(a) that there is in fact no conflict between the claims in question,

(b) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,

(c) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or

(d) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

On September 18, 1961, the Commissioner notified the appellant and the respondent of a conflict between the two applications in respect of 12 claims, which he designated C1 to C12. Affidavits were filed by the parties, pursuant to subs. (5) of s. 45, and, after considering these, the Commissioner, pursuant to subs. (7), awarded claims C1 to C4 to the appellant, and claims C5 to C12 to the respondent.

Pursuant to subs. (8), the appellant filed a statement of claim in the Exchequer Court on March 12, 1964, claiming entitlement to claims C5 to C12. On April 8 the respondent filed a statement of defence and a counterclaim claiming entitlement to claims C1 to C4.

On November 23, 1964, the appellant filed an amended statement of claim, which added additional paragraphs 10 to 19 inclusive and a new prayer.

On January 25, 1965, the respondent filed a notice of motion to strike out the amendments. This motion was successful, save as to paragraph 18, as to which there is no cross-appeal, and which is no longer in issue before this Court.

The amendments to the statement of claim, now in issue, attacked 78 of the claims in the respondent's application, in addition to those which the Commissioner had designated as C1 to C12. Of these 78 claims it was alleged that 21 were

claims to subject matter disclosed in the appellant's application, that 30 were identical with claims in patents already granted to the appellant, that 17 were claims to subject matter disclosed in patents already granted to the appellant and that 10 were claims to subject matter known by one Sziklai before any invention by Boothroyd (the respondent's inventor) and disclosed to the public and to the respondent before the respondent's application was filed.

The point which is in issue on this appeal is as to whether the appellant had the right, in proceedings taken pursuant to s. 45(8), to attack claims contained in the respondent's application in relation to which no conflict had been found by the Commissioner.

On behalf of the appellant, it was contended that the possibility of such an attack being made was contemplated by the terms of s. 45 standing by itself, but that, in any event, such proceedings were authorized by s. 21 of the *Exchequer Court Act*.

At the conclusion of the argument for the appellant we stated our unanimous opinion that the first contention could not be successfully maintained. We were in agreement with the learned President, who stated his position in the following words:

> In these circumstances, the question is whether the very special provision impliedly made by subsection (8) of section 45 for proceedings in this Court to determine the respective rights of the parties whose applications are in conflict is restricted to the respective rights in respect of the claims in conflict as dealt with by the Commissioner or whether that very special provision opens the door to an attack by either of the applicants on any of the claims set out in the other party's application no matter what the basis for that attack may be and no matter how remote such claims may be from the subject matter of the claims put in conflict by the Commissioner.
>
> I am of opinion that proceedings under section 45(8) are restricted to a determination of the respective rights of the parties in respect of the subject matter of the claims put in conflict by the Commissioner. Giving the best consideration that I can to section 45 as a whole and reading it in relation to the other provisions of the Act, I cannot read subsection (8) as applying to anything except the claims that have been dealt with pursuant to subsections (3) to (7) inclusive.

1966

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE)

Martland J.

I turn now to consider the effect of s. 21 of the *Exchequer Court Act*, which, it was submitted, permitted the course taken by the appellant by its amendment to the statement of claim. That section provides:

21. The Exchequer Court has jurisdiction as well between subject and subject as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade mark or industrial design;

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified; and

(*c*) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at common law or in equity, respecting any patent of invention, copyright, trade mark, or industrial design.

Dealing with this issue, the learned President stated:

While I recognize that the jurisdiction conferred on this Court by section 21 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, may not extend to such parts of paragraphs 11 to 17 as do not form the basis for a claim in respect of conflicting applications, I am of opinion that what I have to decide is not to be determined by reference to that section. In my view, section 21 confers jurisdiction on the Court where a right to relief exists, in the classes of cases therein defined, by virtue of some other statutory provision, at common law or in equity. (Unlike section 18(1)(*c*), section 21 does not create a right to relief as well as confer jurisdiction on the Court.) In addition to the jurisdiction conferred by section 21, the Court has jurisdiction wherever some statutory provision expressly imposes on the Court a duty to hear and determine some claim for relief in classes of cases not covered by section 21. Applications for patents of invention are creatures of the *Patent Act*. No right to obtain relief from a Court in respect thereto exists except where such right has been conferred expressly or impliedly by some statute and, as far as I am aware, the only statute that deals with such applications is the *Patent Act* itself. The only provision in the *Patent Act* upon which the plaintiff has attempted to found the claims for relief contemplated by paragraphs 11 to 17 is section 45. In my view, those paragraphs must be struck out unless section 45 confers on the plaintiff a right to seek the relief contemplated thereby in this Court.

In contending that s. 21 conferred upon the appellant the right to the relief which was sought by the amended statement of claim, reference was made by counsel to the case of *Hutchins Car Roofing Company and Frame v.*

Burnett[1]. That was an application to stay proceedings before the Exchequer Court respecting conflicting applications for a patent. The plaintiff in those proceedings had sued for a declaration that the plaintiff Frame was the first and true inventor and for an order requiring the issue of letters patent to the plaintiffs. The defendant sought a stay, alleging that he had already named an arbitrator so that the issue of conflict might be determined by arbitration in accordance with s. 20 of the *Patent Act*, R.S.C. 1906, c. 69.

That section, which was headed "CONFLICTING APPLICATIONS", provided that in the case of conflicting applications for any patent the same should be submitted to the arbitration of three skilled persons, two to be chosen by the applicants and one to be chosen by the Commissioner. A majority decision of the arbitrators was declared final. No reference was made in this section to the Exchequer Court.

The predecessor of this section is to be found in s. 43 of Chapter 26, 35 Vict. (1872). That section preceded the enactment, in s. 4 of Chapter 26, 54-55 Vict. (1891), of the section which is now s. 21 of the *Exchequer Court Act*.

The application for a stay was refused, Cassels J. holding that the Exchequer Court had jurisdiction under s. 23 of the *Exchequer Court Act*, R.S.C. 1906, c. 140, (the predecessor of the present s. 21), to determine the matter notwithstanding the proceedings pending for arbitration under the *Patent Act*.

When an appeal was launched to this Court[2], the plaintiffs sought to quash the appeal on the grounds of lack of jurisdiction. It was held an appeal would lie. There is no report of any later decision by this Court on the merits.

A few years after the decision of Cassels J., and, presumably, to meet the difficulty created by the possible existence of two distinct procedures for dealing with conflicting applications for a patent, Parliament, when it enacted the

[1] (1916), 16 Ex. C.R. 391.
[2] (1917), 54 S.C.R. 610, 36 D.L.R. 45.

1966

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE)

Martland J.

Patent Act, Chapter 23, Statutes of Canada 1923, added to s. 22 (formerly s. 20, R.S.C. 1906, c. 69) a new subs. (7), which provided as follows:

> (7) If prior to such time as may be fixed by the Commissioner for the appointment of arbitrators or allowed by him to enable the conflicting applicants to unite in appointing arbitrators, any one of the conflicting applicants takes proceedings in the Exchequer Court for the determination of the conflict, no further proceedings shall be taken thereon under this section, and the said Court shall have exclusive jurisdiction in the premises; but no such proceedings shall be taken in the Exchequer Court after the expiration of such time.

This subsection recognized the jurisdiction of the Exchequer Court with respect to conflicting applications for patents, but limited the period during which it might be exercised. It continued in effect as subs. (7) of s. 22 of the *Patent Act*, R.S.C. 1927, c. 150.

In 1932 s. 22 was repealed. The procedure by way of arbitration was replaced by the method of dealing with conflicting applications which now appears in s. 45 of the present Act. The change was effected by Chapter 21, Statutes of Canada 1932.

The important point is, however, that, since 1923, Parliament has made it clear in the provisions of the various *Patent Acts* that, notwithstanding the jurisdiction conferred by the *Exchequer Court Act* upon the Exchequer Court to deal with conflicting patent applications, the right to seek redress in that Court by an applicant is governed and limited by the provisions of the *Patent Act* respecting conflicting applications. The conclusion which I draw from the legislative history of the provisions of the *Patent Act* respecting conflicting applications is that, although jurisdiction is conferred upon the Exchequer Court by s. 21 of the *Exchequer Court Act* in cases of conflicting applications for a patent, the right of a party involved in such a conflict to attack the patent application of another party is governed by s. 45 and such party is restricted to such rights as are conferred by that section. As previously stated, it is the opinion of this Court that proceedings under subs. (8) of

that section are limited to the subject matter of the claims found to be in conflict by the Commissioner.

In my opinion, therefore, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

CANADIAN HOME ASSURANCE COMPANY (*Defendant*) ..... APPELLANT;

1965
*Oct. 27, 28
1966
Jan. 25

AND

JOSEPH A. GAUTHIER (*Plaintiff*) .....RESPONDENT.

R. C. STEVENSON (*Defendant*) .....APPELLANT;

AND

JOSEPH A. GAUTHIER (*Plaintiff*) .....RESPONDENT.

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

Insurance—Fire—Hotel destroyed by fire—Risks insured by different insurers—Misdescription and concealment of fact—Whether policies invalid—Civil Code, arts. 2485, 2572.

Following a fire which destroyed his hotel, the plaintiff sued the ten insurance companies from whom he had obtained fire insurance policies. The property insured was described in the policies as a hotel in use having not more than twenty rooms, with a permit to sell alcoholic beverages. At the time of the fire, and for some time prior, the hotel had lost its permit and had been unoccupied. Some of the policies had been issued through C, an insurance broker, and the two policies which are in issue in this appeal were obtained through G, also an insurance broker. The defence was, *inter alia*, that the plaintiff had wrongly described the premises as a hotel in use and licensed. The action was maintained by the trial judge. The Court of Appeal, by a

PRESENT: Fauteux, Abbott, Ritchie, Hall and Spence JJ.

1966

CANADIAN HOME ASSURANCE Co. v. GAUTHIER

R. C. STEVENSON v. GAUTHIER

majority judgment, held that the plaintiff was entitled to recover under the policies, as it found that the knowledge of C, through whom most of the policies had been obtained, that the premises were not as described in the policies was the knowledge of the insurers. Two judges dissented as to the liability of the two appellant companies, who were granted leave to appeal to this Court.

Held: The appeal should be allowed.

At all relevant times, C was familiar with the condition of the property, but as to G this was not so. The plaintiff failed to disclose to G that the hotel's licence had been cancelled or suspended and that the hotel was vacant. The description of the property both as to the occupation and the possession of a liquor licence was material to an appreciation of the risk. The insurer was entitled to take both of these factors into account when determining the premium to be charged or in deciding whether or not the risk would be assumed. The failure to disclose that the hotel had lost its licence was fatal to the validity of the policies in issue. The failure to disclose also that the building was unoccupied at the time the policy was issued and had continued so until the fire occurred was equally fatal. These two conditions were inseparable.

Assurance—Incendie—Hôtel détruit par le feu—Risques assurés par différents assureurs—Fausse description et dissimulation de fait—Les polices sont-elles invalides—Code Civil, arts. 2485, 2572.

A la suite d'un feu qui détruisit son hôtel, le demandeur a poursuivi les dix compagnies d'assurances de qui il avait obtenu des polices d'assurances contre le feu. La propriété assurée était décrite dans les polices comme étant un hôtel en usage n'ayant pas plus de vingt chambres, avec licence pour vendre des boissons alcooliques. Lors du feu, et depuis quelque temps, l'hôtel avait perdu sa licence et était inoccupé. Quelques-unes des polices avaient été émises par l'entremise de C, un agent d'assurances, et les deux polices dont il est question dans cet appel avaient été obtenues par l'entremise de G, un autre agent d'assurances. La défense a plaidé, *inter alia*, que le demandeur avait faussement décrit la propriété comme étant un hôtel en usage et ayant une licence. L'action a été maintenue par le Juge au procès. La Cour d'Appel, par un jugement majoritaire, a jugé que le demandeur avait droit de recouvrement en vertu des polices. Elle a décidé que la connaissance imputée à C, par l'entremise duquel la majorité des polices avaient été obtenues, que la propriété n'était pas telle que décrite dans les polices, était la connaissance même des assureurs. Deux Juges ont enregistré une dissidence quant à la responsabilité des deux compagnies appelantes, qui ont obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu.

Durant la période critique, C était au courant de la situation de la propriété, mais il n'en était pas ainsi quant à G. Le demandeur était en défaut de ne pas avoir indiqué à G que la licence de l'hôtel avait été annulée ou suspendue et que l'hôtel était vacant. La description de la propriété quant à l'occupation et quant à la possession d'une licence de

boissons était un fait important dans l'appréciation du risque. L'assureur avait droit de tenir compte de ces deux facteurs pour déterminer le taux qu'il devait exiger ou pour décider s'il devait ou non assumer le risque. Le défaut d'indiquer que l'hôtel avait perdu sa licence était fatal à la validité des polices en question. Le défaut d'indiquer aussi que le bâtiment était inoccupé lorsque la police a été émise et a continué dans cette situation jusqu'au temps du feu était également fatal. Ces deux conditions étaient inséparables.

APPELS d'un jugement de la Cour du banc de la reine, province de Québec[1], rejetant un appel d'un jugement du Juge Ouimet. Appel maintenu.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], dismissing an appeal from a judgment of Ouimet J. Appeal allowed.

John A. Nolan, Q.C., and *Jerome C. Smythe,* for the defendants, appellants.

Jean Badeaux, Q.C., Claude Benoît and *Jacqueline Beaupré,* for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The present appeals, by leave, are from two majority judgments of the Court of Queen's Bench[1], rendered March 19, 1964, affirming two judgments of the Superior Court which maintained respondent's actions against the two appellants respectively.

Respondent originally instituted ten separate actions, against ten insurance companies, claiming indemnity under ten fire insurance policies, with respect to the loss by fire, on December 4, 1957, of a hotel property known as Hôtel Laval, situated at Lavaltrie, a small town on the North Shore of the St. Lawrence River between Montreal and Trois-Rivières. All ten actions were joined for trial and all were maintained by the learned trial judge.

Appeals were taken by nine of the defendant companies and all appeals were unsuccessful. Montgomery and Owen JJ. dissented as to the liability of the two appellants, who applied for and were granted leave to appeal to this Court.

[1] [1964] Que. Q.B. 861, *sub. nom. Royal Ins. Co. v. Gauthier.*

1966

CANADIAN HOME ASSURANCE CO. v. GAUTHIER

R. C. STEVENSON v. GAUTHIER

Abbott J.

The material facts are fully set out in the judgments below and it is unnecessary to repeat them here at any length. In their essential details they are not now in dispute.

The hotel property at Lavaltrie, the object of the insurance, was originally acquired by respondent in 1954. In July 1957 following a series of transfers, the property was owned by one Marcel Lapierre. Respondent was an hypothecary creditor, and the original deed of sale from him contained a "dation en paiement" clause. At that time the fire insurance coverage on the property had been cancelled for non-payment of premiums. During the month of July 1957, the respondent, through a broker Jean-Marie Corbeil, obtained ten fire insurance policies on the hotel from ten different companies. Of these policies, seven were subsequently cancelled.

On August 28, 1957, the said Marcel Lapierre was declared a bankrupt and one Yvan Massé named as trustee. The trustee operated the hotel for a short time, but on September 27, 1957, the licence to sell alcoholic beverages was cancelled by the Quebec Liquor Board and thereafter the hotel ceased to operate and became vacant.

By judgment dated November 7, 1957, effect was given to the "dation en paiement" clause above referred to, and the respondent Gauthier was declared to be the owner of the property with retroactive effect.

Gauthier did not wish to operate the hotel however, and desired to sell it. He testified that when he visited the hotel on November 10, 1957, it was closed and that on the date of the fire, December 4, 1957, it was not operating. On November 10, 1957, Gauthier appointed a caretaker, one Roger Miron, the owner and operator of a garage situated immediately to the west of the hotel property. This garage was between the hotel and Miron's residence. Miron testified that from the date of his appointment to the date of the fire he visited the hotel two or three times daily and attended to the operation of the heating system. The hotel was vacant at that time and continued to be unoccupied until the date of the fire.

On October 3, 1957, Corbeil was notified, on behalf of the insurance companies concerned, that seven of the policies above referred to were cancelled. On being advised of this, Gauthier then instructed Corbeil to obtain other insurance to replace the cancelled policies. At all relevant times Corbeil was familiar with the condition of the property, and knew that it was unoccupied and that the liquor licence had been cancelled. Corbeil testified he advised respondent that he was doubtful if he would be able to obtain the insurance requested, to which respondent replied "J'ai mon agent Monsieur Girardin" and Corbeil asked that Girardin communicate with him.

In fact three additional policies were obtained through Corbeil (which are not the policies in issue on this appeal) and four policies—two of which are the policies in issue here—were obtained through the agent Maurice Girardin. These policies were issued as of November 21, 1957. The hotel property was destroyed by fire on December 4, 1957.

Girardin testified that he was an insurance broker, that he knew the respondent Gauthier whom he had first met when he had insured Gauthier's private residence in Montreal. He said that in November 1957 Gauthier called him and asked him to insure part of the Hôtel Laval. Gauthier told Girardin that he had an insurance broker named Corbeil, but that the latter could not get coverage for the full amount. Gauthier requested Girardin to call Corbeil and ask him if he, Girardin, could take the balance.

Girardin called Corbeil and asked for information as to the construction of the hotel. He says that he knew nothing else at the time as to the condition of the hotel or its circumstances, but since he knew that respondent had spoken to Corbeil, he issued policies in terms similar to those contained in the policies previously issued.

Girardin obtained the two policies which are the subject of the present appeals. They were issued as of November 21, 1957, and upon receipt thereof, Girardin delivered them to respondent.

1966

CANADIAN HOME ASSURANCE CO. v. GAUTHIER

R. C. STEVENSON v. GAUTHIER

Abbott J.

The object of the insurance is described in the two policies as follows:

The Canadian Home Assurance Company—Policy No. 521743

> Sur le Bâtiment seulement de l'immeuble à 3 étages construit en bois avec toiture en 1re classe ainsi que ses annexes contiguës et communicantes par l'intérieur occupées aux mêmes fins et qui ne sont pas spécialement assurées ou séparées par un mur complet ou un espace, les fondations, les garnitures et aménagements permanents lesquels y sont assujettis en forment partie et appartiennent au propriétaire de l'immeuble, les clôtures, les fresques et les glaces, *seulement lorsque ledit bâtiment n'est occupé qu'à l'usage de Hôtel connu sous le nom Hôtel Laval avec pas plus de 20 chambres, licence pour boissons alcooliques et situé à Paroisse Lavaltrie, Cté. Berthier, Province de Québec.*
>
> (emphasis added).

Lloyd's of London—Policy No. CH 15507

> On Building and Contents, as per wording attached to Warranty Company's Policy.

The warranty company referred to is the appellant, Canadian Home Assurance Company.

Girardin says that when he delivered the policies to respondent he checked the descriptions therein against the descriptions in the policies already held by respondent. He pointed out to respondent that the policies stated:

> Hôtel Laval, si je me rappelle bien, avec des chambres et avec permis de la Commission des Liqueurs.

He says that he asked respondent if that was correct, to which respondent replied:

> Bien, avec permis, je vais l'avoir d'ici quelques jours.

Girardin states that he then told respondent:

> S'il n'avait pas de permis, que l'assurance n'entre pas en force—il faut que ça suive la police.

He was told nothing further by respondent concerning the hotel when he delivered the policies.

At the time Girardin obtained the policies, he did not know that any previous policies on the hotel had been cancelled, nor did he know whether or not the owner of the hotel held a liquor permit.

Girardin's evidence as to these matters was not denied by respondent, and I am satisfied that respondent and Corbeil

failed to disclose to Girardin, when applying for insurance, that the hotel's licence had been cancelled or suspended and that the hotel was vacant.

The courts are frequently called upon to consider an insurer's defence based upon misdescription of, or failure to disclose information respecting the object of the insurance. Aside from certain well established general principles, most cases turn upon the circumstances in each case and the wording of the particular policy.

One of the general principles to which I have referred was stated by Newcombe J. in *Sun Insurance Office of London, England v. Roy*[1], when speaking for the Court he said:

> There are many cases referred to in the factums, and more in the books, with regard to the effect of words forming part of the description in a fire policy and intended to describe, sometimes in the present and sometimes in the future tense, the user of the premises, but there is none inconsistent with the view, the reasonableness of which commends itself, that, where the property is described as occupied in a particular manner, and occupation in that manner is material to the risk, the insurance is not attached to the risk if the premises, at the date of the contract, be not, and have not subsequently been, so occupied.

That statement has been quoted with approval by the Court of Queen's Bench in *Dumais v. Laurentian Insurance Co.*[2] and *Ice Supply Co. Ltd. v. Guardian Assurance Co.*[3].

Appellants principal defence to the actions against them was that the risk was not properly described in accordance with arts. 2485 and 2572 of the *Civil Code* which read:

Article 2485

> The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.

Article 2572

> It is an implied warranty on the part of the insured that his description of the object of the insurance shall be such as to show truly under what class of risk it falls according to the proposals and conditions of the policy.

[1] [1927] S.C.R. 8 at 14, 1 D.L.R. 17.
[2] (1930), 49 Que. K.B. 413.
[3] (1935), 58 Que. K.B. 335, 2 I.L.R. 217.

1966

CANADIAN HOME ASSURANCE CO. v. GAUTHIER

R. C. STEVENSON v. GAUTHIER

Abbott J.

Appellants submitted (1) that what was intended to be insured was clearly a licensed and operating hotel, not an unoccupied and unlicensed building and (2) that there was fundamental error as to the object of the insurance with the effect that no contracts of insurance ever existed.

The significant words in the description of the object insured, as contained in the policies, are these,

> . . . seulement lorsque ledit bâtiment n'est occupé qu'à l'usage de Hôtel connu sous le nom Hôtel Laval avec pas plus de 20 chambres, licence pour boissons alcooliques et situé à Paroisse Lavaltrie, Cté Berthier, Province de Québec.

The majority in the Court below were of opinion that the words "occupé qu'à l'usage de Hôtel" in this context were descriptive only, and meant a building furnished and equipped in such a fashion as to permit it to be used only as a hotel. With respect I cannot agree with that interpretation. In my opinion, the description of the property both as to occupation and the possession of a liquor licence was material to an appreciation of the risk. There is evidence to that effect in the record. The insurer is entitled to take both of these factors into account, when determining the premium to be charged, or in deciding whether or not he will assume the risk.

I share the view expressed by Montgomery J. that the failure to disclose that the hotel had lost its licence was fatal to the validity of the policies in issue here. I am also of opinion that the failure to disclose that the building was unoccupied at the time the policy was issued and had continued so until the fire occurred is equally fatal. In my view these two conditions are inseparable.

In the result I would allow both appeals and dismiss both actions with costs throughout.

Appeals allowed with costs.

Attorneys for the defendants, appellants: O'Brien, Home, Hall, Nolan & Saunders, Montreal.

Attorneys for the plaintiff, respondent: Turgeon & Beaupré, Montreal.

HOFFMAN-LA ROCHE LIMITED .....APPELLANT;

AND

BELL-CRAIG PHARMACEUTICALS DIVISION OF L. D. CRAIG LIMITED } RESPONDENT.

1965

*Dec. 13, 14, 15

1966

Jan. 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Preparation or production of medicine—Exchequer Court affirmed granting of licence by Commissioner of Patents—Royalty as fixed by Commissioner changed by Exchequer Court—Patent Act, R.S.C. 1952, c. 203, s. 41(3).

Pursuant to s. 41(3) of the *Patent Act*, R.S.C. 1952, c. 203, the Commissioner of Patents granted to the respondent a licence to use for the purpose of the preparation or production of medicine an invention patented by the appellant and which related to a substance sold by it under the trade name Librium. The Commissioner of Patents fixed the royalty to be paid by the respondent at 15 per cent of respondent's net selling price of the bulk active material. The Exchequer Court affirmed the Commissioner's decision to grant the licence but changed the royalty fixed by the Commissioner to a royalty of 15 per cent of the respondent's net selling price of the patented drug in dosage form. The appellant appealed to this Court from that judgment and the respondent cross-appealed with regard to the amount of the royalty. At the conclusion of the argument on behalf of the appellant, the Court invited counsel for the respondent to argue only the cross-appeal asking that the royalty as fixed by the Commissioner should be restored.

Held: The appeal should be dismissed and the cross-appeal allowed; the royalty as fixed by the Commissioner should be restored.

The purpose of s. 41(3) of the *Patent Act* is clear. No absolute monopoly can be obtained in a process for the production of food or medicine. In the public interest there should be competition in the production and marketing of such products produced by a patented process in order that they might be "available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention". Since the royalty payable by a licensee for using a patented process is one of his costs of production, there is an obvious justification, in cases where a percentage royalty is decided upon, for using as a base, the sale price of the bulk material rather than a base which reflects a variety of packaging, distribution, promotion, sales and other like expenses. The Commissioner was entitled to use the base which he did in this case in establishing the royalty. The appellant has failed to discharge the burden which was upon it of establishing that the Commissioner acted on a wrong principle or that on the evidence his decision was manifestly wrong.

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

1966

HOFFMAN LAROCHE LTD. v. BELL-CRAIG PHARMACEUTICALS DIV. OF L.D. CRAIG LTD.

Brevets—Licence forcée—Préparation ou production de médicaments—La Cour de l'Échiquier confirmant la licence accordée par le Commissaire des Brevets—Redevance fixée par le Commissaire étant changée par la Cour de l'Échiquier—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 41(3).

En vertu de l'art. 41(3) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, le Commissaire des Brevets a accordé à l'intimée une licence pour utiliser, pour les fins de la préparation ou production de médicaments, une invention brevetée par l'appelante et qui couvrait une substance vendue par elle sous la marque de commerce Librium. Le Commissaire des Brevets a fixé la redevance devant être payée par l'intimée à 15 pour-cent du prix net de vente par l'intimée de la substance en gros. La Cour de l'Échiquier a confirmé la décision du Commissaire d'accorder la licence mais a changé la redevance fixée par le Commissaire à une redevance de 15 pour-cent du prix net de vente par l'intimée de la drogue brevetée sous forme de dose. L'appellante en a appelé de ce jugement devant cette Cour et l'intimée a porté un contre-appel relativement au montant de la redevance. Lorsque l'appelante eut terminé sa plaidoirie, la Cour a invité l'avocat de l'intimée à ne faire porter son argument que sur le contre-appel par lequel elle demandait que la redevance telle que fixée par le Commissaire soit rétablie.

Arrêt: L'appel doit être rejeté et le contre-appel maintenu; la redevance telle que fixée par le Commissaire doit être rétablie.

Le but de l'art. 41(3) de la *Loi sur les Brevets* est clair. Aucun monopole absolu ne peut être obtenu pour des procédés visant à la production d'aliments ou de médicaments. Il est de l'intérêt public qu'il y ait une concurrence dans la production et le service commercial de ces produits provenant d'un procédé breveté afin qu'ils soient «accessibles au public au plus bas prix possible, tout en accordant à l'inventeur une juste rémunération pour les recherches qui ont conduit à l'invention». Puisque la redevance payable par un détenteur de licence pour utiliser un procédé breveté fait partie de ses frais de production, il y a une justification évidente, dans les cas où on se sert d'une redevance par pourcentage, d'utiliser comme base le prix de vente du matériel en gros plutôt qu'une base qui refléterait une variété de dépenses d'empaquetage, de distribution, de promotion, de vente et autres. Le Commissaire était justifié de se servir de la base dont il s'est servi dans ce cas pour établir la redevance. L'appelante n'a pas réussi à se libérer du fardeau qui lui incombait d'établir que le Commissaire avait agi selon un principe erroné ou que sa décision avait été manifestement erronée en regard de la preuve.

APPEL et CONTRE-APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], maintenant en partie une décision du Commissaire des Brevets. Appel rejeté et contre-appel maintenu.

APPEAL and CROSS-APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], allowing in part an appeal from a decision of the Commissioner of Patents. Appeal dismissed and cross-appeal allowed.

[1] [1965] 2 Ex. C.R. 266.

R. G. McClenahan and *C. R. Carson,* for the appellant.

I. Goldsmith, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a judgment of the President of the Exchequer Court[1] allowing in part an appeal by the present appellant from a decision of the Commissioner of Patents, pursuant to s. 41 (3) of the *Patent Act,* R.S.C. 1952, c. 203, as amended, which had granted to respondent a licence to use for the purpose of the preparation or production of medicine, the invention patented by Canadian Patent No. 612,497 held by appellant. This patent is entitled "1, 4 Benzodiazepine 4-Oxides and Process for the Manufacture Thereof". It relates to a substance, the chemical designation for which is 2-Methylamino-5-phenyl-7-chloro-3H-1, 4 benzo-diazepine 4-oxide, the generic name for which is Chlordiazepoxide, and which is sold by appellant under the registered trade name "Librium".

Section 41 (3) of the *Patent Act* provides:

> In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

The President of the Exchequer Court affirmed the Commissioner's decision to grant the licence, but varied the terms as fixed by him and allowed the appeal with respect to the question of royalty, changing the royalty as fixed by the Commissioner at 15 per cent of respondent's net selling price of the bulk active material, to a royalty of 15 per cent of the respondent's net selling price of the patented drug in dosage form to persons with whom respondent is dealing at arm's length. Save as aforesaid the appeal was dismissed and appellant was ordered to pay to respondent 90 per cent of the costs of the appeal.

The appellant appealed to this Court from that judgment and respondent cross appealed with regard only to the amount of the royalty fixed by Jackett P.

[1] [1965] 2 Ex. C.R. 266.

1966

HOFFMAN-LAROCHE LTD. v. BELL-CRAIG PHARMACEUTICALS DIV. OF L.D. CRAIG LTD.

Abbott J.

It might be noted here in passing, that the patent in issue on this appeal is the same patent which was before this Court in *Hoffman-Laroche Ltd. v. Delmar Chemical Ltd.*[1] which dismissed an appeal by the present appellant from a judgment of the Exchequer Court which had confirmed a decision of the Commissioner granting, under s. 41 (3) to the respondent in that case, a licence to use the invention for the purposes of the preparation or production of medicine. The general principles to be followed by the Commissioner in deciding whether a licence should be granted under the said section, were dealt with by this Court in the *Delmar* case and in an earlier decision, *Parke, Davis & Company v. Fine Chemicals of Canada Limited*[2].

Before both the Exchequer Court and this Court, appellant asked for an order declaring the licence granted to the respondent by the Commissioner of Patents to be null and void. In the alternative appellant asked that the cross-appeal on the question of royalty be dismissed and that the royalty to be paid by respondent be fixed at the sum of $3,528.37 per kilogram of chlordiazepoxide made and sold by respondent.

At the conclusion of the argument on behalf of appellant, counsel for respondent was informed that the Court did not need to hear him on the main appeal either as to the finding that a licence should issue or as to the adequacy of the royalty. He was invited therefore to argue only the cross-appeal asking that the royalty as fixed by the Commissioner should be restored.

Under s. 41 (3), the decision both as to whether a licence should issue, and if so the royalty to be paid, was one for the Commissioner to make. While an appeal lies from that decision, in order to succeed it is for the appellant to show that the Commissioner acted on a wrong principle or that, on the evidence, the decision was manifestly wrong. *Parke, Davis & Company v. Fine Chemicals Limited* and *Hoffman-Laroche Ltd. v. Delmar Chemical Ltd., supra,* and *The King v. Irving Air Chute Inc.*[3]. It was not suggested before this Court that the evidence before the Commissioner in this case was inadequate to enable him intelli-

[1] [1965] S.C.R. 575, 50 D.L.R. (2d) 607.

[2] [1959] S.C.R. 219, 18 Fox Pat. C. 125, 30 C.P.R. 59, 17 D.L.R. (2d) 153.

[3] [1949] S.C.R. 613 at 621, 9 Fox Pat. C. 10, 10 C.P.R. 1.

gently to arrive at a royalty which would give due weight to all the relevant considerations.

The Commissioner in his reasons dealt with the question of royalty as follows:

> The next question to be determined is that of royalty. The patentee brought, as a witness to the hearing, a Chartered Accountant who has an extensive experience in business practices and who has a thorough knowledge of the pharmaceutical industry. He gave us a detailed explanation of the way the pharmaceutical industry figures out what part of each sales dollar goes to the different items of expenditure that have to be accounted for before profits can be determined.
>
> The purpose was to arrive at a royalty figure. However, the royalty arrived at through his method would amount to the fantastic sum of three thousand five hundred and twenty-eight dollars per kilo of bulk active material which costs approximately one hundred and fifty dollars to make. Of course that was based on the cost of the complete and sustained research program undertaken by the patentee company, the overhead, return on capital invested, depreciation, sponsoring, advertising, and keeping the physicians' interest in the drug, all figured out on the sales of the product when capsuled, sealed and labelled, ready for patient's consumption.
>
> In all these considerations the patentee forgets that I am dealing with a patent covering a process. He has no exclusive right to the bulk active material per se, except when made by the particular process of the patent. Anyone is free to make and sell the product if he can develop a different process or somehow obtain it legally. I am therefore concerned with the process only. Much less has he any exclusivity on the finished material in dosage form, packaged and labelled. This is outside the scope of the patent and it is immaterial to me. Reference can be made to the case of *Fine Chemicals Limited v. Parke, Davis & Co.* where I followed the same reasoning, (1957, Vol. 16 Fox Patent cases p. 38). The Commissioner's decision was affirmed in the Exchequer Court, (1957, Vol. 16, Fox Patent cases p. 173) and in the Supreme Court (1959, Vol. 18 Fox Patent cases p. 125). The principle I have established of fixing the royalty on the sale price of the bulk material has not been disturbed by the courts. In the Supreme Court, Mr. Justice Martland said at page 134 (Fox) "The Royalty as fixed is, therefore, to be determined upon the wholesale price and has no relationship to the ultimate selling price of the medicine to the consumer." He went on to question the adequacy of the royalty but not the principle.

I pause here, in the recital of those reasons to emphasize that the passage quoted from the reasons for judgment of Martland J. in the case cited by the Commissioner was merely a description of the method in fact adopted by the Commissioner for the determination of the royalty in that case. The Commissioner is however correct in stating that this Court did not disapprove of the method as constituting an improper means of the determination of royalty. Such a basis of determination is certainly a permissible basis but it was not necessarily the only one open to the Commissioner,

1966

HOFFMAN-LAROCHE LTD. v. BELL-CRAIG PHARMACEUTICALS DIV. OF L.D. CRAIG LTD.

Abbott J.

and on this point I adopt the following statement of Rand J. in the *Irving Air Chute* case, *supra*, at p. 625:

> I am unable to follow either the Commissioner or the President of the Exchequer Court in the preliminary ascertainment of a rate or percentage as something in some degree absolute which will thereafter be applied to a subsequently ascertained base money value. What the inventor is to receive is a sum of money related to the invention used; and the base value, whether cost or selling price of either the whole or part of the apparatus embodying the invention, is obviously bound up with the rate or percentage to be used. Base values as in practice adopted are limited in number and can be accurately ascertained; and being fixed upon, the important question, to which the evidential matters are relevant, becomes that of the highly variable percentage.

I resume the quotation from the Commissioner's reasons:

> Although the product per se is not actually patented the royalty payments have to be calculated on the amount of product made by the process, because it would be next to impossible to assess the value of a process except on the basis of the extent of its use to make a product which in turn can be evaluated in terms of dollars and cents.
>
> In the case at hand the patentee has arrived in his calculations at a royalty of $3,528.37 per kilo but this figure includes all the irrelevant factors that I have in the past refused to consider and which are not part of what is covered by the patent.
>
> * * *
>
> On the basis of past experience and upon considering the wide acceptance of the product, I will fix the royalty at 15% of the net selling price of the bulk active material made by the licensee and sold to others, or should the licensee process all of its production for sale as finished medicine ready for patients consumption, the royalty payments should be based on what would be a fair selling price of the bulk material to others.

The learned President after summarising the arguments of counsel for appellant with reference to royalty said this:

> In this case, the only attack on the Commissioner's decision with reference to royalty is that it is too low. It has not been suggested that it is higher than it should be. As I see the problem, therefore, the only question is whether the royalty fixed is commensurate with the maintenance of research incentive and the importance of both process and substance.

After discussing various considerations to be taken into consideration in fixing a royalty, the President made this finding:

> I have come to the conclusion that the Commissioner fell into error in thinking that "the finished material in dosage form, packaged and labelled" was "outside the scope of the patent" and "immaterial" to him. On the contrary, the drug in the dosage form, if it was made in accordance with the patented process, is just as much the subject matter of the patentee's monopoly as it is when it is sold in bulk. It is precisely the same product as it is when it is in bulk except that it has been packaged so as to be in the form in which it has value as a merchantable commodity.

He then proceeded to fix the royalty payable at 15 per cent of the licensee's selling price when it sells the patented drug in dosage form. The President in the passage just quoted was referring of course to the statement made by the Commissioner in his reasons that:

> In all these considerations the patentee forgets that I am dealing with a patent covering a process. He has no exclusive right to the bulk active material per se, except when made by the particular process of the patent. Anyone is free to make and sell the product if he can develop a different process or somehow obtain it legally. I am therefore concerned with the process only. Much less has he any exclusivity on the finished material in dosage form, packaged and labelled. This is outside the scope of the patent and it is immaterial to me.

With respect I am unable to agree with the conclusion reached by the learned President.

As Martland J. pointed out in the *Parke, Davis* case, *supra,* at p. 228, the monopoly in a process patent for the production or preparation of food or medicine is considerably restricted in scope and the royalty allowed should be commensurate with the maintenance of research incentive and the importance of both process and substance. Such royalty should also be commensurate with the desirability of making food or medicine available to the public at the lowest possible price consistent with giving to *the inventor*—not the patentee—reward for the research leading to the invention.

In my view the purpose of s. 41 (3) is clear. Shortly stated it is this. No absolute monopoly can be obtained in a process for the production of food or medicine. On the contrary Parliament intended that, in the public interest, there should be competition in the production and marketing of such products produced by a patented process, in order that as the section states, they may be "available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention".

The royalty payable by a licensee for using a patented process is one of his costs of production. That being so there is an obvious justification, in cases where a percentage royalty is decided upon, for using as a base, the sale price of the bulk material produced by the patented process, rather than a base which reflects a variety of packaging, distribution, promotional, sales and other like

1966

HOFFMAN-LAROCHE LTD. v. BELL-CRAIG PHARMACEUTICALS DIV. OF L.D. CRAIG LTD.

Abbott J.

expenses. In my opinion on the evidence before him, the Commissioner was entitled to use the base which he did in establishing the royalty.

As I have already stated, it is well established that the appellant could succeed on its appeal only if it were able to establish that the Commissioner acted on a wrong principle, or that on the evidence his decision was manifestly wrong. In my opinion, the appellant failed to discharge that burden, and the royalty as fixed by the Commissioner should not have been interfered with.

I would dismiss the appeal with costs here and below, allow the cross-appeal with costs, restore the royalty as fixed by the Commissioner of Patents and order that the licence be amended accordingly.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent: Duncan, Goldsmith & Caswell, Toronto.

1965

*Oct. 29
*Nov. 1

1966
Feb. 9

DAME EMILIE MARY KREDL ..... APPELLANT;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC and THE SOCIAL WELFARE COURT FOR THE DISTRICT OF MONTREAL } RESPONDENTS;

AND

STANISLAV KELLER ..... (MIS-EN-CAUSE).

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

Jurisdiction—Prohibition—Custody of children—Matter before Superior Court—Whether Social Welfare Court superseded—Youth Protection Act, R.S.Q. 1941, c. 38, s. 15 [now R.S.Q. 1964, c. 220]—Code of Civil Procedure, art. 1210.

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

In 1957, the appellant obtained a separation from her husband, the mis-en-cause, and custody of their two children. The parties were later divorced. Subsequently, the husband filed two petitions before the Superior Court to obtain the custody of the children. The first one was dismissed, and the second one was adjourned *sine die* and was still pending at the time of the present proceedings. In November 1962, the husband signed a petition before a judge of the Social Welfare Court, seeking the holding of an inquiry in respect of one of the children, pursuant to s. 15 of the *Youth Protection Act,* R.S.Q. 1941, c. 38 [now R.S.Q. 1964, c. 220]. The first allegation contained in the petition was a repetition of the wording of the first sentence of s. 15(1) of the Act. The second allegation recited that the boy was being kept away from his father, that he was being prejudiced against his father, and that all of this "may lead to serious character disturbances". The Court ordered a notice to be served on the appellant advising her that an inquiry would be held before a judge of the Social Welfare Court. The appellant then obtained from the Superior Court the issuance of a writ of prohibition which was later declared peremptory. The Social Welfare Court and the Attorney General, the latter pursuant to the right conferred upon him by art. 1210 of the *Code of Civil Procedure,* appealed to the Court of Appeal where the writ of prohibition was quashed. The appellant was granted leave to appeal to this Court.

Held (Martland and Hall JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott and Judson JJ.: The proposition that a child, of whom the custody has been determined by the Superior Court, is under the protection of that Court and does not need to be protected by the Social Welfare Court, is untenable.

The unalterable consequences of *res judicata* do not attach to a judgment of the Superior Court awarding the custody of children. The jurisdiction of the Social Welfare Court to entrust the custody of the children to somebody else than the person to whom it had been entrusted by the Superior Court is to be ascertained by a reference to the terms of the *Youth Protection Act*—the validity of which was not challenged here—and not by reference to the doctrine of *res judicata.*

The argument that the jurisdiction of the Courts has been completely exhausted when the husband elected to proceed by way of a petition which is still pending before the Superior Court, is also untenable. The maxim *Electa una via non datur recursus ad alteram* has no application in the province of Quebec. Even if it were part of the law of the province, it could not operate to prevent an inquiry under the *Youth Protection Act* which is not a judicial process of the nature and character of the judicial proceedings contemplated by the maxim.

Nothing has been shown and there is nothing in the *Youth Protection Act* supporting the proposition that the jurisdiction of a judge of the Social Welfare Court to embark upon an inquiry is subject to the limitations suggested by the appellant. An inferior Court may not be prevented from exercising the jurisdiction, conferred upon it by a valid statute, through fear that its judgment may contradict that of another Court.

The judge of the Social Welfare Court was given information of the nature indicated in the *Youth Protection Act.* The word "information" is not to be given the technical meaning ascribed to it in penal or criminal proceedings.

1966

KREDL
v.
ATTORNEY GENERAL OF QUEBEC
et al.

Per Martland and Hall JJ., *dissenting*: The judge of the Social Welfare Court can only order an inquiry if he has information, which he deems serious, to the effect that the child is particularly exposed to moral or physical dangers by reason of environment or other special circumstances and for such reasons needs to be protected. In this case the judge did not have before him information to the effect that the child in question was in the conditions described in the first sentence of s. 15(1) of the *Youth Protection Act*, and therefore he had no legal authority to bring the child before him for an inquiry.

Juridiction—Prohibition—Garde des enfants—Question devant la Cour Supérieure—La Cour de Bien-Être Social est-elle supplantée—Loi de la Protection de la Jeunesse, S.R.Q. 1941, c. 38, art. 15 [maintenant S.R.Q. 1964, c. 220]—Code de Procédure Civile, art. 1210.

En 1957, l'appelante et son mari, le mis-en-cause, obtinrent une séparation de corps, et la garde de leurs deux enfants fut confiée à l'appelante. Un divorce a été subséquemment accordé. Par la suite, le mari a produit deux requêtes devant la Cour supérieure pour obtenir la garde des enfants. La première a été rejetée, et la seconde a été ajournée *sine die* et était encore en suspens lors des procédures en instance. En novembre 1962, en se basant sur l'art. 15 de la *Loi de la protection de la jeunesse*, S.R.Q. 1941, c. 38 [maintenant S.R.Q. 1964, c. 220], le mari a signé une requête devant un juge de la Cour de bien-être social demandant la tenue d'une enquête relativement à l'un des enfants. La première allégation dans la requête était une répétition des mots de la première phrase de l'art. 15(1) de la Loi. Dans la seconde allégation il était récité que l'enfant était tenu éloigné de son père, qu'on le prédisposait contre son père, et que tout ceci «pouvait le conduire à des troubles caractériels sérieux». La Cour a ordonné qu'un avis soit signifié à l'appelante l'avisant qu'une enquête serait tenue devant un juge de la Cour de bien-être social. L'appelante a alors obtenu de la Cour supérieure l'émission d'un bref de prohibition qui par la suite a été déclaré péremptoire. La Cour de bien-être social et le Procureur général, ce dernier en vertu du droit qui lui est conféré par l'art. 1210 du *Code de Procédure Civile*, en appelèrent devant la Cour d'Appel qui a rejeté le bref de prohibition. L'appelante a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté, les Juges Martland et Hall étant dissidents.

Les Juges Fauteux, Abbott et Judson: La proposition qu'un enfant, dont la garde a été déterminée par la Cour supérieure, est sous la protection de cette Cour et n'a pas besoin d'être protégé par la Cour de bien-être social, est insoutenable.

Les conséquences immuables de la *res judicata* ne peuvent être imputées à un jugement de la Cour supérieure confiant la garde des enfants. La juridiction de la Cour de bien-être social de confier la garde des enfants à une autre personne que celle à qui la Cour supérieure les avait confiés doit être établie en se référant aux termes de la *Loi de la protection de la jeunesse*—dont la validité n'est pas mise en question ici—et non pas en se référant à la doctrine de *res judicata*.

La proposition que la juridiction des Cours a été complètement épuisée lorsque le mari a choisi de procéder par voie de la requête qui est encore en suspens devant la Cour supérieure, est elle aussi insoutena-

ble. La maxime *Electa una via non datur recursus ad alteram* n'a pas d'application dans la province de Québec. Même si elle faisait partie de la loi de la province, elle ne pourrait pas avoir l'effet d'empêcher une enquête sous le régime de la *Loi de la protection de la jeunesse,* car une telle enquête n'est pas une procédure judiciaire de la nature et du caractère des procédures judiciaires contemplées par la maxime.

Rien n'a été démontré et il n'y a rien dans la *Loi de la protection de la jeunesse* pour supporter la proposition que la juridiction d'un juge de la Cour de bien-être social d'entreprendre une enquête est sujette aux limitations suggérées par l'appelante. Une Cour inférieure ne peut pas être empêchée d'exercer la juridiction, qui lui est conférée par un statut valide, par crainte que son jugement pourrait contredire celui d'une autre Cour.

Le Juge de la Cour de bien-être social a reçu une information de la nature prescrite par la *Loi de la protection de la jeunesse.* On ne doit pas donner au mot «information» le sens technique attribué à ce mot dans les procédures pénales ou criminelles.

Les Juges Martland et Hall dissidents: Le Juge de la Cour de bien-être social ne peut ordonner une enquête que s'il a une information, qu'il estime sérieuse, à l'effet que l'enfant est particulièrement exposé à des dangers moraux ou physiques en raison de son milieu ou de d'autres circonstances spéciales et qu'il a besoin pour ces raisons d'être protégé. Dans le cas présent, le Juge n'avait pas devant lui une information à l'effet que l'enfant en question était dans les conditions décrites dans la première phrase de l'art. 15(1) de la *Loi de la protection de la jeunesse,* et en conséquence il n'avait pas l'autorité légale d'émettre un ordre d'amener l'enfant devant lui pour les fins d'une enquête.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], rejetant un bref de prohibition. Appel rejeté, les Juges Martland et Hall étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], quashing a writ of prohibition. Appeal dismissed, Martland and Hall JJ. dissenting.

C. A. Geoffrion, Q.C., for the appellant.

Laurent E. Bélanger, Q.C. for the respondents.

The judgment of Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—The facts of this case are simple and not in dispute. Since 1957 the appellant and the mis-en-cause, now divorced, have been litigating over the custody of their two minor children, Stephen and George. In November

[1] [1965] Que. Q.B. 689.

1966

KREDL
v.
ATTORNEY GENERAL OF QUEBEC
et al.

Fauteux J.

1962, Keller signed a petition, supported by affidavit, before Judge J. W. Long, of the Social Welfare Court, in Montreal, in which he alleged

> I have reason to believe and I do believe that the child GEORGE KELLER under the age of eighteen years, is particularly exposed to moral and physical dangers by reasons of his environment or other special circumstances, and for such reasons needs to be protected. The boy is being kept away from the father, the boy is being prejudiced against the father, all of which may lead to serious character disturbances.

and prayed that one of the Judges of the Court apply the provisions of s. 15 of the *Youth Protection Act*, as amended by 8-9 Eliz. II, c. 42, now being R.S.Q. 1964, c. 220, and conduct an inquiry as to the particular circumstances in which the child was situated. The relevant parts of the section read as follows:

> 15. (1) When a child is particularly exposed to moral or physical dangers, by reason of its environment or other special circumstances, and for such reasons needs to be protected, any person in authority may bring him or have him brought before a judge. A judge may also, upon information which he deems serious, to the effect that a child is in the above described conditions, order that he be brought before him.
>
> Without limiting the generality of the provisions of the preceding paragraph, children whose parents, tutors or guardians are deemed unworthy, orphans with neither father nor mother and cared for by nobody, abandoned illegitimate or adulterine children, those particularly exposed to delinquency by their environment, unmanageable children generally showing pre-delinquency traits, as well as those exhibiting serious character disturbances, may be considered as being in the conditions contemplated by the preceding paragraph.
>
> * * *
> * * *
>
> The judge shall make an inquiry, in judicial form, into the particular circumstances in which the child is situated.
>
> Notice in writing of such inquiry and of the time and place when and where it will be held must be served on the father and mother or one of them, or the tutor or on those having custody of the child; the latter shall have the right to be heard and to submit any proof which the judge deems relevant.

The Court then ordered a notice to be served on the appellant and her son George, advising them of the inquiry, of the time and place of its holding and of the right to be heard and submit any pertinent evidence. Upon reception of this notice appellant applied to and obtained from the Superior Court the issuance of a writ of prohibition directed against the Social Welfare Court, its Judges and particularly Judge J. W. Long, and the mis-en-cause, ordering them to refrain from and discontinue all proceedings in the

matter until final judgment. In support of her petition for prohibition, appellant alleged that in November 1957, the Superior Court for the District of Montreal granted her a separation from bed and board from the mis-en-cause and awarded her the custody of their two minor children, Stephen and George; that in April 1959, she obtained a Parliamentary divorce from Keller; that in March 1961, the Superior Court dismissed a petition by which the latter sought to obtain the custody of the children; and that in January 1962, the Superior Court was again seized of a similar petition by Keller and that this petition, which was never proceeded with but adjourned *sine die* after several postponements, was still pending before the Superior Court. Appellant submitted that in view of the above facts the Social Welfare Court had no jurisdiction whatever to reopen the case, confirm or reverse the Superior Court which had already decided the issue and which had again been and was still being seized of the matter by reason of the last mentioned petition of Keller. Appellant also contended that the Social Welfare Court and Judge J. W. Long had already exceeded their jurisdiction by accepting Keller's petition for an inquiry under the *Youth Protection Act* and by ordering a notice of hearing to be addressed to her.

The mis-en-cause did not appear and while both Judge J. W. Long and the Social Welfare Court filed an appearance only the latter contested appellant's petition. The case having been heard, the writ of prohibition was declared peremptory by a judgment of the Superior Court resting substantially on the factual and legal grounds raised in appellant's petition for prohibition.

The Social Welfare Court and the Attorney General of the Province, the latter pursuant to the right conferred upon him by art. 1210 of the *Code of Civil Procedure*, appealed from this judgment. By a unanimous decision, the Court of Queen's Bench (Appeal Side)[1] composed of Tremblay C.J., Pratte, Casey, Rinfret and Owen JJ., allowed the appeal and quashed the writ of prohibition.

The appellant now appeals, with leave, from this judgment of the Court of Appeal.

The validity of the *Youth Protection Act* and particularly of s. 15 has not been challenged and is not here in

[1] [1965] Que. Q.B. 689.

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Fauteux J.

issue. Appellant's contention is simply that in the circumstances of this case the Judge of the Social Welfare Court should not have embarked upon the inquiry contemplated by s. 15 and that this is a question of jurisdiction. This contention is more fully stated at p. 11 of appellant's factum and textually expressed as follows:

> In the second place, it should be borne in mind that by the Writ of Prohibition herein, the jurisdiction of the Social Welfare Court and its judges is under attack only to a limited extent, Appellant's position being simply that neither the Social Welfare Court nor any of its judges has jurisdiction to deal with the case of a child whose custody is already the subject of proceedings before the Superior Court, particularly where, as in the present case, the application to the Social Welfare Court or its judge, it is made by a party to the litigation before the Superior Court, a judgment has already been rendered by such Court awarding custody to one of the parents and a Petition is pending before the Superior Court to revise this judgment. Beyond these limits the jurisdiction of the Social Welfare Court is not under attack nor is the constitutional validity of Section 15 and following of the *Youth Protection Act* questioned in any way whatsoever.

In support of these views appellant submitted, as a first proposition, that at least one of the conditions precedent to the exercise of the jurisdiction of the Social Welfare Court does not exist in the present case. A child, it is said, of whom the custody has been determined by the Superior Court, is under the protection of that Court and does not need to be protected by the Social Welfare Court. On appellant's interpretation the words "and for such reasons needs to be protected" could only have been inserted in the first paragraph of s. 15 to prevent a Judge of the Social Welfare Court from proceeding in the case of a child of whom the custody has been determined by the Superior Court. I cannot agree with this interpretation. If valid, it should equally obtain in the case of children to whom the Superior Court has appointed a tutor or guardian. Yet, the second paragraph of s. 15 provides that "children whose parents, tutors or guardians are deemed to be unworthy, . . . may be considered as being in the conditions contemplated by the preceding paragraph".

Appellant then argued that neither the Social Welfare Court nor any of its Judges have jurisdiction to interfere with a judgment of the Superior Court which carries with it the force of *res judicata*. A judgment of the Superior Court which awards the custody of a child may be changed or modified every time the interest of the child requires it. The unalterable consequences of *res judicata* do not attach

to a judgment of this nature. Trudel: Traité de droit civil du Québec, vol. 2, p. 49. The inquiry in the Social Welfare Court may very well show, in certain cases, that the person, to whom the Superior Court has previously entrusted the custody of a child, has now become unworthy of it and that it should be committed to somebody else. The jurisdiction of the Social Welfare Court to do so must be ascertained by reference to the terms of the *Youth Protection Act*—the validity of which is not challenged—and not by reference to the doctrine of *res judicata* which, in addition and in the present hypothesis, can hardly have more virtue in the Social Welfare Court than it has in the Superior Court.

Appellant also suggested that even assuming that both the Superior Court and the Social Welfare Court and its Judges could have jurisdiction over the case of the child here involved, such jurisdiction has been completely exhausted when mis-en-cause Keller elected to proceed by way of a petition which, continued *sine die,* is still pending before the Superior Court. In appellant's view this is a clear case for the application of the maxim *Electa una via non datur recursus ad alteram.* This maxim, which no general text of law justifies, has been borrowed from the Roman law which never formulated it in precise terms. Revue de législation et jurisprudence (1866), tome 28, p. 412. Its principle is stated in Revue critique de législation (1933), v. 53, p. 85:

> Le principe *Electa una via* 'est fondé sur l'humanité et aussi sur la justice qui ne permettent pas qu'on traîne un accusé d'une juridiction dans une autre et qu'on décline à son préjudice celle qu'on a volontairement saisie parce qu'on ne la croit peut-être pas favorable aux demandes qu'on a formées par devant elle'.

The rule is formulated in these terms in Dalloz (1955), Encyclopédie juridique, Procédure, tome 1, p. 55, n° 181:

> D'après elle, si la victime d'une infraction peut, à son choix, agir en réparation devant la juridiction civile ou devant la juridiction répressive, son option a un caractère irrévocable.

In France, the maxim has no application in civil matters and only in criminal matters does jurisprudence take it into account. Glasson et Tissier, Précis de procédure civile (1925), tome 1, p. 427, n° 174. Whatever be the situation in other jurisdictions, the maxim appears to have no application whatever in the Province of Quebec. In this respect, reference may be had to the provisions of s. 10 of the

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Fauteux J.

Criminal Code of Canada; Roy, Droit de plaider (1902), p. 7, n° 9, Ferland, Traité sommaire et Formulaire de procédure civile (1962), pp. 4-5. Even if it could be held to be part of the law in the Province, it cannot, in my opinion, operate to prevent an inquiry under the *Youth Protection Act,* which is not a judicial process of the nature and character of the judicial proceedings contemplated by the maxim.

In short, nothing has been shown and I can find nothing in the *Youth Protection Act* supporting the proposition that the jurisdiction of a Judge of the Social Welfare Court to embark upon an inquiry—be that in the case of a child brought before him by a person in authority within the meaning of s. 1(*e*) or as a result of an order of the Judge—is subject to the limitations suggested by appellant, which, in essence, appear to be inspired by the fear that a custody order, conflicting or in any way different from that which was made by the Superior Court, might issue at the conclusion of the inquiry. I am in respectful agreement with Mr. Justice Casey, who delivered the judgment for the Court of Appeal, that an inferior Court may not be prevented from exercising the jurisdiction, conferred on it by a valid statute, through fear that its judgment may contradict that of another Court.

The only remaining point is one of which no mention is made in the reasons for judgment of the Court of Appeal or in appellant's factum where the limited extent of the attack on jurisdiction is, as shown from the quotation above, well defined. This point seems to have been mentioned for the first time at the hearing in this Court. It is said that Judge Long did not have before him information that the child involved was in the conditions described in s. 15 and, that being so, he had no legal authority to order the child before him. With deference, I am unable to agree with the premise of this proposition. The procedure set out in s. 15 is of a civil nature. I do not think that the word "information", in the context in which it appears, has the technical meaning ascribed to the same word, in penal or criminal proceedings, and that rules, related to the sufficiency of an information or indictment, are here relevant. The question is whether Judge Long was given information of the nature indicated in the Act. I think he was. The petition contains two allegations, sworn to before him, one of which repeats

the words of the Statute. The record does not permit an assumption that Judge Long did not ask and did not obtain details pertaining to this particular case. The holding of an inquiry, under the *Youth Protection Act,* is, of course, a serious matter. It may very well be that the decision to embark upon an inquiry was unwise. We are concerned here with jurisdiction and not with the manner in which it was exercised. I see nothing in this Statute, specially enacted for the protection of children, which suggests that the Legislature intended that the wide authority, conferred on a Judge of the Social Welfare Court to order a child to be brought before him, should be narrowed by procedural considerations.

I would dismiss the appeal with costs.

The judgment of Martland and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—By a judgment of the Superior Court of the Province of Quebec dated November 27, 1957, the appellant obtained a separation from her husband, Stanislav Keller (hereinafter referred to as Keller) and custody of the two children of their marriage, Stephen and George.

On April 28, 1959, by an act of the Parliament of Canada, she obtained a divorce from Keller.

On March 1, 1961, a judgment of the Superior Court dismissed a petition by Keller for revision of the earlier judgment of that Court.

A further petition was submitted by Keller to the Superior Court on January 23, 1962, seeking custody of the two children. After several adjournments this petition was adjourned *sine die* on March 14, 1962.

On November 12, 1962, Keller signed a petition before the respondent, Honourable John W. Long, a judge of the Social Welfare Court, seeking the holding of an inquiry pursuant to s. 15 of the *Youth Protection Act,* R.S.Q. 1941, c. 38, as amended (now c. 220, R.S.Q. 1964), in respect of the child George Keller. As a result, a notice, dated the same day, was issued and served upon the appellant, advising her that an inquiry as to the particular circumstances in which George Keller is found would be held on November 21, 1962, before a judge of the Social Welfare Court.

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Martland J.

Upon receipt of this notice, the appellant obtained the issuance of a writ of prohibition on April 4, 1962, by a judgment of the Superior Court. Appearances were filed by the respondents, Judge Long and the Social Welfare Court, but only the latter filed a contestation. The respondent Keller did not appear. By a judgment of the Superior Court on January 22, 1964, the writ of prohibition, previously authorized, was declared peremptory.

An appeal was taken by the Attorney General of Quebec pursuant to the provisions of art. 1210 of the *Code of Civil Procedure*. This appeal was allowed by unanimous decision of the Court of Queen's Bench (Appeal side).[1] From that judgment the appellant, by leave of this Court, has appealed.

The question in issue before this Court is as to whether the Social Welfare Court exceeded its jurisdiction when it directed an inquiry in relation to George Keller. That issue involves a consideration of the provisions of the *Youth Protection Act,* which is now c. 220, R.S.Q. 1964. The references to sections in these reasons are to the sections of that Act, which are the same as the ones applicable at the relevant times, although the former numbering was slightly different.

The Act, as its name indicates, was enacted to provide for the protection of children particularly exposed to moral or physical dangers by reason of environment or other special circumstances. It is divided into eight divisions.

Division I contains the interpretation section, s. 1, the relevant portions of which are as follows:

> *(c)* "judge": a district judge, except in a territory under the jurisdiction of a Social Welfare Court, where it means a judge of such court;
>
> * * *
>
> *(e)* "person in authority": the father, mother, tutor and subrogate tutor of a child, rector (curé), any school commissioner of the locality where the child is, any person designated ex-officio by the judge in a particular case, and any officer of any social organizations looking after the welfare and protection of children and who shall be officially recognized as such by the Minister;
>
> *(f)* "child": a boy or a girl apparently or effectively aged less than eighteen years;

[1] [1965] Que. Q.B. 689.

Division II deals with the establishment of youth protection schools.

Division III deals with the duties of the directors of such schools.

Division IV is entitled "Admission and Sojourn of Children in Schools" and it contains s. 15, which is the provision of the greatest importance in this case. The relevant parts of that section provide as follows:

15. (1) When a child is particularly exposed to moral or physical dangers, by reason of its environment or other special circumstances, and for such reasons needs to be protected, any person in authority may bring him or have him brought before a judge. A judge may also, upon information which he deems serious to the effect that a child is in the above described conditions, order that he be brought before him.

Without limiting the generality of the provisions of the preceding paragraph, children whose parents, tutors, or guardians are deemed unworthy, orphans with neither father nor mother and cared for by nobody, abandoned, illegitimate or adulterine children, those particularly exposed to delinquency by their environment, unmanageable children generally showing pre-delinquency traits, as well as those exhibiting serious character disturbances, may be considered as being in the conditions contemplated by the preceding paragraph.

Throughout the pendency of the case the judge, in case of urgency, may take for the benefit of the child such provisional protective measures as he may deem useful by confiding the child to any person, home, society, reception centre or institution capable of receiving him temporarily.

The judge may also whenever he deems it expedient, issue an order to bring or have brought before him any child whose case is pending before the Court.

The judge shall make an inquiry, in judicial form, into the particular circumstances in which the child is situated.

Notice in writing of such inquiry and of the time and place when and where it will be held must be served on the father and mother or one of them, on the tutor or on those having custody of the child; the latter shall have the right to be heard and to submit any proof which the judge deems relevant.

(2) The judge may then, according to circumstances and after consultation, if need be, with a social agency, leave the child at liberty under supervision, confide him to any person or society, recommend to the Minister that he be entrusted to a school, to a public charitable institution or to a social agency, or take any other decision in the interest of the child.

Division V deals with the cost of custody of children. Division VI defines various offences under the Act. Section 39(2) has some relevance to this case:

39. (2) Whosoever, wilfully and without valid excuse, exposes a child to a serious moral or physical danger or, being responsible for such child, neglects to protect him from such danger in a manner and in circumstances

1966

KREDL
v.
ATTORNEY GENERAL OF QUEBEC
et al.

Martland J.

not covered by the Criminal Code, is liable, on summary conviction, to a fine not exceeding three hundred dollars or to imprisonment not exceeding one year, or to both penalties together, in addition to the costs.

Division VII covers the final discharge of children and Division VIII contains miscellaneous provisions.

Under the terms of this Act a judge has important duties to perform in relation to children particularly exposed to moral or physical dangers because of environment or other special circumstances, with power to place them in the care of persons, societies, schools, charitable organizations or social agencies. He is given broad powers to control the destinies of such children, including the power to remove them from the custody of their own parents. Such a power is not to be exercised lightly, and in entrusting it to a judge the Legislature has spelled out in s. 15 the circumstances which must exist before he can do so.

Under the first paragraph of s. 15(1) a child may be brought before a judge in one of two ways. A "person in authority" may bring a child before him or have him brought, when such child is "particularly exposed to moral or physical dangers, by reason of its environment or other special circumstances, and for such reasons needs to be protected".

It should be noted that the child must be *"particularly"* exposed to such dangers and needs to be protected.

The second paragraph of s. 15(1) contains specific instances of what may be considered as the conditions contemplated by the first paragraph. These include "exhibiting serious character disturbances".

The second way in which a child may be brought before a judge is by his own order, which he may make "upon information *which he deems serious*", to the effect that a child is in the conditions described earlier in the first paragraph of s. 15(1), and which have been described above.

This provides a method whereby a person not having custody or control of a child may seek the intervention of a judge to have such child brought before him, and it was this method which was invoked by Keller in the present case.

The power of the judge to make such an order is set out in this subsection. He can do so only if he has information, which he deems serious, to the effect that the child is particularly exposed to moral or physical dangers by reason of environment or other special circumstances and for such reasons needs to be protected.

I turn now to consider the information which was before the judge in the present case. It consisted of a written petition by Keller, sworn to before the judge, which read as follows:

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO. 1481/62

SOCIAL WELFARE
COURT

Youth Protection Schools Act
(As modified by 14-15 Geo. VI,
chapter 56).

Petition re child GEORGE KELLER child of Mr. and Mrs. Stanislav Keller (Emily M. Kredl)

I am one of the persons in authority mentioned in section 1 (paragraph e) of the Youth Protection Schools Act, to wit Mr. Stanislav Keller, father of the said child, 4461 Linton Ave., apt. 5.

I have reasons to believe and I do believe that the child GEORGE KELLER under the age of eighteen years, is particularly exposed to moral and physical dangers by reasons of his environment or other special circumstances, and for such reasons needs to be protected. The boy is being kept away from the father, the boy is being prejudiced against the father, all of which may lead to serious character disturbances.

Wherefore I pray that one of the judges of the Court of Social Welfare apply the provisions of section 15 of the Youth Protection Schools Act (14 George VI Chapter II as modified by 14-15 Geo. VI, Chapter 56) and conduct an inquiry as to the particular circumstances in which this child is found.

(Signed) STANISLAV KELLER

Sworn to before me at Montreal
this 9th day of November 1962.
(Signed) J. W. Long,
Judge of the Social Welfare Court
District of Montreal.

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Martland J.

The essential part of this petition is contained in the second paragraph. Keller there expresses a belief that George Keller is particularly exposed to moral and physical dangers by reason of his environment or other special circumstances and for such reasons needs to be protected. This is merely a repetition of the wording of the first sentence of s. 15(1). This, in my opinion, is not sufficient unless the facts on which that belief is founded are stated. Under s. 15, before ordering an inquiry, the judge must have before him *information*, which he deems serious. I understand this to mean an allegation of circumstances which create a particular exposure to moral or physical danger.

Keller then goes on to state what are the reasons for his belief:

> The boy is being kept away from the father, the boy is being prejudiced against the father, all of which *may* lead to serious character disturbances.

(The italics are mine.)

As to the allegation that George Keller was being kept away from his father, it is clear that this separation was the consequence of the custody order granted by the Superior Court. Keller did allege, in his petition to the Superior Court of January 23, 1962, that he had been denied the right to see his children, given to him by the Superior Court, but he did not proceed with that petition, which was adjourned *sine die*.

The contention that the child was being prejudiced against the father and that this might lead to serious character disturbances is not, in my opinion, an allegation that the child was particularly exposed to moral or physical danger. The second paragraph of s. 15(1) refers to the actual exhibition of serious character disturbances.

In my opinion the judge did not have before him information to the effect that George Keller was in the conditions described in the first sentence of s. 15(1), and, that being so, he had no legal authority to bring the child before him for an inquiry.

In reaching this conclusion, I do not feel that I am adopting a technical approach to the provisions of the *Youth Protection Act*, which would impair its proper operation. The Act is an important means for the protection of neglected children and, for that reason, clothes the judge

with wide powers. On the other hand, it certainly was not designed to serve as a weapon in the hands of a disgruntled parent who has been unsuccessful in custody proceedings in the Superior Court.

If it is open to any person to compel the appearance of a child before a judge for an inquiry merely by swearing to a belief that it is particularly exposed to moral or social danger the consequences may be serious indeed. Individual beliefs as to what constitutes moral danger to a child may vary widely. Consequently the Act requires that, before summoning a child before him for an inquiry, the judge must have information to the effect that the conditions defined in s. 15(1) do, in fact, exist. In my opinion the Act does not contemplate that, without that much information before him, a judge can compel a parent, in lawful custody of a child, to produce that child before him.

The holding of an inquiry, under s. 15, is a matter of serious consequence to a child and to the parent in lawful custody of that child. The child faces the possibility of being removed from the custody of its parent and being placed in the care of another person, school, institution or agency. The parent is faced with the possibility of a charge under s. 39(2) of the Act, the provisions of which have been previously quoted.

In my opinion, the appeal should be allowed, and the judgment of the Superior Court restored, with costs throughout.

Appeal dismissed with costs, MARTLAND *and* HALL JJ. *dissenting.*

Attorneys for the appellant: Biega, Beauregard & Kooiman, Montreal.

Attorney for the respondents: L. E. Bélanger, Montreal.

1965

*Oct. 19, 20

1966

Jan. 25

THE WINNIPEG SUPPLY & FUEL CO. LTD. (*Claimant*) ..... APPELLANT;

AND

THE METROPOLITAN CORPORATION OF GREATER WINNIPEG (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Expropriation—Part of claimant's property expropriated for traffic interchange—Misapprehension of evidence upon which valuation of damages based—Arbitrator's award reduced by Court of Appeal—Majority judgment of Court of Appeal also found to have overlooked or misapprehended material evidence—Compensation fixed by Supreme Court.

The appellant company owned a property at the north-east corner of Portage Avenue and Madison Street in the City of Winnipeg, having a frontage on Portage Avenue of 332.5 feet and a depth running along the easterly limit of Madison Street of 624.16 feet, containing 201,504 square feet. The respondent expropriated 55,521 square feet of the said property. The portion expropriated was at the south-west corner of the appellant's lands, *i.e.*, that portion immediately adjacent to the intersection of Portage Avenue and Madison Street and after the expropriation the appellant was left with only 193.43 feet frontage on Portage Avenue plus an additional frontage on a widened portion of that avenue, and with no frontage remaining on Madison Street. The property was taken so that the respondent could construct on it and on other property in the area a large traffic interchange.

The appraisers for both the appellant and the respondent were in agreement that the value of the property before the expropriation would have averaged about $2.85 per square foot. They differed, however, when they came to value what was left after the expropriation. The appellant's appraiser valued this at $1.25 per square foot, the respondent's appraiser at $2.60 per square foot. In their evidence before the trial judge the appraisers attempted to use the "before and after" method of arriving at the damages suffered by the appellant. That is they found the value of the property as a whole before the expropriation and then attempted to find the value of the property left after the expropriation, and by deducting the latter figure from the former, they purported to find the amount of damage that the appellant suffered by the expropriation. Having found that the evidence was not sufficient to apply the "before and after" method in a proper manner, the trial judge, taking part of the evidence of the respondent's appraiser, proceeded on a frontage basis and arrived at a valuation of $280,000. The majority in the Court of Appeal in reducing the award to $195,000 found error in the trial judge's method of valuation.

Held (Judson J. dissenting): The appeal should be allowed and the compensation fixed at $242,000.

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

Per Martland, Ritchie, Hall and Spence JJ.: The trial judge was entitled to fix a valuation for the premises which were expropriated rather than attempt a "before and after" method, but in so doing he had misapprehended the evidence upon which he based his valuation of damages. This placed the Court of Appeal in the position where it was necessary to "make its own valuation on a proper and recognized basis". The majority in that Court, accepting the evidence of the respondent's appraiser, turned back to the "before and after" method. If they were justified in accepting the said evidence it must be upon a consideration that that evidence was so plainly correct and of such preponderance that the finding of the trial judge could not be maintained in opposition to it.

An examination of the evidence of the respondent's appraiser showed that there was no sound basis for starting his calculation of injurious affection by deducting a certain amount from the artificial figure of $2.85 per square foot. Secondly, he was of the opinion that the value of the property after the taking had not been reduced in value except for the 25¢ per square foot reduction he allowed on the question of access. This opinion could not be supported by the evidence.

The majority judgment of the Court of Appeal had also overlooked or seriously misapprehended much material evidence of fact, and this Court, as was the Court of Appeal, was called upon to "make its own valuation on a proper and recognized basis". This task had already been done for the Court in the dissenting judgment of Schultz J.A. in the Court below, where, as here, the following elements were considered:—the construction greatly reducing the suitability of the remaining property for expropriation purposes, eliminating or lessening many of the advantages it possessed; the problem of access involved in the curving roadways having ostensible purpose of facilitating traffic; the change from a corner type property to a property abutting on a busy traffic interchange; the extremely wide frontage on Portage Avenue combined with the great depth being now reduced by about one-third, and left of irregular shape, including an unusable triangle and the great interference with access.

Schultz J.A. adopted two methods of considering the valuation, *i.e.*, a "before and after" method and the actual valuation of the property taken; by either method the valuation arrived at was roughly $242,000. In view of the fact that the latter calculation by frontage did not consider the injurious affection to the balance of the property, the valuation arrived at by fixing a deduction on square foot rate for the injurious affection of the property which remained was a sounder method. The reasons for judgment of Schultz J.A. were accepted in that they arrived at a sum of $242,000 particularly by the use of that method.

Per Judson J., *dissenting:* The "before and after" approach was the only possible approach in this case. The land taken, had it stood alone, would have been close to being unmarketable. No one would have paid $280,000 for it and there was no suggestion that it could have been sold separately. The majority in the Court of Appeal were correct in accepting the evidence of the respondent's expert in preference to that of the claimant's expert. The latter expert had made five basic errors in arriving at his opinion of value.

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from an expropriation award by Solomon Co.Ct.J. Appeal allowed, Judson J. dissenting.

Clive K. Tallin, Q.C., and *J. McJannett,* for the appellant.

D. C. Lennox and *F. N. Steele,* for the respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the claimant from the judgment of the Court of Appeal for Manitoba pronounced on December 31, 1964. By that judgment the Court allowed an appeal by the present respondent from the judgment of His Honour Judge J. R. Solomon pronounced on March 18, 1964, in which he had fixed the damages of the claimant for the expropriation of part of its property by the respondent at $280,000.

The Chief Justice of Manitoba, with Mr. Justice Guy and Mr. Justice Monnin concurring, allowed the appeal from a judgment of the County Court Judge by reducing the amount of the said damages to $195,000. Mr. Justice Schultz dissenting would only have varied the judgment of the trial judge by reducing the damages allowed from $284,000 to $242,000.

It would seem that no purpose can be served by a review of the jurisprudence in reference to the variation by the Court of Appeal of an award made by an arbitrator. Sufficient to say that the Court of Appeal has jurisdiction to act when the arbitrator has proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact. With respect it would appear that both of those grounds for variation of award were present in this case.

The appellant owned a property at the north-east corner of Portage Avenue and Madison Street in the City of Winnipeg, having a frontage on Portage Avenue of 332.5 feet and a depth running along the easterly limit of Madison Street of 624.16 feet, containing 201,504 square feet. By By-law No. 202, registered in the Winnipeg Land Titles Office on June 26, 1962, the Metropolitan Corpora-

tion of Greater Winnipeg expropriated 55,521 square feet of the said property. The portion expropriated was at the south-west corner of the appellant's lands, *i.e.*, that portion immediately adjacent to the intersection of Portage Avenue and Madison Street and after the expropriation the appellant was left with only 193.43 feet frontage on Portage Avenue plus an additional footage to which reference shall be made hereafter on what turns out to be a widened portion of Portage Avenue, and with no frontage remaining on Madison Street.

The extent of and the effect of the expropriation may best be visualized by a scrutiny of Schedule B of Exhibit 23 a plan attached to the report of the appraiser who gave evidence for the respondent. What remained was a property consisting of 145,983 square feet having an average width of about 210 feet by a depth of 646 feet but being irregular in shape on both the south limit and the west limit and including a sharp triangle where the property ran out to Madison Street at a point.

The purpose of the expropriation is in the present case most important. The property was taken so that the Metropolitan Corporation of Greater Winnipeg could construct on it and on other property in the area a large traffic interchange providing a new access to the St. James Bridge which crosses the Assiniboine River to the south of Portage Avenue. The effect of this interchange construction will be considered in some detail hereafter.

Before the learned County Court Judge evidence was given by appraisers called both on behalf of the claimant and on behalf of the respondent Corporation. Those witnesses were in substantial agreement that the property expropriated was in the middle of a very rapidly growing commercial area and in fact the appraiser for the municipal Corporation the respondent, swore that since 1960 the property in the area had, in many cases, more than doubled in value. They were in agreement that the value of the property before the expropriation would have averaged about $2.85 per square foot. From that point, however, the witnesses varied most startlingly. The appraiser for the claimant put the value of the premises which remained after the taking at only $1.25 per square foot, while the appraiser called for the respondent municipal Corporation put the value of the property which remained at $2.60 per

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Spence J.

square foot. Commenting on that evidence the learned County Court Judge said:

> I am satisfied that both appraisers placed such value on the subject property after expropriation which would reflect the claims of their respective clients. I am satisfied that the value of the subject property after expropriation is more than $1.25 per square foot but less than $2.60 per square foot if the formula the appraisers used is to be applied for arriving at the value of the expropriated land.

I adopt herein the reasons for judgment of Schultz J.A. in the Court of Appeal for Manitoba when he said:

> . . . Where the experts' opinions vary as much as they do here the question of their competence, credibility and the weight of their testimony is primarily for the trial judge. This Court has consistently adhered to the policy of not requiring a trial judge to believe evidence which he finds unconvincing and of declining to substitute its judgment for his upon issues which it is his function to determine. The learned trial judge has made it convincingly clear that he could not and did not accept either of the valuations submitted by the appraisers as to the loss in value to the claimant's property as a result of the expropriation, and, with respect, I do not think this Court can disregard his finding in that regard. Having reached that conclusion, the learned trial judge proceeded to make his award on a basis I will discuss later.

In their evidence before the learned County Court Judge, both the appraisers called on behalf of the appellant and the appraiser called on behalf of the respondent Corporation had attempted to use the "before and after" method of arriving at the damages suffered by the appellant. That is they found the value of the property as a whole before the expropriation and then attempted to find the value of the property left after the expropriation, and by deducting the latter figure from the former, the appraisers purported to find the amount of the damage that the appellant suffered by the expropriation. As Schultz J.A. remarked in his reasons for judgment in the Court of Appeal of Manitoba:

> . . . Theoretically, but only theoretically, the 'before and after' method is ideal, for the result presumably includes in one lump sum all of the factors of compensation requiring consideration, namely, value of the land taken, plus severance damage to the remainder, less special benefits arising out of the taking.

Having expressed his dissatisfaction with the evidence of the expert witnesses as to the value of the property after expropriation in the terms which I have quoted above, the learned County Court Judge then turned to part of the evidence given by the appraiser for the respondent municipal Corporation. That expert witness, one Farstad, had tried various methods of arriving at his result and in one of

those methods he divided the property into a strip of 332.6 feet in length and 120 feet in depth along the north side of Portage Avenue and then another strip commencing at the rear of the first on Madison Avenue of 410 feet in length by about 111 feet in depth and then the balance of the property to the rear of the two pieces which he found amounted to about 97,140 square feet, and he placed values before expropriation of $1,000 per frontage foot for the 332.6 feet fronting on Portage Avenue and $350 per frontage foot for the 410 feet fronting on Madison Street, and $1 per square foot for the 97,140 square feet in the inside property, thereby arriving at a total value of the land before expropriation of $573,240.

The learned trial judge simply applied these frontage values to the property taken describing it as 141.17 feet on Portage Avenue and 410 feet on Madison Street and, allowing the Portage Avenue feet at $1,000 per frontage foot, obtained a damage of $141,170 and allowing the $350 rate to the 410 feet frontage on Madison Street, found a damage of $143,500. Those two amounts he totalled to $284,670 and then deducted therefrom the $4,670 because a part of the frontage taken on the Portage Avenue side was only to a very short depth.

It will be seen that the County Court Judge thereby deserted the "before and after" method of arriving at the damages. Of course, the County Court Judge was entitled to refrain from adopting that method when he found that the evidence was not sufficient for him to apply it in a proper manner.

With respect I agree with the Chief Justice of Manitoba when he said:

> I am of the opinion that the learned County Court Judge oversimplified his valuation. He disregarded the approaches of the appraisers of both sides and simply adopted figures that had been mentioned in one of the appraisal reports.

It should be noted that the learned County Court Judge in proceeding in the said fashion fell into these errors of principle or failure to comprehend the evidence:

(1) By applying the valuations to the expropriated property without considering any injurious affection on the balance of the property he arrived at a result which failed to give due weight to the latter factor.

(2) Secondly, and most important, he did not realize that the appraiser giving the evidence had given such frontage valuations on the basis

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Spence J.

that the premises were to be sold in one lot including the large square foot area to the rear of both frontages. It should be noted that the said appraiser in giving evidence said:

> In my opinion if it had been, and this does not mean that it would have been sold in separate parcels, I merely indicated values to the overall development of this whole site based on probable values indicated on Portage Avenue, that is, the property had a value as high as $1,000 per foot for which 332.6 feet was $332,600. The Madison Street frontage averaged 410 feet at $350 per foot for a value of $143,500 and the remaining inside land of 97,140 square feet at $1.00 per square foot amounting to $97,140 *for a total of $573,240*. (The italics are my own.).

(3) The learned trial Judge fixed the frontage on Portage Avenue taken in the expropriation at 141.17 feet and although he allowed $4,670 off the value of such frontage, by such allowance he failed signally to reflect the fact that of that frontage 46.39 feet were taken only to a depth of about 50 feet so that the effective taking away of Portage Avenue frontage, remembering that the balance fronted on Portage Avenue as widened, was only 94.78 feet.

To summarize, the learned County Court Judge was entitled to fix a valuation for the premises which were expropriated rather than attempt a "before and after" method, but in so doing he misapprehended the evidence upon which he based his valuation of damages.

Under such circumstances I agree with the Chief Justice of Manitoba when he stated:

> This places this Court in the position where it must make its own valuation on a proper and recognized basis.

The Chief Justice then turned back to the "before and after" method of arriving at a quantum of damages. This course the Chief Justice was entitled to take as was the County Court Judge in his refusal to use that basis, the latter being of the opinion that the evidence upon which it could be used had not been given. The Chief Justice continued:

> .....I favour the appraisal arrived at by Mr. Farstad, the appraiser for the respondent, The Metropolitan Corporation of Greater Winnipeg. He has made several approaches, all of which are reasonable, well-balanced, and would stand scrutiny. In his summary of values Mr. Farstad proposes:
>
> | | |
> |---|---|
> | Value before the taking | $ 575,000 |
> | Value after the taking | 380,000 |
> | Difference, including all damages to the remainder | $ 195,000 |

I have already quoted and adopted the statement of Schultz J.A. as to the task of the Court of Appeal in

considering the finding of a trial judge as to the testimony given by expert witnesses. Therefore, it is my view that if the majority of the Court of Appeal were justified in accepting the evidence of Mr. Farstad, it must be upon a consideration that that evidence was so plainly correct and of such preponderance that the finding of the learned County Court Judge could not be maintained in opposition to it.

Let us examine the evidence of Mr. Farstad leading him to give the results quoted by the Chief Justice of Manitoba. The value before taking of $575,000 was arrived at, as I have said, by two methods: Firstly, by taking $1,000 per frontage foot for 332.6 feet on Portage Avenue, plus $350 per frontage foot for 410 feet on Madison Street, and then $1 per square foot for 97,140 square feet of the back property, and also by hitting a mean between $2.75 and $3 a square foot for the whole property. Since $575,000 for 201,594 square feet is at the rate of $2.85 per square foot, one wonders whether the evidence is not an example of what Schultz J. A. was referring to when he said:

> Any result can be predetermined by simply altering any one of such factors.

What must be realized is that this sum of $575,000 is in fact the total of three valuations, *i.e.*, 332.6 feet frontage on Portage Avenue by a depth of 120 feet at $1,000 a foot; 410 frontage feet on Madison Street by a depth of 111 feet, at $350 a foot; and 97,140 square feet to the rear at a rate of $1 per square foot. If the square foot rate of the 332.6 frontage feet on Portage Avenue were taken on this basis, it would be, not $2.85 per square foot, but $7.14; and if the square foot rate of the 410 feet frontage on Madison Street were taken at this rate, it would not be $2.85, but $3.51. It must also be remembered that all of the property expropriated was within those two pieces of frontage. I am therefore of the opinion that there was no sound basis for Mr. Farstad starting his calculation of injurious affection by deducting a certain amount from the artificial figure of $2.85 per square foot.

Secondly, Mr. Farstad only allowed a deduction of 25¢ per square foot from that figure of $2.85 per square foot to cover the injurious affection of the land and it was put by

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Spence J.

counsel for the respondent the evidence would seem to justify the view that the whole of that 25¢ was attributable to the reduced access to the new property. Yet Mr. Farstad, even on examination-in-chief, described the property remaining as

> A long narrow strip of land remaining for eventual development.

In cross-examination Mr. Farstad attempted to maintain that the property before taking was also "narrow to some extent for certain types of development", yet he admitted that the original frontage on Portage Avenue of 332 feet was more than a full city block. He further admitted in cross-examination that although the premises had been suitable for a super market or a motor hotel development, and perhaps even a department or discount store or high-rise apartment, that it was no longer suitable for the same range of commercial or industrial or even residential development. His actual reply was:

> There would be some restrictions against some of these things, yes. There would be a lesser number of potential developments on the site.

Again, Mr. Farstad admitted that although there was a frontage remaining on Portage Avenue, as a result of the expropriation, there was no frontage remaining on Madison Street as the side there was not on a street. This I shall deal with later when I speak of the question of access.

Why then did Mr. Farstad find that the value of the property after the taking had not been reduced in value except for the 25¢ reduction he allowed on the question of access? It would appear from a perusal of the evidence that Mr. Farstad arrived at this conclusion by considering that many of the properties bordering the north side of Portage Avenue west of Madison Street had been removed so that now it was possible to see the subject property from the St. James Hotel site some distance east of it, and that therefore the property had an "advertising value" and a "corner influence" which it had not possessed before.

In evidence, Mr. Farstad, when asked what effect the demolition had upon the subject property, answered:

> A. This has really opened up the area completely. From the St. James Hotel to the subject property there are no more buildings.
>
> Q. When you used the words opened up, what do you mean?
>
> A. In other words, you now have a complete view of the property from any point at the St. James Hotel or as you are driving by.

And further:

Q. Yes, it is not on a street. Would you say that frontage that is not on a street has any great value as commercial or industrial use?

A. I would say this property has after because of the fact that it can be seen. Access of course is a problem but this does still have corner influence in a sense.

Q. There might be some corner influence?

A. There is.

Q. But it would not be worth $350 a foot?

A. It could well continue to be worth $350 to some potential buyer.

Q. But not to many?

A. Maybe not to some.

To the Court in answer to the question:

Q. You were considering by putting this loop or this interchange that this might better the location to some extent; is that your opinion?

A. That is right, sir, because of the opening up of the demolition of the buildings to the west. So some of this was betterment in my opinion. And I know this is purely a matter of opinion.

It would appear that Mr. Farstad's evidence is based on a view of the property after demolition had proceeded so that the whole area was a bare flat one and did not take into consideration that that area did not so remain, but in it there was placed a very large overpass and interchange. Although the only exhibit which showed the site after the construction will have been completed is Exhibit 19, and that is a plot plan without elevations, it is apparent that the plan was to have Portage Avenue cross over the level of Kensington Street. Through the area Portage Avenue would appear to have two lanes, one for eastbound and one for westbound traffic, each about 51 feet wide with a median strip running down the centre some 7 feet wide. The "corner influence" and the "advertising value" would be with reference to those persons who are proceeding from west to east on Portage Avenue approaching the premises from Queen Street or one of the streets to the north. Those persons would be driving on the right hand or southerly side of the street with a 7-foot median to their left, then another 50 feet of pavement and in addition some type of railing must run along the northerly side of the bridge over Kensington Street.

Moreover, the subject property will be right at this great interchange and under such circumstances I cannot see that there is any advertising value which will make any marked difference in the damage caused by the expropriation.

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Spence J.

Drivers of vehicles eastbound on Portage Avenue will have little opportunity to look to their left across median, pavement and bridge rail to observe the subject property. Drivers of vehicles northbound under the underpass will not even be able to see the subject property as they will be running in a channel some thirteen feet deep. Drivers of vehicles winding their way up the loops from the underpass to Portage Avenue will be too much engaged to look around at properties. I am therefore of the opinion that the so-called advertising value of the property has been much exaggerated.

What remains is a property not one of the largest available in that area of Portage Avenue, as the evidence showed it was before the expropriation, and which was about 330 feet on Portage Avenue by 645 feet odd in depth, but a property of only an average width of 211 feet with less frontage on Portage Avenue and which, on its southerly and westerly borders, is of uneven contour and includes a sharp triangle which will be most difficult to develop.

When one turns to the question of access, an even more startling situation is revealed. Exhibit 12, a sketch, illustrates the access prior to the taking and shows a total of five accesses, two directly from Portage Avenue and three directly from Madison Street on a level. In addition there was one other access from a lane running easterly from Madison Avenue and then turning southerly into the property. That lane was only 30 feet wide to the corner and from there westerly only 20 feet. It was said that the lane was of little use as an access and one cannot imagine a long vehicle negotiating that sharp turn into a 20-foot roadway with any success. The access after the taking is illustrated in Exhibit 13. The two entries from Portage Avenue have been reduced to one. There is an entry and an exit into the southerly or outer loop of the interchange and there remains the access to the rear through the lane which I have described.

Exhibit 19, the plot plan, illustrates the first three of these accesses after the taking. It will be noted that the accesses on to the loop are of very little value for either northbound or southbound traffic on the loops. The northbound traffic is running in a loop of an interchange and drivers would find, I think, some hazard in even turning right into the premises at the most westerly of the two cuts

in the curve. Similarly, a driver leaving the premises through the most easterly would find difficulty in driving into the traffic along that loop. The entry for the person who had been northbound and who came through the interchange, swung around the inner loop and then dived—and I think that is an appropriate word—through the opening in the median across the outer loop and into the subject property would be most hazardous. Moreover, these two accesses cut into the property from the outer loop are subject to future action by the municipality should the traffic conditions show that their use was causing an obstruction to traffic, and the claimant has been warned that action will be taken to close the accesses in such event.

I am of the view, therefore, that there has been a very serious limitation in the access to the property by the replacement of the three straight entries on to Madison Street, a two-way street, with these two provisional and conditional cuts from a loop into the property and of the elimination of one of the two access entries from Portage Avenue.

It would seem, therefore, that again Mr. Farstad's opinion that such interference with access only made a diminution of 25¢ per square foot in the value of the property ascertained cannot be supported by the evidence. I am in agreement with the view expressed by Schultz J.A., when he said:

> . . . The difficult conditions existing in regard to access after the taking would unquestionably be considered as having some element of hazard by a prudent investor as compared to the situation before expropriation when northbound traffic was completely free of any such hazards.
>
> Southbound traffic had direct access to the property via Madison Street prior to the taking. This approach is now eliminated and access from the north much longer and more circuitous.

I am, therefore, of the opinion that the majority judgment of the Court of Appeal of Manitoba has also overlooked or seriously misapprehended much material evidence of fact, and that this Court, as was the Court of Appeal of Manitoba, is called upon to "make its own valuation on a proper and recognized basis". It would appear, however, that that task has already been done for us in the dissenting judgment of Schultz J.A., in the Court of Appeal for Manitoba. The learned Justice of Appeal has considered all of the elements to which I have referred

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Spence J.

hereinbefore, *i.e.*, the construction greatly reducing the suitability of the remaining property for expropriation purposes, eliminating or lessening many of the advantages it possessed; the problem of access involved in the curving roadways having ostensible purpose of facilitating traffic; the change from a corner type property to a property abutting on a busy traffic interchange; the extremely wide frontage on Portage Avenue combined with the great depth being now reduced by about one-third, and left of irregular shape, including the unusable triangle to which I have referred and the great interference with access. The learned Justice of Appeal adopts two methods of considering the valuation. In the first place, taking the $2.85 average valuation arrived at by Mr. Farstad by the arithmetical calculation to which I have referred above, he then reduced it by a factor for injurious affection of the property which remained for all of these reasons, *i.e.*, a "before and after" method. The learned Justice of Appeal, however, adopts, in my view, a much more realistic factor than that given by Mr. Farstad and adopted in the majority judgment of the Court of Appeal for Manitoba. In the evidence, as given by Mr. Farstad, appears this sentence:

> And with all this it is my opinion that the remaining land after the taking was worth $2.60 a square foot, which is only 25 *per cent* per square foot less than the $2.85 I gave or $379,555, make it $330,000.

This is, of course, an obvious error. $2.60 is only 8.7 per cent less than $2.85.

It may be that the error is that of the stenographer; on the other hand, the words "per cent" might have been said. It may be that the majority of the Court of Appeal were misled in considering that a 25 per cent reduction had been allowed rather than only a 25 cents reduction. At any rate, a reduction of 8.7 per cent, in my view, is not realistic and I am ready to agree with Schultz J.A. that a proper and realistic reduction is the 20 per cent reduction which he was ready to allow, *i.e.*, to value the property remaining after expropriation at $2.28 per square foot which would give a valuation of the damages caused at $241,445. Schultz J.A., however, realized that such procedure was subject to the many difficulties inherent in the "before and after" method

and therefore preferred to use the same method as used by the trial judge, *i.e.*, the actual valuation of the property taken. Noting that the true frontage on Portage Avenue was not 141.17 feet but only 94.78 feet, the learned Justice of Appeal was ready to allow $1,000 per foot for that frontage, *i.e.*, $94,780, and then the same $350 for the 410 feet frontage on Madison Street, *i.e.*, $143,500, and then added an amount for the narrow strip erroneously included in the frontage by the learned trial Judge and fixed that amount at $4,000 to arrive at a total of $242,000. So that, by either method, Schultz J.A.'s valuation arrives at roughly $242,000, an amount which he would have been ready to allow. In view of the fact that the latter calculation by frontage foot does not consider the injurious affection to the balance of the property, a subject which was very carefully dealt with in the reasons of Schultz J.A., I am of the opinion that the valuation arrived at by fixing a deduction on square foot rate for the injurious affection of the property which remains is a sounder method and I am ready to accept the reasons for judgment of Schultz J.A. in that they arrive at a sum of roughly $242,000 particularly by the use of that method.

There was considerable discussion during the argument as to interest. Counsel finally expressed the view that the interest adjustments could be left to their consultation and, if necessary, they could speak to the Court later.

I would allow the appeal and fix the compensation at $242,000; the claimant is entitled to the arbitration costs as provided in the trial Court; there should be no costs in the appeal and the claimant should have the costs of the appeal to this Court.

JUDSON J. (*dissenting*):—The majority of the Court of Appeal in reducing the award of the arbitrator from $280,000 to $195,000 found error in his method of valuation. The case was put before him by both experts in the same way. They valued the whole property before expropriation at approximately the same figure—in one case $2.85 per square foot and the other, $2.60 per square foot. They differed when they came to value what was left after the expropriation. The claimant's expert valued this at $1.25

1966

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Judson J.

per square foot, Metro's expert at $2.60 per square foot. The arbitrator did not think that the figure of $1.25 was of any use to him. On the other hand, he expressed dissatisfaction with the $2.60 figure but perhaps not quite as emphatically. He then took part of the evidence of Metro's expert and arrived at this valuation:

Portage Avenue:	141.17 feet at $1,000 per ft.	$ 141,170
Madison Street:	410 feet at $350 per ft.	$ 143,500
		$ 284,670

from which he deducted the sum of $4,670, leaving him with a round figure of $280,000.

The Court of Appeal thought this was an oversimplification of the problem and that it involved the misuse of the expert's figures that were given for an entirely different purpose:

> These values of $1,000 per foot and $350 per foot respectively were mentioned by Mr. Farstad, the appraiser for The Metropolitan Corporation of Greater Winnipeg, respondent, in his appraisal report, Exhibit 23, but not for the purpose for which they were used by the learned County Court Judge. Farstad used these figures as part of his "before and after" approach. One need only look at the plan and see how narrow and poorly proportioned the expropriated land is, to realize that it could not, standing by itself, be worth the $280,000 value attributed to it by the learned County Court Judge. The learned Judge did not allow, in his assessment of compensation, anything for injurious affection to the remaining parcel but simply sought to value the expropriated part and the evidence does not support his figure.

I agree with this criticism. I do not think that it was open to the arbitrator to deal with the problem as he did, having regard to the evidence before him. In my opinion, the approach of the experts was the only possible approach in this case. Metro took an irregular piece of land which, had it stood alone, would have been close to being unmarketable. This is the point of the criticism of the Chief Justice. No one would have paid $280,000 for this parcel of land and there was no suggestion in the evidence that it could have been sold separately. This emphasizes that the "before and after" approach was the only possible one in this case, and we have this common element that both experts were very close together in their valuation of the whole parcel.

The Court of Appeal, therefore, began with the figure given by Metro's expert of $575,000. They also accepted

this expert's valuation of the property after the taking, and the difference was $195,000. They had good reason for rejecting the low valuation of $1.25 per square foot for the remainder of the property which was made by the claimant's expert. As pointed out by counsel for the respondent, this expert made five basic errors in arriving at his opinion of value. These errors were:

(*a*) The zoning of the area was stated to be M2.

(*b*) The area of land being appraised incorrectly contained land which was not owned by the Claimant as at the date of the valuation.

(*c*) The estimate of value before the taking was based on an incorrect land area which did not include all of the land which was actually owned by the Claimant.

(*d*) One of the advantages attributed to the site before the taking, namely frontage, was incorrect with reference to the number of thoroughfares and actual frontage.

(*e*) There was an error of omission in that no reference was made to the access to the site from the public lane off Madison Street, either before or after the taking.

The issue in this appeal is whether the majority in the Court of Appeal were right in accepting the evidence of Metro's expert in preference to that of the claimant's expert. There is no doubt in my mind that they were.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the appellant: Tallin, Kristjansson, Parker, Martin & Mercury, Winnipeg.

Solicitor for the respondent: D. C. Lennox, Winnipeg.

1966

*Fév. 7

Fév. 11

ALPHÉE GAGNON ..... APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL ..... INTIMÉ.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Revenu—Impôt sur le revenu—Terres achetées et revendues par parties—Les profits réalisés sont-ils des revenus imposables ou des gains en capital—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

De 1946 à 1948, l'appelant était le vice-président et le gérant général d'une compagnie d'aviation civile. A partir de 1947, il a acheté plusieurs propriétés situées près du champ d'aviation de la compagnie avec l'intention déclarée que la compagnie puisse s'en servir pour des pistes d'atterrissage et pour cultiver le reste. Durant les années 1950 à 1955 il a vendu des parties de ces terres avec profit. De 1947 à 1955, il a conclu en tout vingt-deux transactions immobilières. Le Ministre a cotisé les profits réalisés par l'appelant durant les années 1950 à 1955 (à l'exception de 1952) comme étant des revenus imposables d'un commerce. La cotisation a été confirmée par la Commission d'Appel de l'Impôt et par la Cour de l'Échiquier. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Il n'y a pas lieu d'intervenir dans la présente cause. La Commission d'Appel de l'Impôt et la Cour de l'Échiquier ont justement décidé que le montant réclamé était légalement dû.

Taxation—Income tax—Land purchased and resold in parcels—Whether profits income or capital gain—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

From 1946 to 1948, the appellant was vice-president and general manager of a civil aviation company. From 1947 on, he bought several properties situated close to the company's airfield with the declared intention that the company would use some of them for runways and to farm the rest. During the years 1950 to 1955 he sold parcels of these lands with profit. From 1947 to 1955, he concluded twenty-two real estate transactions in all. The Minister assessed the profits realized by the appellant during the years 1950 to 1955 (1952 excepted) as income from a business. The assessment was upheld by the Income Tax Appeal Board and by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

There was no reason to interfere in the matter. The Income Tax Appeal Board and the Exchequer Court had properly decided that the amount claimed by the Minister was legally due.

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*CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Ritchie et Hall.

APPEAL from a judgment of Kearney J. of the Exchequer Court of Canada[1], affirming an assessment for income tax. Appeal dismissed.

1966

GAGNON v. MINISTRE DU REVENU NATIONAL

APPEL d'un jugement du Juge Kearney de la Cour de l'Échiquier du Canada[1], confirmant une cotisation pour impôt sur le revenu. Appel rejeté.

Taschereau J.C.

Gilles Poussard et *Brian Crane*, pour l'appelant.

P. R. Coderre, pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—Il s'agit de savoir dans cette cause si les cotisations fixées par le Ministre du Revenu National contre l'appelant à la somme de $10,368.32 pour les années 1950 à 1955 inclusivement, à l'exception de l'année 1952, doivent être maintenues. Le montant n'est pas contesté; seul le droit que peut avoir l'intimé de le réclamer fait l'objet de ce litige.

L'appelant a réalisé des profits sur des transactions immobilières, et c'est la prétention de l'intimé que ces profits sont sujets à l'impôt. La Commission d'Appel de l'Impôt a maintenu la décision du Ministre du Revenu National qui a confirmé les cotisations. La Cour de l'Échiquier[1] a rejeté l'appel et a conclu que les cotisations étaient justifiées.

Je ne crois pas qu'il y ait lieu d'intervenir dans la présente cause. Je suis, au contraire, d'opinion que la Commission d'Appel de l'Impôt et la Cour de l'Échiquier ont justement décidé que le montant réclamé était légalement dû.

L'appel doit être rejeté avec dépens.

Appel rejeté avec dépens.

Procureur de l'appelant: C. Rioux, Québec.

Procureur de l'intimé: P. Boivin, Ottawa.

[1] [1960] C.T.C. 435, 61 D.T.C. 1009.

1966

*Fév. 7
Fév. 11

CLAUDE BELLE-ISLE ..... APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL ..... INTIMÉ.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Revenu—Impôt sur le revenu—Vente de biens susceptibles de dépréciation —Reprise de la dépréciation consentie—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 20(1), 20(5)(c).

En 1958, l'appelant a vendu un hôtel qu'il avait acheté en 1951 au prix de $175,000, et qu'il exploitait depuis ce temps. Comme prix de vente, à une compagnie établie pour ces fins, l'appelant reçut 5,896 actions sans valeur au pair de la compagnie et qui furent évaluées à $29,480. En plus, l'acheteur assumait une hypothèque de $81,800 sur cet immeuble. Le même jour, l'appelant vendait pour un prix de $121,700 les 5,896 actions, soit $92,220 de plus que la valeur qui leur avait été attribuée originalement. Le Ministre a cotisé le profit sur les actions comme étant un revenu imposable, mais a subséquemment pris la position que le prix de vente de l'hôtel avait été de $203,500 ($81,800 plus $121,700), et que des biens susceptibles de dépréciation avaient été vendus pour un montant excédant leur coût en capital non déprécié. L'appelant était donc sujet à une reprise de dépréciation consentie au montant de $71,922.14 en vertu des dispositions de l'art. 20(1) de la *Loi de l'Impôt sur le revenu*, S.R.C. 1952, c. 148. La prétention du Ministre fut maintenue par la Commission d'Appel de l'Impôt et par la Cour de l'Échiquier. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Des contrats passés par l'appelant, il en est résulté un profit imposable, et pour les raisons données par la Commission d'Appel de l'Impôt et par la Cour de l'Échiquier, l'appel doit être rejeté.

Taxation—Income tax—Sale of depreciable assets—Recapture of capital cost allowance—Income Tax Act, R.S.C. 1952, c. 148, ss. 20(1), 20(5)(c).

In 1958, the appellant sold a hotel which he had bought in 1951 for $175,000, and which he had operated since. The buyer, a company formed for that purpose, assumed a mortgage of $81,800 on the building and also gave 5,896 of its shares without par value and on which a value of $29,480 was placed. The same day, the appellant sold the 5,896 shares for $121,700, or $92,220 more than the value attributed to them in the first transaction. The Minister assessed the profit on the shares as

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*CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Ritchie et Hall.

income, but subsequently took the position that the sale price of the hotel had been $203,500 ($81,800 plus $121,700), and that depreciable assets had been disposed of for an amount exceeding their depreciated capital cost. The appellant was therefore subject to capital cost allowance recapture amounting to $71,922.14 pursuant to s. 20(1) of the *Income Tax Act*, R.S.C. 1952, c. 148. The Minister's contention was maintained by the Tax Appeal Board and by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The transactions which the appellant entered into gave rise to a taxable profit, and for the reasons given by the Tax Appeal Board and by the Exchequer Court, the appeal must be dismissed.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming an assessment for income tax. Appeal dismissed.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], confirmant une cotisation pour impôt sur le revenu. Appel rejeté.

Jean-Marc Poulin, pour l'appelant.

Paul Boivin, c.r., pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—Cet appel est d'un jugement rendu par M. le Juge Dumoulin de la Cour de l'Échiquier[1], le 16 janvier 1964. Ce dernier confirma l'opinion de Me Maurice Boisvert de la Commission d'Appel de l'Impôt.

Il s'agit d'une cotisation en date du 14 juillet 1960 pour l'année d'imposition 1958, établie sur un revenu de $92,220, gagné par l'appelant, mais réduit à l'audition par l'intimé à $71,922.14. Me Boisvert a donc maintenu l'appel en partie et la cotisation a été retournée au Ministre pour nouvel examen. Ce fut aussi l'avis de M. le Juge Dumoulin qui a rejeté l'appel logé à la Cour de l'Échiquier. L'appelant Belle-Isle a été condamné à payer les frais.

Il appelle de ce jugement devant cette Cour. Nous sommes d'opinion que de ces contrats intervenus entre

[1] [1964] Ex. C.R. 894, [1964] C.T.C. 40, 64 D.T.C. 5041.

1966

BELLE-ISLE v. MINISTRE DU REVENU NATIONAL

Taschereau J.C.

lui-même et Dessert (qu'il s'agisse de lui personnellement ou de Gérard Dessert Limitée), un profit imposable a été réalisé sur lequel le fisc peut et doit percevoir des impôts.

Pour les raisons données par Me Boisvert et M. le Juge Dumoulin, avec qui je m'accorde substantiellement, je suis d'opinion que cet appel doit être rejeté avec dépens.

Appel rejeté avec dépens.

Procureurs de l'appelant: Lemay, Poulin & Corbeil, Montréal.

Procureur de l'intimé: E. S. McLatchy, Ottawa.

1965

*March 15
March 15

ROBERT TERRY MORRISON ..... APPLICANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

WRIT OF HABEAS CORPUS

Criminal law—Robbery—Plea of guilty—Habeas corpus—Warrant of committal.

The applicant pleaded guilty to a charge of robbery. Some three years later he applied to the Court of Appeal for an extension of time for leave to appeal in writing against his conviction, and when this application was refused he applied again to the Court of Appeal for an extension of time for leave to appeal in writing against his sentence. That application was also refused. The grounds brought forward by the applicant were that he had been improperly induced by fraud and threats to elect trial by the Magistrate and to plead guilty. He then applied to this Court for a writ of habeas corpus.

Held: The application should be dismissed.

The writ of habeas corpus could not be granted as the warrant of committal showed that the applicant was confined in execution of a legal sentence, imposed by a Court having jurisdiction, after conviction and that the sentence had not expired.

Even if he had sought leave to appeal to this Court, this relief could not have been granted. This Court has no jurisdiction as regards a sentence; and as regards the conviction there was no dissenting judgment in the Court of Appeal and his grounds before that Court did not include any ground of law in the strict sense.

As no relief could be afforded to him by this Court nothing could have been gained by adjourning the matter to enable him to make the necessary arrangements to be brought before this Court as he had requested in a letter addressed to the Registrar.

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

Droit criminel—Vol—Plaidoirie de culpabilité—Habeas corpus—Mandat de dépôt.

Le requérant a plaidé coupable à une accusation de vol. Quelques trois ans plus tard il demanda à la Cour d'Appel une prorogation du délai pour obtenir permission d'appeler par écrit à l'encontre du verdict de culpabilité, et lorsque cette demande fut refusée il demanda à la Cour d'Appel une prorogation du délai pour obtenir une permission d'appeler par écrit à l'encontre de sa sentence. Cette demande fut aussi refusée. Les motifs d'appel soulevés par le requérant étaient à l'effet qu'il avait été improprement induit par fraude et menaces à choisir un procès devant le Magistrat et à plaider coupable. Il demanda alors à cette Cour l'émission d'un bref d'habeas corpus.

Arrêt: Cette demande doit être rejetée.

Le bref d'habeas corpus ne peut pas être accordé vu que le mandat de dépôt démontre que le requérant était détenu en exécution d'une sentence légale, imposée par une Cour ayant juridiction, après une déclaration de culpabilité et que la sentence n'était pas expirée.

Même s'il avait demandé permission d'appeler à cette Cour, ce recours n'aurait pas pu lui être accordé. Cette Cour n'a pas juridiction relativement à une sentence; et quant à la déclaration de culpabilité le jugement de la Cour d'Appel ne comportait aucune dissidence et ses motifs d'appel devant elle ne comprenaient aucun motif de droit dans le sens strict.

Puisque aucun recours ne pouvait lui être accordé par cette Cour, il n'y avait pas lieu d'ajourner la cause pour lui permettre de conclure les arrangements nécessaires pour être amené devant cette Cour ainsi qu'il l'avait demandé dans une lettre adressée au Registraire.

REQUÊTE pour obtenir un bref d'habeas corpus déférée à la Cour par le Juge en chambre. Requête rejetée.

APPLICATION for a writ of habeas corpus referred to the Court by the Rota Judge. Application dismissed.

No one appearing for the applicant.

C. M. Powell, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—By notice in writing, dated February 5, 1965, Robert Terry Morrison, hereinafter referred to as "the applicant", applied to this Court for a writ of habeas corpus and certiorari. The application was referred to the Court by the Rota Judge.

It appears from the certified copy of the warrant of committal which accompanied the application that the

1965

MORRISON v. THE QUEEN

Cartwright J.

applicant was convicted in the County of York before the late Magistrate F. W. Bartrem on February 17, 1961, upon a charge of robbery and that on February 27, 1961, he was sentenced to be imprisoned in the penitentiary for the term of fifteen years. Pursuant to that warrant of committal he is now confined in the penitentiary in British Columbia.

At the request of the Court counsel for the Attorney General for Ontario has furnished us with a copy of the record of the proceedings in regard to the above charge in the Court of Appeal for Ontario.

From this it appears that the applicant pleaded guilty to the charge of robbery, that in August 1964 he applied to the Court of Appeal for Ontario for an extension of time for leave to appeal in writing against his conviction, that on October 20, 1964, that application was refused, that thereafter, in November 1964, he applied to the Court of Appeal for Ontario for an extension of time for leave to appeal in writing against his sentence and that on December 1, 1964, that application was refused.

The grounds put forward by the applicant in writing in the Court of Appeal were that he was improperly induced by fraud and threats to elect trial by the Magistrate and to plead guilty.

It is clear from the record that a writ of habeas corpus cannot be granted as the warrant of committal shews that the applicant is confined in execution of a legal sentence, imposed by a court having jurisdiction, after conviction for the offence of robbery and that the sentence has not expired.

Even if the applicant had sought leave to appeal to this Court from either of the orders of the Court of Appeal it is clear that no relief could have been granted to him. The jurisdiction of this Court in criminal matters is strictly limited. As regards the sentence this Court has no jurisdiction; as regards the conviction there was no dissenting judgment in the Court of Appeal and the grounds on which in that Court the applicant sought to question his conviction did not include any ground of law in the strict sense. In such circumstances this Court has no jurisdiction. Mention has been made in these reasons only of the conviction on the charge of robbery; the applicant at the same time as he pleaded guilty to that charge also pleaded guilty

to other charges but the sentences imposed in regard thereto were made concurrent with that on the charge of robbery.

1965
MORRISON
v.
THE QUEEN
Cartwright J.

By a letter addressed to the Registrar of the Court the applicant stated that he wished to appear before the Court in person on this application. As the material, including the statements of the applicant, makes it clear that no relief could be afforded to him by this Court nothing would be gained by adjourning the matter to enable him to make the necessary arrangements to be brought before the Court.

The application for a writ of habeas corpus and certiorari is dismissed.

Application dismissed.

1965
*Nov. 30
*Dec. 1, 2
1966
Jan. 25

THE ALGOMA CENTRAL AND HUDSON BAY RAILWAY COMPANY and PARRISH HEIMBECKER LIMITED *(Plaintiffs)* ..... APPELLANTS;

AND

MANITOBA POOL ELEVATORS LIMITED and LAKEHEAD HARBOUR COMMISSIONERS *(Defendants)* ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, ONTARIO ADMIRALTY DISTRICT

Shipping—Damages—Negligence—Ship grounded while taking on cargo at Lakehead Harbour.

The plaintiff, The Algoma Central and Hudson Bay Railway Company, sued the defendants for damages sustained by its vessel *Algoway* through grounding while taking on a cargo of wheat at the dock of the defendant, Manitoba Pool Elevators Ltd., within the limits of the Lakehead Harbour. A chart of the harbour, No. 2314 of the Canadian Hydrographic Survey, which was on board, showed a depth alongside the dock of 19 feet, which, when adjusted to conform with the hydrographic survey gauge, became 18½ feet. The ship also carried a document entitled "By-Laws and General Information" issued by the Lakehead Harbour Commissioners, which showed a mean water depth of 21.2 feet at the same berth. Upon reaching the point where the ship

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

1966

ALGOMA CENTRAL AND HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

was drawing 19 feet 8 inches forward, it was decided that she should be shifted forward so as to load additional grain in the after hatches. Before ordering the ship to be moved forward, the mate, who seemed to have been in charge of the loading, stated that he called out to a man on the dock who turned out to be the superintendent of the elevator in question, asking whether there was "lots of water" and received an affirmative reply. The ship was then winched ahead, grounded and was damaged. The trial judge dismissed the claim of the ship as well as the claim of the other plaintiff, the owner of the wheat cargo which was damaged. The plaintiffs appealed to this Court.

Held: The appeal should be dismissed. There was no negligence on the part of either defendants which was causative of the grounding and consequent damage.

As to the appeal against the Lakehead Harbour Commissioners. There was no evidence of any obstructions in the berth, and the nature of the lake bottom was such as to be anticipated in the area in question. There was no reason to question the finding of fact made by the trial judge that there was no believable evidence which would tend to show that the ship believed or acted upon the pamphlet issued by the Lakehead Harbour.

As to the appeal against the Manitoba Pool Elevators Ltd. There was no danger in the berth in question until the ship rested on the bottom, and the short conversation between the mate and the superintendent could not be treated as a warranty. The motivating concern in the mind of those in charge of the ship was to load as much wheat as her winter draft would allow, and the possibility of the ship taking ground was a secondary consideration.

It was not necessary to consider the question of whether the Lakehead Harbour Commissioners was an agency of the Crown to which the provisions of s. 11 of the *Public Authorities Protection Act*, R.S.O. 1960, c. 318, would apply.

Navigation—Dommages—Négligence—Échouage d'un bateau alors qu'il prenait une cargaison au port de la Tête des Lacs.

La demanderesse, Algoma Central and Hudson Bay Railway Company, a poursuivi les défendeurs pour dommages subis par son bateau *Algoway* lorsqu'il s'est échoué en prenant une cargaison de blé au quai de la défenderesse, Manitoba Pool Elevators Ltd., situé dans les limites du port de la Tête des Lacs. Une carte du port, n° 2314 du Canadian Hydrographic Survey, qui était à bord, montrait une profondeur de 19 pieds le long du quai, laquelle, lorsqu'elle était ajustée pour se conformer à l'indicateur du relevé hydrographique, devenait 18½ pieds. Le bateau avait aussi à bord un document intitulé "By-laws and General Information" émis par les Commissaires du port de la Tête des Lacs, qui montrait une moyenne de profondeur de 21.2 pieds à ce même endroit. Ayant atteint le point où le bateau tirait 19 pieds 8 pouces en avant, on a décidé qu'il devait être avancé pour charger la cale arrière de grains additionnels. Avant d'ordonner que le bateau soit avancé, le second officier, qui semblait être en charge du chargement, a déclaré qu'il a demandé à un homme qui se tenait sur le quai et qui était le surveillant de l'élévateur en

question s'il y avait de l'eau en quantité, ce à quoi l'autre a répondu affirmativement. Le bateau a alors été avancé par treuil, échoua et fut endommagé. Le juge au procès a rejeté la réclamation du bateau ainsi que celle de l'autre demanderesse, la propriétaire de la cargaison de blé qui avait été endommagée. Les demanderesses en ont appelé devant cette Cour.

Arrêt: L'appel doit être rejeté. Il n'y a eu aucune négligence de la part des défendeurs qui ait causé l'échouage et le dommage qui en est résulté.

Quant à l'appel contre les Commissaires du port de la Tête des Lacs. Il n'y avait aucune preuve d'obstruction à l'endroit en question, et la nature du lit du lac était telle qu'elle devait être anticipée à l'endroit en question. Il n'y avait pas lieu de mettre en question la conclusion sur les faits du juge au procès à l'effet qu'il n'y avait pas de preuve croyable tendant à démontrer que les officiers du bateau avaient cru ou s'en étaient rapportés à la brochure émise par les Commissaires.

Quant à l'appel contre la Manitoba Pool Elevators Ltd. Il n'y avait aucun danger dans l'endroit en question jusqu'à ce que le bateau ait touché le fond, et la courte conversation entre le second officier et le surveillant ne pouvait pas être considérée comme étant une garantie. L'intérêt primordial dans l'esprit de ceux qui étaient en charge du bateau était de charger autant de blé que son tirage d'hiver le permettait, et la possibilité que le bateau pourrait s'échouer était une considération secondaire.

Il n'était pas nécessaire de considérer la question de savoir si les Commissaires du port de la Tête des Lacs était une agence de la Couronne à qui les dispositions de l'art. 11 du *Public Authorities Protection Act,* R.S.O. 1960, c. 318, devait s'appliquer.

APPEL d'un jugement du Juge Wells, du district d'amirauté de l'Ontario[1]. Appel rejeté.

APPEAL from a judgment of Wells D.J.A. for the Ontario Admiralty District[1]. Appeal dismissed.

F. O. Gerity, Q.C., and *S. G. Fisher,* for the appellant, Algoma Central and Hudson Bay Ry. Co.

J. Mahoney, for the appellant, Parrish and Heimbecker Ltd.

P. B. C. Pepper, Q.C., and *A. S. Hindman,* for the respondent Manitoba Pool Elevators Ltd.

B. Jas. Thomson, Q.C., for the respondent, Lakehead Harbour Commissioners.

[1] [1964] Ex. C.R. 505.

1966

ALGOMA CENTRAL AND HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Dalton C. Wells sitting in his capacity as District Judge in Admiralty for the Ontario Admiralty District of the Exchequer Court of Canada[1] whereby he dismissed a claim by The Algoma Central and Hudson Bay Railway Company (hereinafter called "Algoma") for damage sustained by its vessel *Algoway* through grounding whilst taking on a cargo of wheat at a dock and grain elevator known as Manitoba Pool No. 2 owned and operated by the respondent Manitoba Pool Elevators Limited (hereinafter called "Manitoba") and situate within the limits of the Lakehead Harbour as the same are defined in s. 4 of c. 34 of the the Statutes of Canada 1958, by which Act the respondent, Lakehead Harbour Commissioners (hereinafter called "Lakehead") was incorporated.

By the same judgment the learned District Judge dismissed the claim of the appellant Parrish & Heimbecker Limited (hereinafter referred to as "Parrish") the owner of the wheat cargo carried on board the *Algoway* at the time of its grounding which was damaged as the result of the incursion of water resulting therefrom.

On November 29, 1961, the *Algoway* having already loaded some 94,000 bushels of wheat at the Thunderbay elevator which is also within the Lakehead Harbour, was directed to a berth at Manitoba Pool No. 2 about $1\frac{3}{4}$ miles to the northward, at which latter position the master and mate intended to load sufficient wheat to bring the *Algoway* to her mean winter draft of 19′ $9\frac{1}{2}$″. The master of the *Algoway* was unfamiliar with the berth to which he was directed but had on board for his guidance the official Canadian Hydrographic Survey Chart ♯ 2314 as well as a Great Lakes Pilot (U.S. Lake Survey) and a sketch of the harbour which was incorporated in a pamphlet entitled "Bylaws and General Information" issued by Lakehead. Chart ♯ 2314 shows a maximum depth of 19 ft. at the Manitoba Pool No. 2 berth, which, when adjusted to conform with the hydrographic survey gauge at Port Arthur, would read 18′ 6″ whereas information contained in the

[1] [1964] Ex. C.R. 505.

Lakehead pamphlet under the heading "Working data—Port Arthur Harbour" shows a mean water depth of 21.2 ft. at the same berth.

On reaching Pool No. 2, the *Algoway* was secured at the west side of the berth and loading was commenced in the forward hatches, but upon reaching the point where the ship was drawing 19′ 8″ forward and 18′ 3″ aft it was decided that she should be shifted forward so as to load additional grain in the after hatches in order to trim the vessel to her winter marks. Before ordering the ship to be moved forward, the mate, who appears to have been in charge of loading on board the *Algoway* at the time, states that he called out to a man on the dock who turned out to be the superintendent of the Manitoba Pool Elevator No. 2, asking whether there was "lots of water" and received the reply that there was lots of water and that boats were loaded there at a draft of 21 and 21.6 ft. Upon receiving this assurance the *Algoway* was winched ahead by the use of its own winches and it was found that she had taken ground and that water was coming in No. 1 starboard tank. Subsequent examination revealed that, as might have been anticipated, when the heavily laden forward section of the ship was thus brought forcibly in contact with the rough bottom of the Lake, a hole was punctured in one of the starboard plates and five other plates were damaged.

The chief negligence alleged against Lakehead by both appellants is that the pamphlet entitled "Bylaws and General Information" published by it was inaccurate and misleading and reflected a failure on the part of Lakehead to ascertain the actual depths of water at the various berths where ships were invited to dock, and it is further alleged that Lakehead, as the corporation having jurisdiction over the Harbour in question, was under a duty to warn those in charge of the *Algoway* of the actual condition of the berth to be used by it including the presence of any obstructions and the depth of the water to be expected therein.

I agree with the learned trial judge that there is no evidence as to any obstructions in the berth and that the nature of the lake bottom was such as to be anticipated in the area in question. Counsel for both appellants, however, rested their case against Lakehead primarily on the fact

1966

ALGOMA CENTRAL AND HUDSON BAY RY. CO. *et al.* v. MANITOBA POOL ELEVATORS LTD. *et al.*

Ritchie J.

that those in charge of the *Algoway* were entitled to rely on the representations as to the depth of water in Manitoba Pool No. 2 made in the pamphlet which has been referred to above.

With respect to the contention that the damage was caused as the result of those in charge of the *Algoway* having relied on this pamphlet, the learned trial judge said:

> . . . there is no believable evidence in my opinion which would tend to show that they did believe or act on it.

I see no reason to question this finding of fact which is so clearly based on the credibility of the witnesses who testified at the trial.

The safety of the ship is primarily the concern of its captain who is charged with navigating safely at all times, and if those in charge of the *Algoway* had relied on the Lakehead pamphlet they would have been ignoring the information which was clearly indicated on the Canadian Hydrographic Survey Chart ♯ 2314 which, at the very least, should have put them on their guard against loading to the ship's winter marks at the berth to which they were directed.

The evidence is clear, however, that when the ship berthed at Manitoba Pool No. 2, the captain retired to his cabin and left the responsibility of loading to the mate who says that before moving the ship forward he relied, not on the Lakehead pamphlet, but upon the assurance of the superintendent of the Manitoba Pool No. 2 who happened to be on the dock, that there was enough water to load to the ship's winter draft.

The assurance so given to the mate is now relied on as forming the basis of the claim of both appellants against the respondent Manitoba and is alleged to have constituted an express warranty given by that Company as to the depth of water at its berth, and it is contended that Manitoba improperly invited or allowed the *Algoway* to come into and occupy a berth operated by it at a time when it knew or ought to have known that it was not safe for her to do so.

There was no danger in the berth in question until the ship rested on the bottom and I do not think that the short

conversation between the mate speaking from the deck and the superintendent from the dock, can be treated as a warranty or that it constituted any assurance upon which the mate was entitled to rely in exposing the ship to the serious risk of grounding in these waters.

In reading the mate's evidence it occurs to me that he was not very much concerned as to whether the ship touched ground or not. In direct examination he was asked:

Q. In the meantime, when you have been loading at the Lakehead, is it usual or unusual to touch ground from time to time?
A. I have loaded at elevators where we have rubbed the bottom.

And later in cross-examination he gave this evidence:

Q. Were you at all anxious or apprehensive as to the depth of water you might find there?
A. I wasn't unduly concerned.

Q. You don't sound sure. You were somewhat concerned?
A. I was somewhat concerned.

And later:

Q. You had no difficulty getting the ship into that position where she could load?
A. She was rubbing the bottom and we didn't try to move her.

Q. Before you started completing your loading she was rubbing the bottom?
A. Yes.

Q. Where—forward or aft?
A. Forward.

Q. When you say the ship stopped herself, what do you mean by that?
A. She came to a stop herself because the winch was having too much power.

Q. You didn't have to use your engines after she had gone forward?
A. No.

Q. Were you surprised she had gone aground forward?
A. Not necessarily.

On consideration of all the evidence I have reached the opinion that the motivating concern in the minds of those in charge of the *Algoway* was to load as much wheat as her winter draft would allow and that the possibility of the ship taking ground in the process was a secondary consideration.

As I agree with the learned trial judge that no reliance was placed on the inaccurate data supplied in the Lakehead pamphlet and as I am of opinion that the conversation between the mate and the superintendent was of too casual

1966

ALGOMA CENTRAL AND HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Ritchie J.

a nature to justify moving the *Algoway* into a position where it should have been known to those in charge that she was likely to be resting on the rocky bottom of the lake, I can find no negligence on the part of either of the respondents which was causative of the grounding and consequent damage.

In view of the conclusion which I have reached on the evidence, I do not find it necessary to consider the question of whether Lakehead was an agency of the Crown to which the provisions of s. 11 of the *Public Authorities Protection Act*, R.S.O. 1960, c. 318 apply and nothing herein contained is to be treated as adopting the reasoning of the learned trial judge in that regard.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant, Algoma Central and Hudson Bay Ry. Co.: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the appellant, Parrish & Heimbecker Ltd.: John J. Mahoney, Toronto.

Solicitors for the respondent, Manitoba Pool Elevators Ltd.: Holden, Hutchison, Cliff, McMaster, Meighen & Minnion, Montreal.

Solicitors for the respondent, Lakehead Harbour Commissioners: Haines, Thomson, Rogers, Macauly, Howie & Freeman, Toronto.

CHARLES GHIRARDOSI .....APPELLANT;

1966

*Jan. 31
Mar. 11

AND

THE MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration—Expropriation of appellant's land—Motion to set aside award of umpire—Existence of solicitor and client relationship between arbitrator and respondent at time of arbitration unknown to appellant —Disqualification of arbitrator fatal to validity of award.

The appellant was the owner of certain lands in Trail, British Columbia, expropriated by the Department of Highways. No agreement was reached as to compensation. In the arbitration proceedings which followed pursuant to the *Department of Highways Act*, R.S.B.C. 1960, c. 103, one McQ was appointed arbitrator by the Minister of Highways and one M, by the appellant. The arbitrators, together with H, the umpire appointed by them, convened and heard evidence and argument. The arbitrators were unable to reach an agreement and accordingly, pursuant to s. 26 of the *Department of Highways Act*, requested that the amount of compensation be determined by the umpire who thereupon fixed the compensation at $25,000.

By originating notice, the appellant proceeded to set aside the award on the grounds that (1) the arbitrator McQ was disqualified by interest in that he, at the time of the arbitration, was acting as solicitor for the Minister of Highways and (2) the umpire was disqualified by interest in that, at the time of the arbitration, he was acting as crown counsel for the Province of British Columbia. On motion an order was made setting aside the award. On appeal the Court of Appeal, by a unanimous judgment, set aside the order of the judge of first instance and affirmed the award.

Held: The appeal should be allowed and the order of the judge of first instance restored.

The arbitrator McQ was disqualified. From the beginning to the end of the arbitration he was retained by the respondent Minister in a dispute of the same nature as that which was the subject-matter of the arbitration; in that dispute the party whose land was required by the respondent was in no way connected with the appellant and the land expropriated was some 250 miles distant, but the disqualification arose from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times between McQ and the respondent. Assuming that the umpire H was in no way personally disqualified, the disqualification of McQ was fatal to the validity of the award. *Sellar v. The Highland*

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*PRESENT: Taschereau C.J. and Cartwright, Martland, Hall and Spence JJ.

1966

GHIRARDOSI v. MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA

Railway Co., [1918] S.C. 838; [1919] S.C. (H.L.) 19, followed; *North Shore Railway Co. v. The Reverend Ursuline Ladies of Quebec* (1885), Cass. S.C. Dig. 36, distinguished; *Szilard v. Szasz*, [1955] S.C.R. 3; *Summer et al. v. Barnhill* (1879), 12 N.S.R. 501, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside an order of Collins J. and affirming an arbitration award. Appeal allowed and the order of Collins J. restored.

Charles Ghirardosi, in person.

W. G. Burke-Robertson, Q.C., and *D. T. Wetmore*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for British Columbia[1] setting aside an order of Collins J. and affirming an award made in an arbitration between the parties.

The appellant was the owner of 7.226 acres of land in the City of Trail, British Columbia, expropriated by the Department of Highways. No agreement was reached as to compensation. In the arbitration proceedings which followed pursuant to the *Department of Highways Act*, R.S.B.C. 1960, c. 103, Mr. C. D. McQuarrie, Q.C., was appointed arbitrator by the Minister of Highways and Mr. M. E. Moran, by the appellant. The arbitrators, together with Mr. D. B. Hinds, the umpire appointed by them, convened at the City of Trail in November 1963, and heard evidence and argument. The arbitrators were unable to reach an agreement and accordingly, pursuant to s. 26 of the *Department of Highways Act*, requested that the amount of compensation be determined by the umpire who on December 23, 1963, made an award fixing the compensation at $25,000.

By originating notice dated February 11, 1964, the appellant moved to set aside the award on the following grounds:

1. The Arbitrator, Colin D. McQuarrie, Q.C., appointed by the Minister of Highways of the Province of British Columbia, was and is disqualified by interest in that he has been and was at the time of the

[1] (1964), 50 W.W.R. 296.

arbitration referred to herein acting as solicitor or counsel or agent for the said Minister of Highways or the Department of Highways of the Province of British Columbia or both.

2. The Umpire, D. B. Hinds, was and is disqualified by interest in that he has been and was at the time of the arbitration referred to herein acting as Crown Counsel for the Province of British Columbia.

The material before Collins J. consisted of five affidavits. There was no cross-examination on any of these and there is really no dispute as to the relevant facts.

From time to time Mr. McQuarrie had acted for the Department of Highways and had also acted against that Department. Neither he nor any member of his firm had ever held a general retainer from the Department. Prior to being appointed arbitrator in the matter with which we are concerned Mr. McQuarrie was retained by the Minister of Highways to act as solicitor for the Department of Highways in the matter of an expropriation by the Department of a property situate near to Radium, British Columbia, and continued to be so retained throughout the period of the holding of the hearing in the arbitration and the making of the award in regard to the appellant's property.

These facts were not disclosed to the appellant or his solicitor and did not come to the notice of either of them until some time in January, 1964, after the appellant had received a copy of the award.

Mr. Hinds had never acted for the Department of Highways but from time to time had acted as counsel for the Crown in the right of British Columbia in criminal prosecutions. These facts also were unknown to the appellant and his solicitor until after the appellant had received a copy of the award.

On March 2, 1964, the motion came before Collins J. who set aside the award. He gave no recorded reasons for his decision but it is said in the reasons of Lord J.A. in the Court of Appeal that counsel were agreed that the judgment of Collins J. was:

based on a reasonable apprehension that the arbitrator appointed by the Minister might not act in an entirely impartial manner. There was no suggestion of actual bias, and it is common ground that he is a gentleman of integrity and high standing in his profession.

In the Court of Appeal, Sheppard J.A. was of opinion that there was no evidence to support a reasoned suspicion of bias on the part of Mr. McQuarrie. Lord J.A., with

1966

GHIRARDOSI v. MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA

Cartwright J.

whom Davey J.A. was in substantial agreement, proceeded on the ground that the award was that of Mr. Hinds and not that of the Board of Arbitrators and so found it unnecessary to deal with the question whether Mr. McQuarrie was disqualified. With the greatest respect I am unable to agree with either of these views.

The applicable principles have recently been restated by Rand J. giving the unanimous judgment of this Court in *Szilard v. Szasz*[1]. At p. 4 he said:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. This principle has found expression in innumerable cases, and a reference to a few of them seems desirable.

Rand J. then reviewed a number of decisions and continued at pp. 6 and 7:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
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> * * *
>
> Nor is it that we must be able to infer that the arbitrator 'would not act in an entirely impartial manner'; it is sufficient if there is the basis for a reasonable apprehension of so acting.

One of the cases referred to with approval by Rand J. was *Summer et al. v. Barnhill*[2], in which an award was set aside on the ground that one of the arbitrators was disqualified by the fact of having been regularly retained as solicitor of the estate of which the defendant was the executor, although he had not been engaged as counsel or attorney in the matter referred, and did not concur in the award. Sir William Young C.J. in delivering the judgment of the Court said at p. 505:

> The modern cases are in Russell 101-3, affirming the general principle that an arbitrator ought to be a person who stands indifferent between the parties, and that any concealed or unknown interest or bias will disqualify him. The rule is well expressed in *Kemp v. Rose*, 1 Giff., 258; 'a perfectly

[1] [1965] S.C.R. 3. [2] (1879), 12 N.S.R. 501.

even and unbiased mind, said the Vice-Chancellor, is essential to the validity of every judicial proceeding. Therefore where it turns out that, unknown to one or both of the parties who submit to be bound by the decision of another, there was a circumstance in the situation of him to whom the decision was entrusted, which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of the Court.' See also *Harvey v. Shelton*, 7 Beav. 462-4. It is of no consequence that Mr. Longworth has not joined in the award. He sat upon the reference and was there as a judge, and, without at all questioning the purity and conscientiousness of his action, I am of opinion, that, as the solicitor of Pearson's estate and the adviser of the executor quite independently of this case, he was not competent to act as one of the arbitrators thereon, and, the fact being unknown to the plaintiffs, their attorney and counsel, that the award should be set aside and the rule *nisi* made absolute with costs.

In the case at bar from the beginning to the end of the arbitration Mr. McQuarrie was retained by the respondent in a dispute of the same nature as that which was the subject-matter of the arbitration; the party whose land in *Radium* was required by the respondent was in no way connected with the appellant and the land expropriated was some 250 miles distant, but the disqualification arises from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times between Mr. McQuarrie and the respondent.

Lord J.A. relied in part on the decision of this Court in *North Shore Railway Company v. The Reverend Ursuline Ladies of Quebec* (1885), which is briefly noted in Cassels Digest of Supreme Court Decisions at p. 36. An examination of the complete record of that case in this Court shews that the appeal was heard on March 4, 1885, and judgment reserved. On the following day judgment was given orally and the note in the Registrar's book reads as follows:

> In the *North Shore Railway Company v. The Ursulines of Quebec*, the Chief Justice states there is no doubt that the judgment of the Court below was correct and the Court is of opinion that the appeal should be dismissed with costs.

No recorded reasons were delivered in either of the Courts below. The action was brought by the Ursulines of Quebec to recover from the Railway Company the amount awarded by a board of arbitrators as compensation for a piece of land taken by the Railway. The main defence was that Charlebois, the arbitrator appointed by the plaintiffs, was disqualified because since a date prior to the arbitra-

1966

GHIRARDOSI v. MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA

Cartwright J.

tion he was "le procureur agent" of the plaintiffs, that he had always left the defendant in ignorance of this fact and this had prevented it from taking steps to have him removed as arbitrator. In answer the plaintiffs denied that Charlebois was disqualified and added that if he were it was the duty of the defendant to take steps to set aside his appointment before proceeding with the arbitration. In the plaintiff's factum filed in this Court it is stated that the appellant and its arbitrator knew the facts and never raised any objection and this allegation is supported by the evidence of Charlebois and also by that of Bertrand who was the arbitrator named by the defendant. In these circumstances I think it probable that the ground of the decision was that the defendant proceeded with the arbitration with knowledge of the facts which, after the award, it claimed disqualified Charlebois. There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.

Turning to the main ground on which Lord J.A. proceeded, I am of opinion that, assuming that Mr. Hinds was in no way personally disqualified, the disqualification of Mr. McQuarrie was fatal to the validity of the award. On this point it is sufficient to refer to the judgments in *Sellar v. The Highland Railway Company*[1]. In this case it was held that an arbitrator was disqualified because he held some shares in the Railway Company and that by reason of this the award made by the oversman appointed by the arbitrators must be set aside. On appeal to the Inner House from the judgment of Lord Sands, Lord Johnston said at p. 853:

> The disqualification here of the arbiter has had a somewhat exceptional result. It has not tainted his award, for he did not get the length of making one. It has vitiated his nomination of and devolution on the oversman. At first sight disqualification of the oversman may appear far-fetched. But I think, when the practice in the conduct of arbitrations, at least in Scotland, is remembered, that the propriety and justice of the judgment becomes apparent. By common, and I may say almost invariable, practice the arbiters nominate their oversman before commencing the work of the reference. As a pure matter of convenience, and to charge him with a knowledge of the matter at issue, and the considerations *hinc inde*, he

[1] [1918] S.C. 838; [1919] S.C. (H.L.) 19.

accompanies them on any visit to the *locus*. He sits with them throughout the leading of evidence and hears the arguments addressed to them by counsel or agents. He is present at their deliberations. In point of fact he may not inaptly be described as the president of a Court of three, with a controlling voice in case of difference between subordinate colleagues. There can be no question that a man in such a position, should the decision of the question in dispute ultimately devolve upon him, is open to be swayed by the opinions and reasoning of either of those with whom he has thus sat, and therefore that there is substance and not merely form in carrying the objection to the arbiter to the length of vitiating the appointment of the oversman in which he has had a hand. The objection must have been sustained if the disqualification of the arbiter had been discovered before the devolution, and it is, I think, equally well founded, though the discovery does not take place till the devolution has been made, or even the oversman's award has been issued. The arbitration in question has therefore proved abortive,

This judgment was affirmed in the House of Lords. At p. 24 Lord Finlay said:

It follows that the decreet-arbitral cannot stand. It is perfectly true that the decreet-arbitral was not the work of Mr. Hogg, but Mr. Hogg did act as arbiter in the matter. Having this interest in the Highland Railway Co. he heard the evidence and arguments and he considered the matter, and he and the arbiter on the other side failed to come to agreement. It seems to me that in doing that Mr. Hogg did act judicially in the matter, and, inasmuch as the function of the oversman in deciding by decreet-arbitral was the result of the failure to agree by the arbiters, the decreet-arbitral cannot stand.

The principle of this decision appears to me to govern the case at bar.

Before parting with the matter it is scarcely necessary to add that no impropriety is imputed to Mr. McQuarrie whose integrity and high standing in the profession are unquestioned; but when circumstances exist which have the legal result of disqualification the award cannot stand. An outstanding illustration of the application of this rule is found in the well known case of *Dimes v. Proprietors of the Grand Junction Canal et al.*[1], in which the House of Lords set aside a decree of the Lord Chancellor of England because he held some shares in the Canal Company although, as Lord Campbell said at p. 793, "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern".

[1] (1852), 3 H.L. Cas. 759.

1966

GHIRARDOSI v. MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA

Cartwright J.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the order of Collins J. The appellant will recover from the respondent his costs in the Court of Appeal and in this Court such costs as are taxable in view of the circumstance that he conducted the appeal in person.

Appeal allowed and the order of the judge of first instance restored.

Charles Ghirardosi, appellant, on his own behalf.

Solicitor for the respondent: A. W. Hobbs, Victoria.

1966

*March 3
March 11

ROGER L. VINCENT .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Farming losses—Deduction limited under s. 13(1) of the Income Tax Act, R.S.C. 1952, c. 148—Determination under s. 13(2) not made by Minister.

The Minister limited under s. 13(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, the farming losses incurred in the taxation years 1957 to 1960 by the appellant, the president of a publishing company who also owned and operated a farm. The appellant objected to the Minister's computation of his farming losses on the grounds: (1) that the interest paid on the mortgage which he gave as part of the purchase price of the farm, as well as the interest paid on bank loans for capital outlays on the farm, was properly deductible in computing his general income and should not have been deducted from the farm income; (2) that, if those payments had to be included in determining his farming losses, then the mortgage interest received in respect of a farm sold earlier should be included in computing his farming income; and (3) that the capital cost allowance granted in respect of the present farm should not be deducted in computing his farming losses but should be deducted in the computation of his general income. The Exchequer Court confirmed the assessment subject to certain adjustments consented to by the Minister. The taxpayer appealed to this Court where he raised the contention that because the Minister had not made a formal determination under s. 13(2) to the effect that his chief source of income was neither farming nor a combination of farming and some other sources of income, the provisions of s. 13(1) did not come into

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*PRESENT: Taschereau CJ. and Cartwright, Martland, Ritchie and Hall JJ.

operation and, accordingly, either the appeal should be allowed *in toto* or the matter should be referred back to the Minister to make such a determination.

Held: The appeal should be dismissed.

The Exchequer Court had been right in its conclusions and reasons for judgment.

In the absence of a determination by the Minister under s. 13(2), the Exchequer Court had jurisdiction to determine the question concerning the appellant's chief source of income. On the evidence, the only finding that could properly be made was that the appellant's chief source of income was neither farming nor a combination of farming and some other sources of income, which was the basis on which the Exchequer Court proceeded.

Revenu—Impôt sur le revenu—Pertes dues à une exploitation agricole—Déduction limitée en vertu de l'art. 13(1) de la Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148—Aucune décision prise par le Ministre en vertu de l'art. 13(2).

Le Ministre a limité sous le régime de l'art. 13(1) de la *Loi de l'Impôt sur le revenu*, S.R.C. 1952, c. 148, les pertes dues à une exploitation agricole encourues durant les années de taxation 1957 à 1960 par l'appelant, le président d'une maison d'édition qui exploitait aussi une ferme dont il était le propriétaire. L'appelant s'est objecté à la manière dont le Ministre avait calculé ses pertes agricoles pour les motifs: (1) que les intérets qu'il avait payés sur l'hypothèque qu'il avait consentie comme partie du prix d'achat de la ferme, ainsi que les intérêts qu'il avait payés à la banque pour des emprunts faits en vue de dépenses en capital sur la ferme, étaient proprement déductibles dans le calcul de son impôt général et n'auraient pas dû être déduits du revenu de sa ferme; (2) que, si ces paiements devaient être inclus dans la détermination de ses pertes agricoles, les intérêts reçus alors en vertu d'une hypothèque relativement à une ferme qu'il avait vendue auparavant devaient être inclus dans le calcul de son revenu agricole; et (3) que le coût en capital alloué relativement à sa ferme ne devait pas être déduit dans le calcul de ses pertes agricoles mais devait être déduit dans le calcul de son revenu général. La Cour de l'Échiquier a confirmé la cotisation, excepté pour certains ajustements approuvés par le Ministre. Le contribuable en appela devant cette Cour et a soumis que, vu que le Ministre n'avait pas pris de décision formelle en vertu de l'art. 13(2) à l'effet que le revenu de l'appelant ne provenait principalement ni de l'agriculture ni d'une combinaison de l'agriculture et de quelques autres sources, les dispositions de l'art. 13(1) n'entraient pas en vigueur et, en conséquence, l'appel devait être maintenu *in toto* ou alors l'affaire devait être retournée au Ministre pour qu'il puisse prendre une telle décision.

Arrêt: L'appel doit être rejeté.

La Cour de l'Échiquier a eu raison dans ses conclusions et ses notes à l'appui du jugement.

En l'absence d'une décision par le Ministre en vertu de l'art. 13(2), la Cour de l'Échiquier avait juridiction pour déterminer la question concernant le revenu principal de l'appelant. La preuve démontre que la seule

1966

VINCENT v. MINISTER OF NATIONAL REVENUE

conclusion à laquelle on pouvait en venir était que le revenu de l'appelant ne provenait principalement ni de l'agriculture ni d'une combinaison de l'agriculture et de quelques autres sources, ce qui fut la base en vertu de laquelle la Cour de l'Échiquier a procédé.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], confirmant une cotisation pour impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], affirming an assessment for income tax. Appeal dismissed.

F. E. Labrie, for the appellant.

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

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Cattanach J. allowing in part on consent an appeal by the appellant from the assessments made for his 1957, 1958, 1959 and 1960 taxation years and subject to the adjustments directed pursuant to such consent dismissing the appeal and confirming the assessments.

At the conclusion of the argument of counsel for the appellant the Court was unanimously in agreement with the conclusions and reasons of the learned trial judge and counsel for the respondent were called upon in regard to only one point which was not dealt with expressly by Cattanach J. but was fully argued in this Court.

That point, briefly stated, is as follows. The appellant submits that unless the Minister determines under s. 13 (2) of the *Income Tax Act* that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income the provisions of subs. (1) of that section do not come into operation, and that, since the Minister did not make a determination under subs. (2), either the appeal should be allowed *in toto* or the matter should be referred back to the Minister to make such a determination.

[1] [1965] 2 Ex. C.R. 117, [1965] C.T.C. 65, 65 D.T.C. 5056.

Section 13, as applicable to the taxation years 1958, 1959 and 1960 reads as follows:

13. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of

(*a*) his farming loss for the year, or

(*b*) $2,500 plus the lesser of

(i) one-half of the amount by which his farming loss for the year exceeds $2,500, or

(ii) $2,500.

(2) For the purpose of this section, the Minister may determine that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income.

(3) For the purposes of this section, 'farming loss' means a loss from farming computed by applying the provisions of this Act respecting the computation of income from a business mutatis mutandis.

As applicable to the taxation year 1957 there were differences in the wording of subs. (1) which are not material to the point under discussion.

Both at the trial and before us counsel for the respondent conceded that in the case at bar the Minister did not make a determination under subs. (2).

In these circumstances we are all of opinion that the Exchequer Court had jurisdiction to determine the question whether the appellant's chief source of income for the taxation years with which the appeal is concerned was neither farming nor a combination of farming and some other source of income.

On the evidence given at the trial and the admissions made by counsel the only finding that could properly be made is that the appellant's chief source of income during the taxation years in question was neither farming nor a combination of farming and some other source of income and it was on that basis that the learned trial judge proceeded.

For the reasons given by Cattanach J. and those stated above I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: F. E. Labrie, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

1965

*Dec. 13
Dec. 13

J. R. THÉBERGE LIMITÉE .....REQUÉRANTE;

ET

LE SYNDICAT NATIONAL DES EMPLOYÉS DE L'ALUMINUM D'ARVIDA INC. ..... INTIMÉ;

ET

ALUMINUM COMPANY OF CANADA LIMITED (Arvida) MISE-EN-CAUSE.

REQUÊTE POUR PERMISSION D'APPELER

Juridiction—Cour suprême du Canada—Requête pour obtenir permission d'appeler—Décision de la Commission des Relations de Travail du Québec—Décision tombe-t-elle sous l'art. 41(1) de la Loi sur la Cour suprême, S.R.C. 1952, c. 259—Code du Travail, S.R.Q. 1964, c. 141.

La requérante a présenté une requête à cette Cour pour obtenir la permission d'appeler directement d'une décision rendue par la Commission des Relations de Travail du Québec. Cette décision n'a jamais été soumise, au préalable, à une cour de justice de la province de Québec ou à l'un de ses juges. La requérante a soumis que la décision de la Commission est la décision de la plus haute Cour de dernier ressort dans la province où un jugement peut être obtenu dans l'affaire en question, puisque les dispositions du *Code du Travail*, S.R.Q. 1964, c. 141, prohibent tout recours en justice contre la Commission en raison d'actes, procédures ou décisions se rapportant à l'exercice de ses fonctions. La requérante en a conclu que la décision de la Commission tombait sous le régime de l'art. 41(1) de la *Loi sur la Cour suprême*, S.R.C. 1952, c. 259.

Arrêt: La requête pour permission d'appeler doit être rejetée.

Cette Cour est sans juridiction pour entendre et par conséquent pour permettre un appel direct d'une décision émanant de la Commission des Relations de Travail du Québec. Au sens de l'art. 41(1) de la *Loi sur la Cour suprême*, les expressions «Cour ou l'un de ses juges» visent les Cours et les juges dont est formée cette branche de gouvernement que représente le pouvoir judiciaire, ce qui ne comprend pas les organismes administratifs—tels que, par exemple, les commissions administratives, les chambres professionnelles et leur comité de discipline—et ce nonobstant le fait que certaines fonctions judiciaires puissent leur être attribuées purement comme accessoire ou complément nécessaire à la mise en œuvre de leurs fonctions administratives. La Commission des Relations de Travail est l'un de ces organismes administratifs. Dans les dispositions du *Code du Travail* on peut bien reconnaître les traits classiques de ces organismes administratifs institués pour promouvoir la paix industrielle, mais on n'y trouve pas les caractéristiques des cours de justice ou des juges des cours de justice

* CORAM: Les Juges Fauteux, Abbott et Hall.

que vise l'art. 41(1). De plus, la *Loi des Tribunaux judiciaires*, S.R.Q. 1964, c. 20, ne fait aucune mention de la Commission dans l'énumération des tribunaux ayant juridiction dans la province.

Jurisdiction—Supreme Court of Canada—Application for leave to appeal —Decision of the Quebec Labour Relations Board—Whether decision falls within s. 41(1) of the Supreme Court Act, R.S.C. 1952, c. 259 —Labour Code, R.S.Q. 1964, c. 141.

The applicant moved for leave to appeal to this Court directly from a decision of the Quebec Labour Relations Board. That decision had not been previously submitted to a court of justice of the province of Quebec or to one of its judges. The applicant contended that the decision of the Board was the decision of the highest Court of final resort in the province where a judgment can be had in this particular case, since the provisions of the *Labour Code*, R.S.Q. 1964, c. 141, prohibit all recourses in justice against the Board on account of any act, proceeding or decision relating to the exercise of its functions. The applicant has inferred from this that the decision of the Board fell under s. 41(1) of the *Supreme Court Act*, R.S.C. 1952, c. 259.

Held: The motion for leave to appeal should be dismissed.

This Court is without jurisdiction to hear and consequently to entertain an appeal direct from a decision of the Quebec Labour Relations Board. The expressions "Court or a judge thereof", within the meaning of s. 41(1) of the *Supreme Court Act*, allude to the Courts and the judges which form this branch of the government represented by the judiciary power, which does not include administrative bodies—such as, for example, the administrative boards, the professional societies and their disciplinary committees—and this, notwithstanding the fact that some judiciary functions can be attributed to them purely as an accessory or as a necessary complement to the carrying out of their administrative functions. The Labour Relations Board is one of these administrative bodies. One can recognize in the provisions of the *Labour Code* the classical features of these administrative bodies created to promote industrial peace, but one cannot find the characteristics of the courts of justice or of the judges of the courts of justice which s. 41(1) has in view. Furthermore, the *Courts of Justice Act*, R.S.Q. 1964, c. 20, does not mention the Board in the enumeration of the tribunals having jurisdiction in the province.

APPLICATION for leave to appeal from a decision of the Quebec Labour Relations Board. Application dismissed.

REQUÊTE pour permission d'appeler d'une décision de la Commission des Relations de Travail du Québec. Requête rejetée.

Richard Dufour, pour la requérante.

Roger Thibaudeau, c.r., pour l'intimé.

1965

J. R. THÉBERGE LTÉE v. SYNDICAT NATIONAL DES EMPLOYÉS DE L'ALUMINUM D'ARVIDA INC. et al.

Hazen Hansard, c.r., pour la mise-en-cause.

Le jugement de la Cour fut rendu par

Le Juge FAUTEUX:—La compagnie J. R. Théberge Ltée a présenté une requête à cette Cour pour obtenir la permission d'appeler d'une décision rendue, le 14 septembre 1965, par la Commission des relations de travail du Québec. Ce qui est exceptionnel, en l'espèce, c'est que cette décision n'a jamais été soumise, au préalable, à une cour de justice de la province de Québec ou à l'un de ses juges.

Au seuil de l'audition, s'est posée la question de savoir si cette Cour a juridiction pour considérer une telle requête et en disposer au mérite. Sur le point, la requérante a soumis que les dispositions de l'art. 121 du *Code du travail*, S.R.Q. 1964, c. 141, prohibent tout recours en justice contre la Commission des relations de travail du Québec en raison d'actes, procédures ou décisions se rapportant à l'exercice de sa fonction. Et il s'ensuit, a-t-on dit, en paraphrasant les dispositions de l'art. 41(1) de la *Loi sur la Cour suprême*, S.R.C. 1952, c. 259, que la décision de la Commission est la décision de la plus haute cour de dernier ressort dans la province où un jugement peut être obtenu dans l'affaire en question. Et de là on a conclu que l'art. 41(1) confère à cette Cour la juridiction de considérer la requête en question et en disposer au mérite. A la fin de l'audition, la Cour déclara ne pouvoir accueillir cette conclusion comme bien fondée et, après avoir indiqué que des raisons écrites seraient ultérieurement données, rejeta la requête avec dépens.

L'article 41(1) se lit comme suit:

> 41.(1) Sous réserve du paragraphe (3) il peut être interjeté appel à la Cour suprême, avec l'autorisation de cette Cour, contre tout jugement définitif ou autre de la plus haute cour de dernier ressort dans une province, ou de l'un de ses juges, où jugement peut être obtenu dans la cause particulière dont on veut appeler à la Cour suprême, qu'une autre cour ait refusé ou non l'autorisation d'en appeler à la Cour suprême.

Ainsi donc, la décision, dont il peut être interjeté appel en vertu de cette disposition, doit être la décision d'une «... *cour ... ou de l'un de ses juges ...* ». Ces expressions « ... *cour ... ou de l'un de ses juges ...* » sont les mêmes qui apparaissent dans le texte de ces autres articles, relatifs à la juridiction générale d'appel de la Cour suprême, qui, avec l'art. 41(1), sont groupés sous le titre de «Juridiction

d'Appel» dans la Loi régissant cette Cour. Il n'est certes aucune raison d'assigner à ces expressions, dans le contexte de l'art. 41(1), un sens différent du seul sens possible qui leur a toujours été attribué dans le contexte de ces autres articles, soit: cour de justice, et juges d'une cour de justice, ce qui n'inclut pas un corps ou tribunal administratifs, non plus que les membres composant un corps ou tribunal administratifs.

Il n'est pas sans à propos de référer aux origines du présent texte de l'art. 41. C'est par l'art. 2, de la Loi 13 Geo. VI, c. 37, sanctionnée le 10 décembre 1949 et proclamée le 23 décembre de la même année, que le Parlement augmenta considérablement la juridiction de la Cour suprême par l'adoption du texte de l'art. 41(1); et c'est par l'art. 3 de la même Loi qu'il abolit les appels au Conseil privé. Dans cette simultanéité de l'abolition des appels au Comité judiciaire et de l'extension considérable de la juridiction de la Cour suprême ainsi devenue cour de dernier ressort, on peut validement apercevoir, je crois, une intention du Parlement de conférer à la Cour suprême du Canada une contrepartie, en quelque sorte, de la juridiction d'appel jusque là exercée par le Comité judiciaire. Ceci n'implique pas évidemment que cette nouvelle juridiction aille au-delà des limites fixées par les termes de l'art. 41(1) qui la confère. Mais il convient de noter que la juridiction générale d'appel, du Conseil privé, était elle-même exercée, à l'égard de décisions émanant du pouvoir judiciaire—et non de décisions émanant du pouvoir exécutif ou administratif —ainsi qu'il appert à l'art. III de la loi *An Act for the better Administration of Justice in His Majesty's Privy Council*, 3 & 4 Will. 4, c. 41 (1833):

III. All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of *any Court, judge or judicial officer*, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his Privy Council, and that such appeals, causes and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of the Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open Court).

1965

J. R. THÉBERGE LTÉE v. SYNDICAT NATIONAL DES EMPLOYÉS DE L'ALUMINUM D'ARVIDA INC. et al.

Fauteux J.

Dans *Lovibond v. Governor General of Canada*[1], une requête, présentée au Conseil privé, pour obtenir la permission d'appeler du refus du Gouverneur général du Canada d'accorder son *fiat* pour une pétition de droit, fut rejetée. Le motif de ce rejet est fidèlement rapporté comme suit au sommaire de la décision du Conseil privé:

> The Governor General of Canada, in deciding under s. 4 of the Petition of Right Act of Canada whether to grant his fiat, does not act as a 'judicial officer' within the meaning of s. 3 of the Judicial Committee Act, 1833, and consequently an appeal from his refusal does not lie to His Majesty in Council.

On peut noter que l'expression «judicial officer», apparaissant à l'art. III de la Loi régissant le Comité judiciaire, est absente du texte de l'art. 41(1) lequel ne réfère qu'à la «. . . *cour . . . ou de l'un de ses juges. . .*».

En somme, au sens de l'art. 41(1), comme au sens des articles avec lesquels il apparaît sous le titre de «Juridiction d'appel», dans la *Loi sur la Cour suprême,* l'expression «. . . cour . . . *ou de l'un de ses juges . . .* » vise les cours et les juges dont est formée cette branche de gouvernement que représente le pouvoir judiciaire, ce qui ne comprend pas les organismes administratifs—tels, par exemple, les commissions administratives, les chambres professionnelles et leurs comités de discipline—et ce nonobstant le fait que certaines fonctions judiciaires puissent leur être attribuées purement comme accessoire ou complément nécessaire à la mise en œuvre de leurs fonctions administratives.

La Commission des relations de travail est l'un de ces organismes administratifs. Le *Code du travail,* S.R.Q. 1964, c. 141, pourvoit à son établissement et à sa composition. L'article 100 prescrit que:

> 100. Est institué un organisme sous le nom, en français, de 'Commission des relations de travail du Québec', en anglais, de 'Quebec Labour Relations Board'.
>
> Cette Commission est formée d'un président, de cinq vice-présidents et de huit autres membres dont quatre représentent les employeurs et quatre représentent les salariés. Ces huit membres sont recommandés au ministre par les associations ouvrières et patronales les plus représentatives.

Aucune disposition du *Code du travail* n'exige, comme qualification, d'une des personnes, formant cette Commission, d'être avocat. Les dispositions du *Code du travail* édictent que les séances de la Commission sont présidées par le président ou l'un des vice-présidents et que les

[1] [1930]A.C. 717.

membres représentant les employeurs et ceux représentant les employés doivent y siéger en nombre égal; que plusieurs séances de la Commission peuvent être tenues simultanément; que le quorum est de trois membres dont le président ou l'un des vice-présidents et un membre représentant les employeurs et l'autre représentant les employés; que la Commission et ses membres ont tous les pouvoirs, immunités et privilèges des commissaires nommés en vertu de la *Loi des commissions d'enquête*; que la Commission peut, pour cause, reviser, révoquer toute décision, tout ordre et tout certificat qu'elle peut émettre.

Dans les dispositions qui précèdent aussi bien que dans celles ayant trait aux pouvoirs de la Commission et de ses membres, on peut bien reconnaître les traits devenus classiques de ces organismes administratifs institués pour promouvoir la paix industrielle, mais on n'y trouve pas les caractéristiques des cours de justice ou des juges des cours de justice que vise l'art. 41(1). Ajoutons enfin que la *Loi des tribunaux judiciaires;* S.R.Q. 1964, c. 20, ne fait évidemment aucune mention de la Commission des relations de travail dans l'énumération des tribunaux ayant juridiction dans la province.

Si, de ce qui précède, il faut conclure que cette Cour est sans juridiction pour entendre et par conséquent permettre un appel direct à cette Cour d'une décision émanant de la Commission des relations de travail, il ne s'ensuit pas que tel serait le cas s'il s'agissait de l'appel d'un jugement, émanant d'une cour visée par l'art. 41(1) ou de l'un de ses juges, concernant une telle décision.

Pour ces raisons, et comme déjà indiqué, la demande de permission d'appeler ne pouvait être accordée et fut rejetée avec dépens.

Requête rejetée avec dépens.

Procureurs de la requérante: Dufour, Tremblay & Larouche, Chicoutimi.

Procureur de l'intimé: R. Roy, Arvida.

Procureurs de la mise-en-cause: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montréal.

1966

*Feb. 1
Mar. 11

HIGHWAY SAWMILLS LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sale of timber limit after removal of timber—Whether disposition of depreciable property—Capital cost allowance—Undepreciable capital cost—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), (b), 20(1), 20(5)(a), (c), (e)—Income Tax Regulations, ss. 1100(1)(e), 1100(2), 1101(3)(a), (b), 1102(2) and Schedule C.

The appellant company carried on the business of logging and milling on Vancouver Island. Between the years 1949 and 1955, it purchased blocks of land on which merchantable timber was standing. The whole of the purchase price was paid for the timber itself. No value was assigned to the land apart from the timber, it being the custom and the intention of the appellant to let the land be sold for taxes after all the merchantable timber had been removed. In computing its income from year to year the appellant claimed deductions in an amount equal to the capital cost of the timber cut during the year. In 1957, the appellant accepted an offer to sell for $22,620 the lands in one of its logged-over limits. The Minister ruled that this sum was the proceeds of disposition of depreciable property and reduced the appellant's capital cost allowance claim accordingly. The appellant contended that the sum was a capital receipt or windfall from the sale of bare land which is not depreciable property under s. 1102(2) of the Regulations, and that there being no proceeds of disposition of depreciable property, section 20(5)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148, could not be applied to reduce the undepreciated capital cost of the timber limit. An appeal from the Minister's assessment was allowed by the Income Tax Appeal Board. On further appeal, the Exchequer Court reversed that decision and upheld the Minister's assessment. The taxpayer appealed to this Court.

Held (Ritchie J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Judson and Spence JJ.: The $22,620 received by the appellant was the proceeds of a disposition of a depreciable property. When the lands were acquired by the appellant they were properly described as "timber limits" both in ordinary popular language and in the sense in which those words are used in the statutory provisions. The phrase "timber limits" describes a parcel of land with merchantable timber standing upon it; it is used in the Regulations in contradistinction to the phrase "a right to cut timber from a limit". Under the scheme of the relevant sections of the Act and of the Regulations, a timber limit is treated as a class of

* PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

depreciable property; it is an asset the total capital cost of which the owner is entitled to deduct in calculating his income. It was impossible to accept the view that, when all the merchantable timber had been removed, the land that remained ceased to be a timber limit. The proceeds of disposition of that land fell within the terms of s. 20(1) of the Act and s. 1100(2) of the Regulations. In the present case, the appellant purchased the land in question as a capital asset to secure a supply of timber to be used in earning its income. The scheme of the legislation is to allow the taxpayer to deduct the whole of the net cost of such capital asset in arriving at its trading profits. The judgment of the Exchequer Court brought about this result. If, on the other hand, the contentions of the appellant were upheld, the result would be that it would have been permitted to deduct the total original cost of the capital asset although it had already recovered $22,620 of that cost.

Per Ritchie J., *dissenting*: For the purpose of schedule C "a timber limit" or "a right to cut timber from a limit" are to be deemed to belong to a class in which capital cost allowance is limited to the value of the timber cut during a taxation year and in which the land on which the timber stands is not included. The phrase "timber limit", as used in schedule C to connote the property in respect of which a taxpayer is entitled to a deduction, means "merchantable timber within defined limits". Land stripped of timber is not "property in respect of which a taxpayer has been allowed or is entitled to a deduction under regulations made under s. 11(1)(*a*) of the Act". That land is not "depreciable property of a taxpayer" within the meaning of s. 20(5)(*a*) of the Act. Therefore, the proceeds of disposition of the land here in question were not proceeds of a disposition of depreciable property.

Revenu—Impôt sur le revenu—Vente d'une concession forestière après que le bois a été enlevé—Est-ce une disposition de biens susceptibles de dépréciation—Coût en capital à titre d'allocation—Coût en capital non déprécié—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(a), (b), 20(1), 20(5) (a), (c), (e)—Règlements de l'Impôt sur le revenu, arts. 1100(1)(e), 1100(2), 1101(3)(a), (b), 1102((2), Cédule C.

La compagnie appelante s'occupait de la coupe de bois et possédait des moulins sur l'île de Vancouver. Entre 1949 et 1955, elle a acheté des terres sur lesquelles il y avait du bois sur pied en état d'être livré au commerce. Tout le prix d'achat portait sur le bois lui-même. Aucune valeur n'a été attribuée à la terre indépendamment du bois. C'était la coutume et l'intention de l'appelante de laisser la terre être vendue pour taxes après que le bois en avait été enlevé. Dans le calcul de son revenu de chaque année, l'appelante réclamait des déductions pour un montant égal au coût en capital du bois coupé durant l'année. En 1957, l'appelante a accepté une offre de vendre pour $22,620 une de ses terres dont elle avait enlevé le bois. Le Ministre a décidé que ce montant était le produit d'une disposition de biens susceptibles de

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

dépréciation et a réduit, en conséquence, l'allocation du coût en capital de l'appelante. L'appelante a soumis que le montant était un reçu en capital ou une aubaine provenant de la vente d'une terre dénudée qui n'est pas un bien susceptible de dépréciation en vertu de l'art. 1102(2) des Règlements, et comme il n'y avait pas eu de produit d'une disposition de biens susceptibles de dépréciation, on ne pouvait pas se servir de l'art. 20(5) de la *Loi sur l'Impôt sur le revenu*, S.R.C. 1952, c. 148, pour réduire le coût en capital non déprécié de la concession forestière. Un appel de la cotisation du Ministre a été maintenu par la Commission d'appel de l'Impôt. Sur appel subséquent à la Cour de l'Échiquier, la cotisation du Ministre fut maintenue. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Ritchie étant dissident.

Les Juges Cartwright, Abbott, Judson et Spence: Les $22,620 reçus par l'appelante étaient le produit d'une disposition de biens susceptibles de dépréciation. Lorsque l'appelante a acquis les terres, celles-ci étaient proprement décrites comme étant des «concessions forestières» et dans le langage ordinaire populaire et dans le sens dans lequel ces mots sont employés dans les dispositions statutaires. Les mots «concessions forestières» décrivent un lopin de terre sur lequel il y a du bois sur pied en état d'être livré au commerce; ces mots sont employés dans les Règlements par contraste avec la phrase «le droit de couper le bois d'une concession». Sous le système des articles pertinents de la Loi et des Règlements, une concession forestière est traitée comme étant une classe de biens susceptibles de dépréciation; c'est un bien duquel le propriétaire a droit de déduire le coût total en capital dans le calcul de son revenu. Il est impossible d'accepter le point de vue que la terre qui subsiste après que le bois en état d'être livré au commerce a été enlevé, cesse d'être une concession forestière. Le produit de la disposition de cette terre tombait sous les termes de l'art. 20(1) de la Loi et de l'art. 1100(2) des Règlements. Dans le cas présent, l'appelante a acheté la terre en question comme un bien en capital pour s'assurer une provision de bois en vue de se gagner un revenu. Le but de la législation est de permettre au contribuable de déduire le plein montant du coût net d'un tel bien en capital dans le calcul de ses profits commerciaux. Le jugement de la Cour de l'Échiquier a amené ce résultat. D'un autre côté, si la prétention de l'appelante était maintenue, il en résulterait qu'on lui permettrait de déduire le coût original total d'un bien en capital malgré qu'elle ait déjà récupéré $22,620 de ce coût.

Le Juge Ritchie, *dissident:* Pour les fins de la Cédule C, une «concession forestière» ou «le droit de couper le bois d'une concession» sont censés appartenir à une classe dans laquelle l'allocation du coût en capital est limitée à la valeur du bois coupé durant l'année de taxation et dans laquelle la terre sur laquelle il y a du bois sur pied n'est pas incluse. Les mots «concession forestière», tels qu'employés dans la Cédule C pour désigner la propriété à l'égard de laquelle un contribuable a droit à une déduction, signifient «du bois en état d'être livré au commerce à l'intérieur d'une concession définie». Une terre dénuée de son bois n'est pas «un bien à l'égard duquel il a été accordé à un contribuable une déduction en vertu des règlements édictés sous le régime de l'art.

11(1)(*a*) de la Loi, ou à l'égard duquel le contribuable a droit à une telle déduction». Cette terre n'est pas «un bien d'un contribuable susceptible de dépréciation» dans le sens de l'art. 20(5)(*a*) de la Loi. En conséquence, le produit de la disposition de la terre en question n'était pas le produit d'une disposition de biens susceptibles de dépréciation.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], maintenant un appel d'une décision de la Commission d'Appel de l'Impôt. Appel rejeté, le Juge Ritchie étant dissident.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Income Tax Appeal Board. Appeal dismissed, Ritchie J. dissenting.

Kenneth E. Meredith, for the appellant.

G. W. Ainslie, for the respondent.

The judgment of Cartwright, Abbott, Judson and Spence JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Dumoulin J. allowing an appeal from a decision of the Tax Appeal Board and restoring the re-assessment of tax in the sum of $14,758.97 for the appellant's 1957 taxation year.

The appellant carried on the business of logging and milling on Vancouver Island.

Between the years 1949 and 1955 the appellant purchased from the Esquimalt and Nanaimo Railway Company, blocks of land on which merchantable timber was standing. In each case the appellant acquired an estate in fee simple subject to a reservation of mineral rights and other reservations not material to the question raised in this appeal. The purchase price of each block was based on cruises made by the vendor and purchaser assigning prices to the various kinds of standing timber on the land pur-

[1] [1965] 2 Ex. C.R. 297, [1965] C.T.C. 142, 65 D.T.C. 5080.

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

chased. No value was assigned to the land apart from the timber, it being the custom and the intention of the appellant to let the land be sold for taxes after all the merchantable timber had been removed.

In computing its income from year to year the appellant claimed deductions in an amount equal to the capital cost of the timber cut during the year from the lands above referred to.

In 1957 Alaska Pine and Cellulose Company Limited, hereinafter referred to as "Alaska Pine", offered to purchase these lands from the appellant, its intention being to use them as a tree farm. The appellant accepted the offer which it regarded as a windfall. The appellant conveyed the lands to Alaska Pine in fee simple but reserved to itself the right to cut and remove all the merchantable timber standing, lying or being upon the said lands. Prior to the end of the appellant's taxation year on September 30, 1957, it removed all this timber.

It is agreed that the net proceeds from the sale of the land to Alaska Pine amounted to $22,620. In his notice of re-assessment the respondent added this amount to the appellant's income for 1957 by an item worded as follows:

> Reduction of Capital Cost Allowance claimed in 1957 on Blocks 871, 891, 1035 and 1069, and a partial recovery of Capital Cost Allowance on blocks previously shown as depleted. Sold March 4, 1957, for $22,620.00.

The appellant served a notice of objection to the re-assessment. As to this item the objection was rejected by the Minister who stated in his notification that the re-assessment in respect of this item was made in accordance with the provisions of the *Income Tax Act* and in particular:

> on the ground that the proceeds of disposition of depreciable property sold to Alaska Pine Company Limited pursuant to an Agreement dated 4th March, 1957 was $22,620.00 in accordance with the provisions of paragraphs (*a*) and (*c*) of sub-section (5) of section 20 of the Act and therefore for the purpose of paragraph (2) of subsection (1) of section 11 of the Act and paragraph (*e*) of sub-section (1) of section 1100 of the Income Tax Regulations the undepreciated capital cost of the taxpayer's timber limits and rights to cut timber has been properly determined.

The appellant served a notice of appeal to the Tax Appeal Board. Paragraph 10 of the reply to this notice reads as follows:

> The Respondent pleads and relies upon the provisions of sections 11(1)(*a*) and 20(5) of the Income Tax Act and sections 1100(1)(*e*), 1101(3) and 1105 and Schedule C of the Income Tax Regulations.

There is no dispute as to amounts or as to the material facts. The question is whether or not on the true construction of the applicable sections of the *Income Tax Act* and Regulations this addition of $22,620 to the income of the appellant was properly made.

In the reasons of the Tax Appeal Board it is said:

> Even if I were to accept a definition of a timber limit as including not only the timber but also the land, nevertheless it is my conviction that land is not depreciable property and that the proceeds from the sale of the land cannot be brought into income for the purposes of taxation under the provisions of s. 20 of the Act or any of the Income Tax Regulations.

The reasons conclude as follows:

> In any event, I have reached the conclusion that the respondent erred in the assessment appealed against in attempting to tax the proceeds from the sale of land as being applicable to the disposition of *depreciable property*, when, on the evidence before me, there was no depreciable property whatsoever involved in the sale by the appellant to Alaska Pine Company Limited.

Dumoulin J. was of opinion that the lands acquired by the appellant in fee simple and disposed of by it to Alaska Pine were "timber limits" within the meaning of Schedule C of the Income Tax Regulations and "depreciable property" in respect of which the appellant had been allowed a deduction under regulations made under s. 11(1)(*a*) of the *Income Tax Act*.

It is common ground that the blocks of land with the merchantable timber standing on them were acquired by the appellant as capital assets. It was pointed out by Locke J. in *Caine Lumber Co. Ltd. v. Minister of National Revenue*[1], that:

> The provisions of s. 11 of the Act and of the Regulations are required in order to afford a means of properly ascertaining the trading profit of persons engaged in such businesses as mining and lumbering, where capital assets are depleted by the operations.

[1] [1959] S.C.R. 556 at 559, [1959] C.T.C. 221, 59 D.T.C. 1123, 18 D.L.R. (2d) 593.

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

The sections of the Act and Regulations with which we are chiefly concerned are:

Section 11(1) (*a*) and (*b*):

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

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation;

Section 12 (1) (*b*):

12 (1) In computing income, no deduction shall be made in respect of

* * *

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

Section 20 (1):

20 (1) Where depreciable property of a taxpayer of a prescribed class has, in a taxation year, been disposed of and the proceeds of disposition exceed the undepreciated capital cost to him of depreciable property of that class immediately before the disposition, the lesser of

(*a*) the amount of the excess, or

(*b*) the amount that the excess would be if the property had been disposed of for the capital cost thereof to the taxpayer,

shall be included in computing his income for the year.

Section 20 (5), so far as relevant reads:

(5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) 'depreciable property of a taxpayer' as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

(*b*) 'disposition of property' includes any transaction or event entitling a taxpayer to proceeds of disposition of property;

(*c*) 'proceeds of disposition' of property include

(i) the sale price of property that has been sold, . . .

(clauses (ii), (iii) and (iv) are not applicable.)

(*d*) 'total depreciation allowed to a taxpayer' before any time for property of a prescribed class means the aggregate of all amounts allowed to the taxpayer in respect of property of that class under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for taxation years before that time; and

(*e*) 'undepreciated capital cost to a taxpayer of depreciable property' of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of

(i) the total depreciation allowed to the taxpayer for property of that class before that time,

(ii) for each disposition before that time of property of the taxpayer of that class, the least of

(A) the proceeds of disposition thereof,

(B) the capital cost to him thereof, or

(C) the undepreciated capital cost to him of property of that class immediately before the disposition, and

(iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

Regulations, Section 1100(1)(*e*):

1100(1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to . . .

(*e*) such amount as he may claim not exceeding the amount calculated in accordance with Schedule C in respect of the capital cost to him of a timber limit or a right to cut timber from a limit;

Regulations, Section 1100(2):

(2) Where a taxpayer has, in a taxation year, otherwise than on death, disposed of all property of a prescribed class that he had not previously disposed of and has no property of that class at the end of the taxation year, he is hereby allowed a deduction for the year equal to the amount that would otherwise be the undepreciated capital cost to the taxpayer of property of that class at the expiration of the taxation year.

Regulations, Section 1101(3)(*a*) and (*b*):

(3) For the purpose of this Part and for the purpose of Schedules C and D,

(*a*) a timber limit or a right to cut timber from a limit shall be deemed to be a separate class of property, and

(*b*) where a taxpayer has more than one timber limit or rights to cut timber from more than one limit, each limit or right shall be deemed to be a separate class of property.

Schedule C reads as follows:

Schedule C

1. For the purpose of paragraph (*e*) of subsection (1) of section 1100, the amount that may be deducted in computing the income of a taxpayer for a taxation year in respect of a timber limit or a right to cut timber from a limit is the lesser of

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

(*a*) an amount computed on the basis of a rate (computed under section 2 of this Schedule) per cord or board foot cut in the year, or

(*b*) the undepreciated capital cost to the taxpayer as of the end of the year (before making any deduction under section 1100 for the year) of the timber or right.

2. The rate for a taxation year is

(*a*) if the taxpayer has not been granted an allowance in respect of the limit or right for a previous year, an amount determined by dividing the capital cost of the limit or right to the taxpayer minus the residual value by the quantity of timber in the limit or the quantity of timber the taxpayer has obtained a right to cut, as the case may be (expressed in cords or board feet) as shown by a bona fide cruise, and

(*b*) if the taxpayer has been granted an allowance in respect of the limit or right in a previous year,

(i) if no rate has been determined under subparagraph (ii), the rate employed to determine the allowance for the most recent year for which an allowance was granted, and

(ii) where it has been established that the quantity of timber that was in the limit or that the taxpayer had a right to cut was in fact substantially different from the quantity that was employed in determining the rate for the previous year, or where it has been established that the capital cost of the limit or right was substantially different from the amount that was employed in determining the rate for the previous year, a rate determined by dividing the undepreciated capital cost to the taxpayer of the limit or right as of the commencement of the year minus the residual value thereof by the estimated remaining quantity of timber that is in the limit or that the taxpayer has a right to cut, as the case may be (expressed in cords or board feet) at the commencement of the year.

3. In lieu of the deduction otherwise determined under this Schedule, a taxpayer may elect that the deduction for a taxation year be the lesser of

(*a*) $100, or

(*b*) the amount received by him in the taxation year from the sale of timber.

4. In this Schedule, 'residual value' means the estimated value of the property if the merchantable timber were removed.

While in view of these somewhat complex statutory provisions it may seem an over-simplification, it appears to me that the result of this appeal depends upon whether the sum of $22,620 received by the appellant in its 1957 taxation year for the lands from which the merchantable timber had been removed was the proceeds of a disposition of depreciable property of the appellant within the meaning of the provisions quoted above.

In order to be brought within the terms of Regulation 1100(1)(*e*) and Schedule C the lands with which we are concerned must answer one or other of the descriptions "a timber limit" or "a right to cut timber from a limit". I think it plain that when those lands were acquired by the appellant they were properly described as "timber limits" both in ordinary popular language and in the sense in which those words are used in the statutory provisions. In my opinion, the phrase "timer limits" describes a parcel of land with merchantable timber standing upon it. It refers, that is to say, to a corporeal hereditament. The phrase "a timber limit" is used in Regulation 1100 (i) (*e*), Regulation 1101(3)(*a*) and (*b*), and Schedule C in contradistinction to the phrase "a right to cut timber from a limit", which is one apt to describe a profit à prendre.

A timber limit under the scheme of the relevant sections of the Act and Regulations is treated as a class of depreciable property; it is an asset the total capital cost of which the owner is entitled to deduct in calculating his taxable income. Without these statutory provisions the owner would have no right to make such deductions from income. The right to make the deductions is subject to the obligation, if he disposes of the asset, to add to his income the proceeds of that disposition to the extent that such proceeds do not exceed the capital cost to him. I am unable to accept the view that when all the merchantable timber had been removed the land which remained ceased to be a timber limit, and, in my opinion, the proceeds of the disposition of that land fall within the terms of s. 20(1) of the *Income Tax Act* and of Regulation 1100(2).

The answer to the question what tax is payable in any given circumstances depends, of course, upon the words of the legislation imposing it. Where the meaning of those words is difficult to ascertain it may be of assistance to consider which of two constructions contended for brings about a result which conforms to the apparent scheme of the legislation. In the present case the appellant purchased the land in question as a captial asset to secure a supply of timber to be used in earning its income. The scheme of the legislation is to allow the taxpayer to deduct the whole of

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

the net cost of such capital asset in arriving at its trading profit. The judgment of the Exchequer Court in this case brings about this result. If, on the other hand, the contention of the appellant was upheld the result would be that it would have been permitted to deduct the total original cost of the capital asset although it had already recovered $22,620 of that cost.

For the reasons stated above and for those given by Dumoulin J., with which I am in substantial agreement, I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment of my brother Cartwright which are concurred in by the other members of the Court and in which he has outlined the circumstances giving rise to this appeal and has reproduced the relevant provisions of the *Income Tax Act* and regulations.

The following facts appear to me to be undisputed:

1. The capital cost to the appellant of the timber limits in question was determined exclusively by reference to the extent and quality of the standing timber and no value whatever was assigned to the land.
2. "The undepreciated capital cost" of the property so acquired immediately before March 4, 1957, was $49,379.90.
3. On March 4, 1957, the land excluding timber was sold by the appellant to Alaska Pine and Cellulose Company Limited for a net return of $22,620.
4. In computing its income for the 1957 taxation year, the appellant deducted $45,411.42 as a capital cost allowance in respect of the timber cut from the limits during that year.
5. By notice of reassessment dated January 3, 1960, the Minister of National Revenue reassessed the capital cost allowance so claimed by subtracting therefrom the proceeds of the disposition of the land *(i.e.* $22,620) thus leaving the maximum amount deductible by way of capital cost allowance at a figure of $26,759.30 instead of $49,379.90.

6. The timber limits in question were acquired by the appellant for the purpose of removing merchantable timber therefrom and were of no further use to it after the timber had been removed.

The question to be determined on this appeal is whether, in computing his taxable income for a taxation year, a taxpayer who owns a timber limit is required to deduct the sale price of land exclusive of timber from the "undepreciated capital cost" of the limit at the date of sale and this in turn depends, as Mr. Justice Cartwright has pointed out, upon whether such a sale constitutes "a disposition of depreciable property" within the meaning of these words as they are used in the *Income Tax Act*.

For greater clarity, and notwithstanding the fact that the subsections have been reproduced by my brother Cartwright, I think it desirable to set out the portions of the *Income Tax Act* which define "depreciable property of a taxpayer" and "undepreciated capital cost to a taxpayer of depreciable property".

20. (5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) 'depreciable property of a taxpayer' as of any time in a taxation year means property in respect of which the taxpayer has been allowed or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year; . . .

(*e*) 'undepreciated capital cost to a taxpayer of depreciable property' of a prescribed class of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of

(i) the total depreciation allowed to the taxpayer for property of that class before that time,

(ii) for each disposition before that time of property of the taxpayer of that class, the least of

(A) the proceeds of disposition thereof,

(B) the capital cost to him thereof, of

(C) the undepreciated capital cost to him of property of that class immediately before the disposition and

(iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

In determining the "undepreciated capital cost to a taxpayer of depreciable property" the taxpayer can only be

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

required to subtract from the capital cost of the property such items as are specified in s. 20(5)(*e*) and it is clear from the terms of his confirmation of the present reassessment that the Minister has treated the sale price of the land, excluding timber, sold by the appellant on March 4, 1957, as being "the proceeds of disposition" of "depreciable property of a prescribed class" within the meaning of s. 20(1) and s. 20(5)(*e*)(ii)(A).

The "prescribed class" of depreciable property here in question is a "timber limit" and the property of that class "in respect of which the taxpayer . . . is entitled to a deduction . . ." is prescribed by the provisions of Schedule C 1, so that it is a matter of first importance to determine the meaning to be attached to the phrase "timber limit" as it occurs in that Schedule. There does not appear to me to be any difficulty about the meaning of the word "limit" and I take it to be plain that the phrase means the "timber within defined limits or boundaries". The question which remains to be determined, however, is what meaning Parliament intended to be attached to the word "timber" in the context. The provisions of Schedule C 1 read as follows:

Schedule C

(1) For the purpose of paragraph (*e*) of subsection (1) of section 1100, the amount that may be deducted in computing the income of a taxpayer for a taxation year in respect of a timber limit or a right to cut timber from a limit is the lesser of

(*a*) an amount computed on the basis of a rate (computed under section 2 of this Schedule) per cord or board foot cut in the year, or

(*b*) the undepreciated capital cost to the taxpayer as of the end of the year (before making any deduction under section 1100 for the year) of the timber or right.

At common law in the consideration of deeds and other documents of title "timber" is generally treated as connoting growing trees which are a part of the realty and pass with a conveyance of land unless expressly reserved. In this sense the word is defined in the Shorter Oxford English Dictionary as meaning "trees growing upon land and form-

ing part of the freehold inheritance" but growing trees are potentially severable from the land and when severed and reduced to logs and lumber they become personal property and have a value as "merchantable timber" altogether apart from the land and the Oxford English Dictionary also defines "timber" as being "applied to the wood of growing trees capable of being used for structural purposes hence collectively to the trees themselves."

It appears to me that the word "timber" as used in the phrase "timber limit" in Schedule C 1 is to be taken as meaning the kind of "timber" which is made the subject of the deduction allowed by that Schedule and in this regard it is significant that the deduction is not to be computed on the basis of timber as part of the *corporeal hereditament* but rather "on the basis of a rate per cord or board foot cut in the year" in which sense it seems to me that it must refer to the timber in growing trees capable of being severed from the land and being reduced to "cord or board foot" measure and not to growing trees together with the land on which they grow. In this sense the man who has a "right to cut timber from a limit" and the man who has acquired the land itself for the purpose of removing timber from it and has no further use for it have both acquired the same class of property, namely, "the wood in the growing trees" and with the greatest respect for those who hold a different view, I read regulation 1101(3) as reinforcing this view. The regulation reads:

1101.

(3) For the purpose of this Part and for the purpose of Schedules C and D,

(*a*) a timber limit or a right to cut timber from a limit shall be deemed to be a separate class of property, and . . .

Unlike the other members of the Court, I take this to mean that for the purpose of Schedule C "a timber limit" or "a right to cut timber from a limit" are to be deemed to belong to the *same* separate class of property and that they belong to a class in which capital cost allowance is limited

1966

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

to the value of the timber which is cut during a taxation year and in which the land on which the timber stands is not included. For these reasons I have concluded that the phrase "timber limit" as used in Schedule C 1 to connote the property in respect of which the taxpayer is entitled to a deduction means "merchantable timber within defined limits", and I am accordingly of opinion that land stripped of timber is not "property in respect of which a taxpayer has been allowed or is entitled to a deduction under regulations made under para. *(a)* of ss. (1) of s. 11 . . ." and is therefore not "depreciable property of a taxpayer" within the meaning of s. 20 (5) (*a*). It follows in my view that the proceeds of disposition of the land here in question were not proceeds of disposition of depreciable property within the meaning of s. 20(5)(*e*) or s. 20(1) and that the land was not property "of a prescribed class" within the meaning of 1100(2).

Having reached this conclusion, I am unable to find any authority in the *Income Tax Act* to justify the Minister in taking the proceeds of the sale of this land into consideration in determining the undepreciated capital cost of the timber limit in question for the purpose of computing the taxpayer's taxable income for the year 1957.

For these reasons I would allow this appeal and restore the judgment of the Tax Appeal Board.

I appreciate that, as pointed out by my brother Cartwright, the result of this decision is that the taxpayer would be allowed to deduct the total original cost of the timber limit notwithstanding the fact that it had sold the land on which the timber stood for $22,620. Unlike the other members of the Court, I do not regard this as a result which runs contrary to the expressed intention of Parliament but I am, on the other hand, of opinion that it would require an amendment to the statute in order to include land stripped of timber in the prescribed class of depreciable property for which provision is made in Schedule C 1.

The fact that the appellant had made an unexpected sale of cut-over barren lands which it was prepared to abandon is, in my opinion, a circumstance of a kind sometimes referred to in this context as a "windfall" and, with great respect for those who hold a different view, it appears to me to fall clear of what Mr. Justice Dumoulin has referred to as the "rather intricate statutory skein" presently supplied by those provisions of the *Income Tax Act* which are fully set out in the reasons for judgment of my brother Cartwright.

Appeal dismissed with costs, RITCHIE J. *dissenting.*

Solicitors for the appellant: Meredith, Marshall, McConnell & Scott, Vancouver.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

SA MAJESTÉ LA REINE ..... APPELANTE;

ET

ADRIEN MEUNIER ..... INTIMÉ.

1966
*Juin 15
Juin 15

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Parjure—Procès—Présence de l'accusé—Ordre donné à l'accusé de sortir de la salle d'audience pendant son contre-interrogatoire pour qu'une objection à une question qui lui était posée puisse être discutée—Code criminel, 1953-54 (Can.), c. 51, arts. 557(1), 592(1)(b)(iii).

Durant son procès sur une accusation de parjure, et alors qu'il était dans la boîte aux témoins, l'accusé a reçu l'ordre du juge de sortir de la salle d'audience pendant qu'une objection à une question qui lui était posée en contre-interrogatoire était discutée. La question a été subséquemment permise et l'accusé est retourné à la salle d'audience.

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*CORAM: Le Juge en Chef Taschereau et les Juges Fauteux, Abbott, Martland et Spence.

1966

LA REINE
v.
MEUNIER

Devant la Cour l'Appel, l'accusé a soumis que le juge au procès, en lui ordonnant de sortir, avait enfreint les dispositions de l'art. 557 du Code, et que ceci avait eu l'effet d'annuler le procès. La Cour d'Appel, par un jugement majoritaire, a ordonné un nouveau procès. Le juge dissident aurait appliqué les dispositions de l'art. 592(1)(*b*)(iii) du Code. La Couronne en a appelé devant cette Cour sur la question soulevée dans la dissidence, et a aussi obtenu permission d'en appeler sur deux autres questions.

APPEL de la Couronne d'un jugement majoritaire de la Cour du banc de la reine, Province de Québec[1], ordonnant un nouveau procès. Appel rejeté.

Marc Brière, pour l'appelante.

Dollard Dansereau, C.R., et *Guy Guérin*, pour l'intimé.

Lorsque le procureur de l'accusé eut terminé sa plaidoirie, la Cour a rendu le jugement suivant:

LE JUGE EN CHEF (*oralement*):—M. Brière a dit tout ce qui pouvait être dit, mais nous croyons que cet appel ne peut réussir. Nous sommes satisfaits d'adopter les raisons de M. le Juge Casey.

L'appel doit être rejeté.

Criminal law—Perjury—Trial—Presence of accused—Accused ordered to leave courtroom during his cross-examination to discuss an objection to a question put to him—Criminal Code, 1953-54 (Can.), c. 51, ss. 557(1), 592(1)(b)(iii).

During his trial on a charge of perjury, and while in the witness-box, the accused was ordered by the trial judge to leave the courtroom while an objection to a question put to him in cross-examination was being discussed. The question asked was later permitted and the accused returned to the courtroom. Before the Court of Appeal, the accused submitted that by ordering him to leave, the trial judge had contravened s. 557 of the Code, and that this had had the effect of rendering the trial void. The Court of Appeal, by a majority

[1] [1966] B.R. 94, 48 C.R. 14.

judgment, ordered a new trial. The dissenting judge would have applied s. 592(1)(*b*)(iii) of the Code. The Crown appealed to this Court on the question raised in the dissent, and was also granted leave to appeal on two other questions.

APPEAL by the Crown from a majority judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], ordering a new trial. Appeal dismissed.

Marc Brière, for the appellant.

Dollard Dansereau, Q.C., and *Guy Guérin,* for the respondent.

At the conclusion of the argument of counsel for the accused, the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—M. Brière a dit tout ce qui pouvait être dit, mais nous croyons que cet appel ne peut réussir. Nous sommes satisfaits d'adopter les raisons de M. le Juge Casey.

L'appel doit être rejeté.

Appel rejeté.

Procureur de l'appelante: M. Brière, Montréal.

Procureurs de l'intimé: D. Dansereau et G. Guérin, Montréal.

[1] [1966] Que. Q.B. 94, 48 C.R. 14.

1966
*June 13
June 13

ROGER ALLAN FULTON ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Capital murder—Instruction to jury regarding clemency—Criminal Code, 1953-54 (Can.), c. 51, ss. 206, 597A, 642A.

The appellant was convicted of capital murder. The only issue raised by the defence at trial was that the jury should make a recommendation in favour of clemency. Defence counsel's whole address to the jury was devoted to this issue. The trial judge made no reference to it in his address to the jury before they retired to consider the verdict, but after the verdict of guilty had been rendered, he addressed the jury on s. 642A of the Code and read them a summary of the evidence of one psychiatrist. The jury returned an eleven to one recommendation against clemency. The appeal against sentence and conviction was dismissed by a unanimous judgment of the Court of Appeal. An appeal was launched to this Court.

Before this Court and the Court of Appeal, the appellant argued that there had been a miscarriage of justice in that:

(1) The trial judge failed to explain adequately to the jury the considerations that they could apply in arriving at a decision on the question of clemency;

(2) The trial judge erred in failing to define and explain what clemency is, and the extent of the right that the jury had to recommend it;

(3) The trial judge erred by directing the jury on the evidence given by only one of the witnesses on that issue.

In this Court, the Crown raised the question of jurisdiction on the ground that the appeal referred not to the conviction but to the question of sentence.

APPEAL from a judgment of the Court of Appeal for British Columbia,[1] affirming a conviction for capital murder. Appeal dismissed.

Samuel Martin Toy, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

[1] (1966), 55 W.W.R. 427.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—We are all of opinion that there is no merit in the present appeal. In a capital case the trial must be conducted without regard to s. 642A of the *Criminal Code*. After a verdict of guilty is given, all that the judge is required to do, and all that he should do, is to put to the jury the question in the terms of that section. In the light of this conclusion, it is not necessary to deal with the issue of jurisdiction raised by counsel for the respondent.

The appeal is dismissed.

Droit criminel—Meurtre qualifié—Adresse du juge au jury concernant la clémence—Code criminel, 1953-54 (Can.), c. 51, arts. 206, 597A, 642A.

L'appelant a été trouvé coupable de meurtre qualifié. Lors du procès, la défense n'a soulevé qu'un seul point, à savoir que le jury devait faire une recommandation à la clémence. Toute l'adresse du procureur de l'appelant au jury fut consacrée à cette question. Le juge au procès n'a pas référé à cette question dans son adresse au jury avant qu'il se retire pour considérer le verdict, mais après la déclaration de culpabilité, le juge, dans une nouvelle adresse au jury, a traité de l'art. 642A du Code et a lu un sommaire du témoignage d'un psychiatre. Onze des jurés ont déclaré qu'ils s'opposaient à une recommandation à la clémence. Un appel contre la sentence et contre la déclaration de culpabilité a été rejeté par un jugement unanime de la Cour d'Appel. D'où le pourvoi devant cette Cour.

Devant cette Cour et la Cour d'Appel, l'appelant a soumis qu'il y avait eu erreur judiciaire lorsque:

1) Le juge au procès n'a pas expliqué adéquatement au jury les questions qu'il pouvait considérer pour en arriver à une décision sur la question de clémence;
2) Le juge au procès a erré en ne définissant pas et en n'expliquant pas ce qu'était la clémence, ainsi que l'étendue du droit que le jury avait de la recommander;
3) Le juge au procès a erré en référant le jury au témoignage donné par un seul des témoins sur cette question.

Devant cette Cour, la Couronne a soulevé la question de juridiction en se basant sur le fait que l'appel portait non pas sur la déclaration de culpabilité mais sur la question de sentence.

1966

FULTON v. THE QUEEN

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique,[1] confirmant une déclaration de culpabilité pour meurtre qualifié. Appel rejeté.

Samuel Martin Toy, pour l'appelant.

W. G. Burke-Robertson, Q.C., pour l'intimé.

Lorsque le procureur de l'appelant eut terminé sa plaidoirie, la Cour a rendu le jugement suivant:

THE CHIEF JUSTICE (*orally for the Court*):—We are all of opinion that there is no merit in the present appeal. In a capital case the trial must be conducted without regard to s. 642A of the *Criminal Code*. After a verdict of guilty is given, all that the judge is required to do, and all that he should do, is to put to the jury the question in the terms of that section. In the light of this conclusion, it is not necessary to deal with the issue of jurisdiction raised by counsel for the respondent.

The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Boyd, King & Toy, Vancouver.

Solicitor for the respondent: N. A. McDiarmid, Victoria.

[1] (1966), 55 W.W.R. 427.

NIRMAL JIT SINGH HOON (*Defendant*) ..... APPELLANT;

1966

*Feb. 2, 3
Mar. 11

AND

THE BANK OF NOVA SCOTIA (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Guarantee—Guarantees signed by defendant for indebtedness of two companies to plaintiff bank in consideration of bank's agreeing to deal with the companies "in the way of its business as a bank"—Payment demanded shortly after guarantees signed—Bank subsequently agreeing to extension of time for payment on furnishing of additional securities—Whether failure of consideration.

On April 10, 1959, the defendant signed two guarantees for the indebtedness of D Ltd. and M Ltd. to the plaintiff bank "in consideration of the bank's agreeing to deal with [the said companies] in the way of its business as a bank". D Ltd. owed the bank $20,000 on a demand loan and about $28,400 by way of overdraft. M Ltd. owed the bank $20,000 on a demand loan but had a credit balance of something over $4,000 in its current account.

Following the signing of the guarantees the bank refused to honour outstanding cheques of D Ltd. unless cash were deposited to cover them, although up to that time the account had been allowed to become overdrawn. Four days after the signing of the guarantees the bank transferred $5,000 from the account of M Ltd. in part payment of the demand loan, thereby reducing that loan to $15,000 and creating an overdraft in the account of close to $900. On April 23 the bank's manager told the defendant that the bank would not advance further moneys to either D Ltd. or M Ltd. on the basis of the security that had been offered by the defendant. On April 24 the bank demanded payment in full of the indebtedness of the two companies and on April 27 demanded payment thereof from the defendant under the guarantees.

After some days of discussion an arrangement was completed by May 12, 1959, whereby the bank was provided with certain additional security and in return agreed to a postponement of payment until April 29, 1960. However, payment was not made and an action on the two guarantees was commenced on January 11, 1961. The trial judgment in favour of the bank was affirmed by the Court of Appeal with one member of the Court dissenting. On the appeal to this Court one ground of defence required consideration, *i.e.*, that it was a condition precedent to the defendant's liability on the guarantees that the plaintiff should carry out its agreement to deal with D Ltd. and M Ltd. as its customers in the way of its business as a bank, that the plaintiff did not carry out those agreements, and indeed never intended to do so, and that consequently the defendant who received no part of the consideration for his promises was under no liability.

Held (Judson J. dissenting): The appeal should be allowed.

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

1966

HOON
v.
BANK OF NOVA SCOTIA

Per Cartwright, Martland, Ritchie and Hall JJ.: The intention of the bank, far from being to deal with D Ltd. and M Ltd. as customers, was to terminate that relationship immediately upon receiving the guarantees and by April 24, 1959, it had done so. The arrangement completed on May 12, 1959, did not alter this position in favour of the bank. It was the case of a creditor pressing its debtors for payment of the balances due at the time when it had, for all practical purposes, put an end to its relationship of banker and customer with them and agreeing to give an extension of time for payment on the furnishing of additional securities. It did not constitute a *bona fide* fresh transaction between the parties as banker and customer. The bank did not grant an extension of time for payment by the two debtor companies as consideration for the obtaining of the guarantees from the defendant. What it did do was to demand and obtain additional security as the price for postponement of the enforcement of its claim for payment.

The defendant's letter wherein he acknowledged that the acquisition of additional securities by the bank was "in no way" to affect his liability as guarantor did not assist the plaintiff. Its purpose was to retain matters *in statu quo*. It neither increased nor diminished the liability of the defendant. The liability did not exist.

Royal Bank of Canada v. Salvatori, [1928] 3 W.W.R. 501, applied.

Per Judson J., *dissenting*: The guarantee by its express terms was a continuing guarantee and it was in existence at the time of the settlement. The settlement provided that the taking of the additional security was not to affect the defendant's liability as guarantor of the two companies. A binding extension of time given to the two companies was within the consideration recited in the guarantee.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Aikins J. Appeal allowed, Judson J. dissenting.

I. Sara, for the defendant, appellant.

V. R. Hill, for the plaintiff, respondent.

The judgment of Cartwright, Martland, Ritchie and Hall JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] affirming a judgment of Aikins J. in favour of the respondent for $76,305.16. Bull J.A., dissenting, would have allowed the appeal and dismissed the action.

The action was brought on two guarantees signed and sealed by the appellant. It was commenced on January 11, 1961, by specially endorsed writ. The first paragraph of the endorsement reads as follows:

The Plaintiff's claim against the Defendant is for the sum of $49,392.76 plus interest at the rate of 6% per annum on the sum of $45,169.84 from the 9th day of January, 1961 until payment or Judgment, being the balance

[1] (1965), 52 W.W.R. 592, 53 D.L.R. (2d) 239.

and accrued interest due and owing by the Defendant to the Plaintiff under an unlimited guarantee in writing under seal dated the 10th day of April, 1959 signed by the Defendant and given by him to the Plaintiff in consideration of the Plaintiff agreeing to deal with Dunsmuir Construction Ltd. in the way of the Plaintiff's business as a bank.

1966

HOON v. BANK OF NOVA SCOTIA

Cartwright J.

The second paragraph is in the same words except that the name of "Modern Aluminum Ltd." appears instead of "Dunsmuir Construction Ltd.," and the amounts of $17,476.03 and $15,769.85 appear instead of $49,392.76 and $45,169.84.

At the trial there was direct conflict between the evidence of the appellant and that of Mr. Summers who was the manager of the branch of the respondent bank at which the transactions out of which the action arises took place. The learned trial judge preferred to accept the evidence of Mr. Summers. His findings of fact were accepted by all the judges in the Court of Appeal and were not challenged before us. In the result there is now only one ground of defence to the action which requires consideration.

The facts as found are set out in the reasons of the learned trial judge and in those of Bull J.A. I shall endeavour to state them as briefly as is consistent with making clear the reasons for the conclusion at which I have arrived.

In the spring of 1959 Haro Holdings Ltd., hereinafter referred to as "Haro", was building an apartment house in Vancouver. Dunsmuir Construction Ltd., hereinafter referred to as "Dunsmuir", was the construction contractor and Modern Aluminum Ltd., hereinafter referred to as "Modern Aluminum", was the supplier of aluminium materials to Dunsmuir for use in the building. These three companies banked with the respondent at its Columbia and Hastings Streets Branch. All three were short of working capital and were indebted to the bank. In early April 1959 Dunsmuir owed the bank about $28,400 by way of overdraft and $20,000 on a demand loan and Modern Aluminum owed the bank $20,000 on a demand loan but had a credit balance in its current account of $4,133.44. At this time the appellant was engaged in negotiations looking to obtaining control of the three companies.

The appellant met with Summers on April 9 and 10, 1959. As to what occurred at these meetings the learned

1966

HOON
v.
BANK OF NOVA SCOTIA

Cartwright J.

trial judge accepted the evidence of Summers which he summarized as follows:

> There was some discussion as to the bank advancing $75,000.00 to Dunsmuir and Modern Aluminum. Mr. Summers asked for the defendant's personal guarantees, the defendant agreed to give guarantees and he signed the guarantees without the bank making any commitment to make further loans to Dunsmuir or Modern Aluminum.

The two guarantees were signed on April 10, 1959. They were on printed forms prepared by the bank. The opening paragraph of that relating to Dunsmuir reads as follows:

> In consideration of the bank's agreeing to deal with Dunsmuir Construction Ltd. (hereinafter called 'the customer') in the way of its business as a bank, the undersigned hereby guarantees payment to the bank of the liabilities whether direct, contingent or otherwise which the customer has incurred or is under or may hereafter incur or be under to the bank, whether arising from dealings between the bank and the customer, or from other dealings or proceedings by which the bank may become in any manner whatever a creditor of the customer.

The guarantee relating to Modern Aluminum is the same except that "the customer" is Modern Aluminum Ltd. instead of Dunsmuir Construction Ltd.

Following the signing of the guarantees the bank refused to honour outstanding cheques of Dunsmuir unless cash were deposited to cover them, although up to that time the account had been allowed to become overdrawn. Four days after the signing of the guarantees the bank transferred $5,000 from the account of Modern Aluminum in part payment of the demand loan, thereby reducing that loan to $15,000 and creating an overdraft in the account of $866.56. On April 23 Summers told the respondent that the bank would not advance further moneys to either Dunsmuir or Modern Aluminum on the basis of the security that had been offered by the appellant. On April 24 the bank demanded payment in full of the indebtedness of Dunsmuir and Modern Aluminum and on April 27 demanded payment thereof from the appellant under the guarantees.

On the following day, April 28, there was a stormy interview between the appellant and Summers. The bank demanded further securities for the indebtedness of Dunsmuir, Modern Aluminum and Haro as the price of postponement of immediate payment. After some days of discussion an arrangement was completed by May 12, 1959; Haro gave further security for its own indebtedness and gave guarantees, secured by mortgages on the equity of

redemption in the apartment building, of the indebtedness of Dunsmuir and Modern Aluminum; in return the bank agreed to a postponement of payment until April 29, 1960.

On either May 11 or May 12 (Mr. Summers was not sure on which of these days) the appellant signed a letter dated May 8, 1959, which is ex. 5. Mr. Summers said that it was one of a number of documents prepared by the bank's solicitor and presented to the appellant for signature. It is dated at Vancouver, B.C. and reads as follows:

The Manager,
The Bank of Nova Scotia,
Hastings & Columbia Branch,
Vancouver, B.C.
Dear Sir:

Re: Haro Holdings Ltd.,
Dunsmuir Construction Ltd.,
Modern Aluminum Ltd.

In confirmation of discussions between myself and the Bank of Nova Scotia with regard to loans made by the Bank to the three companies named above, I agree that any or all of the following measures be carried out in order to improve the Bank's security position and I will cause the companies concerned to execute and deliver to the Bank all necessary documents to implement the following steps:—

(1) That Haro Holdings Ltd. guarantee to the Bank the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

(2) That Haro Holdings Ltd. furnish to the Bank by way of additional security for loans to Haro Holdings Ltd., a mortgage payable on demand with interest at 6% per annum over Lot 20, Block 32, District Lot 185, Group 1, New Westminster District, Plan 92.

(3) That Haro Holdings Ltd., in support of its guarantee for the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd. furnish the Bank by way of additional security with a further mortgage over the aforesaid property, such mortgage to be payable on 29th April, 1960 with interest at 6% per annum.

(4) That Haro Holdings Ltd. deliver to the Bank and to Great-West Life Assurance Company a letter under seal in accordance with the copy attached hereto and initialled by me.

(5) That Haro Holdings Ltd. will furnish the Bank with a letter of undertaking to execute and deliver the mortgages referred to in paragraphs (2) and (3).

I acknowledge that the acquisition by the Bank of the foregoing securities or any of them shall in no way affect my liability as guarantor of the indebtedness to the Bank of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

Yours truly,

'N. S. Hoon'

1966

HOON
v.
BANK OF NOVA SCOTIA

Cartwright J.

The defence of the appellant is that it was a condition precedent to his liability on the guarantees that the respondent should carry out its agreements to deal with Dunsmuir and with Modern Aluminum as its customers in the way of its business as a bank, that the respondent did not carry out those agreements, and indeed never intended to do so, and that consequently the appellant who received no part of the consideration for his promises is under no liability.

As to the defence the learned trial judge said in part:

> The defendant's position is that the plaintiff did not carry out its part of the bargain because it did not deal with Dunsmuir or Modern Aluminum in the way of its business as a bank after it got the defendant's personal guarantees, and that there was therefore a total failure of the consideration for which the personal guarantees were given. The question therefore is whether or not the bank did deal with Dunsmuir and Modern Aluminum in the way of its business as a bank after the plaintiff had received the defendant's personal guarantees of the liabilities of these two companies.
>
> The case made by the defendant for failure of consideration rests largely on the assertion that the plaintiff bank, immediately after it got the defendant's personal guarantees, required Dunsmuir's outstanding cheques to be covered by cash, withdrew funds to the credit of Modern Aluminum and applied those funds in partial satisfaction of the monies owing by Modern Aluminum, and on what Mr. Summers said he intended to do at the time that he obtained the guarantees. I think it established that Mr. Summer's intent at the time that he got the guarantees, was to demand payment immediately from the principal debtors and from the defendant as guarantor if payment was not forthcoming from the principal debtors, that is, Dunsmuir and Modern Aluminum, or if what the bank considered to be proper security was not provided. Put briefly, the defendant's case is that obtaining the personal guarantees of the defendant, then refusing to honour Dunsmuir's cheques without cash cover, arbitrarily applying Modern Aluminum's current account credit balance to reduce that company's liability, demanding immediate payment from Dunsmuir and Modern Aluminum and then demanding payment from the guarantors, including the defendant, cannot be considered as dealing with either Dunsmuir or Modern Aluminum in the way of the plaintiff's business as a bank, because all this amounted to was nothing more than an attempt to collect the money owing. There might well be considerable virtue in this submission if this action had been brought following demand for payment on the defendant without there having been, as there in fact was in this case, a general settlement of the differences between the plaintiff, Haro, Dunsmuir, Modern Aluminum and the defendant, with the defendant participating in such general settlement, not only personally, but also as an officer of each of the three companies which I have mentioned.
>
> The issue which I would have to decide would be very different if after demand for payment was made on the defendant, there had been no settlement of the plaintiff's demand for immediate payment, and the plaintiff had immediately sued upon the defendant's guarantees. In fact the bank did not insist on immediate payment without offering an alternative

to the companies concerned, and to the defendant as guarantor of the liabilities of Dunsmuir and Modern Aluminum. The bank's demand for payment brought matters to a head. It is patent that the bank offered to extend the time for payment if the additional securities and guarantees, which I have already listed, were given and it is patent that these securities and guarantees were in fact given and that the defendant agreed that the taking of security by the bank would not affect his personal guarantees.

Put simply, what took place in my opinion was this: The Bank demanded payment of Dunsmuir and Modern Aluminum of the monies owing by these two companies; the bank, when payment was not forthcoming, then demanded payment from the defendant as guarantor. After payment was demanded a settlement was reached whereby the bank agreed to postpone its demands for payment for a year, further security and guarantees were given to the bank, all of which I have enumerated, and the defendant agreed that the bank acquiring these securities, or any of them, would in no way affect his liability to the bank as guarantor of the indebtedness of Dunsmuir and Modern Aluminum. I particularly note that the bank agreed to postpone its demands for payment for a year and that the defendant and the companies concerned have had the benefit of that agreement to postpone.

It appears to me to be implicit in the reasons of the learned trial judge that he would have dismissed the action if it were not for the effect which he ascribed to the arrangements completed on May 12, 1959, in connection with which the letter ex. 5, quoted above, was signed by the appellant. In this I think he would have been right. The finding of fact, fully supported by Summers' own evidence, that the respondent (which acted throughout its dealings with the appellant through its manager Summers) had no intention of dealing with Dunsmuir or Modern Aluminum in the way of its business as a bank would have been fatal to the respondent's claim. The case would have been indistinguishable from the decision of the Judicial Committee in *Royal Bank of Canada v. Salvatori*.[1]

The language of the guarantee under consideration in that case did not differ in any material particular from that in the case at bar. The facts were very similar. In the *Salvatori* case following the execution of the guarantee by the defendant the bank left the account of the debtor firm open but refused to extend further credit to it. Lord Atkinson who delivered the judgment of the Board said at pp. 508 and 509:

Their Lordships do not think that the language of this deed is so ambiguous as the appellants contend that it is, but if it be so, then they think that the key to its construction is that laid down by Lord Blackburn. *Weir River Commrs. v. Adamson* (1878) 2 App. Cas. 734, at 763, 47 L.J.Q.B. 193. In the report he expressed himself thus:

[1] [1928] 3 W.W.R. 501.

1966

HOON
v.
BANK OF NOVA SCOTIA

Cartwright J.

Though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment. My Lords, it is of great importance that those principles should be ascertained; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of law act in construing instruments in writing; and a statute is an instrument in writing.

In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used . . .

Adopting that rule of construction, it is impossible in their Lordships' view, having regard to the circumstances out of which the deed of guarantee arose and in reference to which its language was used, to suppose that what was intended was that these broken and insolvent traders, the firm, should get no help from the bank beyond leaving their account open, merely continuing to carry the liability, as Connell phrases it. The learned Judge, Mr. Justice Adrian Clark, said that the words 'continuing to deal with Antoni Brothers in the way of its business as a bank must involve some *bona-fide* fresh transaction between the parties.' Their Lordships concur with him in this view. They think it is impossible to confine these words to merely keeping the account of this firm open, that is, merely receiving payment from anyone who chooses to pay in money to the bank to the firm's credit. The deed really contains two covenants or contracts, one being the consideration for the other, the first covenant being that if the bank continue to deal with the firm as their customer in the way of its business as a bank, the guarantor will pay to the bank the $40,000 at the times and in the manner specified and do the other things he has undertaken to do. The bank have failed to perform this covenant, they have not continued to deal with the firm as their customer in the way of their business as a bank. The guarantor has not received the consideration, i.e., the whole of the consideration upon which his covenant was based. He is therefore not bound to perform that covenant by reason of this failure.

In the case at bar the intention of the respondent, far from being to deal with Dunsmuir and Modern Aluminum as customers, was to terminate that relationship immediately upon receiving the guarantees from the appellant and by April 24, 1959, it had done so.

The real question on which there has been a difference of opinion in the Court of Appeal is as to whether the arrangement completed on May 12, 1959, altered this position in favour of the respondent. In my opinion it did not. The transaction then carried out, while it involved a number of documents, was a simple one. It was the case of a creditor pressing its debtors for payment of the balances due at the time when it had, for all practical purposes, put an end to its relationship of banker and customer with them and

agreeing to give an extension of time for payment on the furnishing of additional securities. It did not, in my opinion, constitute a *bona fide* fresh transaction between the parties as banker and customer. The essential point is that the respondent did not grant an extension of time for payment by the two debtor companies as consideration for the obtaining of the guarantees from the appellant. What it did do was to demand and obtain additional security as the price for postponement of the enforcement of its claim for payment.

It remains to consider whether the situation is affected by the concluding paragraph of the letter, ex. 5, signed by the appellant. The letter has been quoted in full above and as a matter of convenience I repeat the final paragraph:

> I acknowledge that the acquisition by the Bank of the foregoing securities or any of them shall in no way affect my liability as guarantor of the indebtedness to the Bank of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

Without having recourse to the maxim, *Verba chartarum fortius accipiuntur contra proferentem,* I am of opinion that this letter does not assist the respondent. Its purpose is to retain matters *in statu quo*. It neither increases nor diminishes the liability of the appellant. That liability, whatever it may be, is "in no way" affected. I have already expressed my view that the liability did not exist.

The respondent did not plead any cause of action based on the terms of the letter ex. 5, nor did it plead either estoppel or waiver, but I do not found my judgment on the form of the pleadings. In my opinion on the facts found by the learned trial judge the action cannot succeed.

Counsel for the respondent relied on the decisions in *Royal Bank of Canada v. Mills*[1] and *Royal Bank of Canada v. Fleming et al.*[2] For the reasons given by Bull J.A. I agree with his conclusion that these cases are distinguishable and that the case at bar falls within the principle of the *Salvatori* case.

I wish to found my judgment not only on the reasons set out above but also on those given by Bull J.A. with which I am in full agreement. I would allow the appeal with costs throughout and direct that judgment be entered dismissing the action with costs.

[1] [1932] 3 W.W.R. 283, 4 D.L.R. 574, 26 A.L.R. 453.
[2] [1933] O.R. 601, 3 D.L.R. 353.

1966

HOON
v.
BANK OF NOVA SCOTIA

JUDSON J. (*dissenting*):—The Bank of Nova Scotia sued the defendant, Nirmal Jit Singh Hoon, on two guarantees which he signed for the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd., companies in which he was interested as a majority shareholder. The trial judge gave judgment for the bank. This judgment was affirmed on appeal[1] with Bull J.A., dissenting. I agree with the judgment at trial.

Hoon first met the bank manager on April 9, 1959. He had then signed an agreement to acquire one-half of the issued shares in Dunsmuir and Modern Aluminum. He was also to become the controlling shareholder in Haro Holdings Limited. Haro Holdings Limited had an unfinished building on which no work had been done for some time. The general contractor for this building was Dunsmuir. Modern Aluminum was a supplier of materials for the building. All three companies were indebted to the bank and it is quite apparent that on April 9, when Hoon first called, the bank had real doubts of its ability to collect the outstanding indebtedness from Dunsmuir and Modern Aluminum.

The manager says that on April 9, on the first call, he asked Hoon to guarantee the accounts of the two companies. He did this because Hoon represented that he was or was about to become the controlling shareholder. Hoon said that he would think about the matter. He came back the following day and did sign the two guarantees upon which this action is brought.

At the trial, Hoon first said that it was never intended that these documents should be his personal guarantee, that the guarantor was to be Haro Holdings Limited, and that he was merely signing as president of Haro Holdings Limited with the intention that the documents were to be completed later under that company's seal. This defence is an accusation of fraud against the bank manager in using documents as personal guarantees. The trial judge found clearly and decisively against this defence and with good reason.

Hoon also said that the guarantees were signed on the understanding that the bank would make further loans

[1] (1965), 52 W.W.R. 592, 53 D.L.R. (2d) 239.

totalling $75,000 to the two companies. There is an equally decisive finding by the trial judge against this defence.

He also said that when he signed the documents, they were not under seal and that the seals were affixed later. The trial judge found that the seals were affixed at the time of the signature. Nothing turns on the rejection of this defence. The real question is whether there was failure of consideration.

The findings of fact of the learned trial judge which depend upon all the probabilities of the situation and his impression of the credibility of Hoon were not disturbed on appeal. In the Court of Appeal the argument was confined to the question of failure of consideration and this does require further examination. It was the only point argued in this Court and it was the basis for the dissenting judgment of Bull J.A.

It is unnecessary to set out the terms of the guarantee at length. The opening paragraph reads:

> In consideration of the bank's agreeing to deal with Dunsmuir Construction Ltd. (hereinafter called "the customer") in the way of its business as a bank, the undersigned hereby guarantees payment to the bank of the liabilities whether direct, contingent or otherwise which the customer has incurred or is under or may hereafter incur or be under to the bank, whether arising from dealings between the bank and the customer, or from other dealings or proceedings by which the bank may become in any manner whatever a creditor of the customer.

At the time when the guarantees were signed, April 10, 1959, Dunsmuir owed the bank $20,000 on a demand note and approximately $25,000 on an overdraft. Modern Aluminum owed the bank $20,000 on a demand note but had a credit balance of something over $4,000 in its current account. This sum was the residue of the moneys from its loan of $20,000 represented by the demand note. On April 14, 1959, the bank applied a sum of $5,000 on the Modern Aluminum note and, as a result, created an overdraft in the current account of close to $900. There was nothing to prevent the bank from doing this at any time. As far as Dunsmuir is concerned, the bank insisted that before any cheques would be honoured, they would have to be covered by special deposits, the company being already overdrawn by more than $20,000. In summary, after the guarantees were signed, the bank made no further advances to these two companies.

1966

HOON
v.
BANK OF NOVA SCOTIA

Judson J.

Some time between April 10 and April 23, 1959, the manager received information that the two companies were operating accounts with another bank.

The next meeting between the manager and Hoon was on April 23. On this date the manager told Hoon that the bank would not lend money to Dunsmuir and Modern Aluminum on the basis of the defendant's pledging the shares of Haro Holdings Limited as collateral. Hoon at this time did not seem to be unduly disturbed. He said that he could make other arrangements for the completion of the building.

On April 24, the bank sent to Dunsmuir and Modern Aluminum demands for payment of their total indebtedness, and on April 27, demand was made on Hoon as guarantor.

The next interview between the bank and Hoon was on April 28 and, according to the trial judge, this was a stormy interview. Without going into details, the manager was demanding further security for the accounts of these companies and Hoon was saying that he was the victim of fraud.

The learned trial judge's summary of the position at this time is contained in the following paragraph:

> The position on April 28th and immediately thereafter can best be summarized I think in this way: The plaintiff had demanded payment of the loans of Dunsmuir and Modern Aluminum and had demanded payment of these loans from the guarantors, including the defendant, under the guarantees executed by him on the 10th of April. The bank was prepared to forego its demand for immediate payment of these liabilities and defer payment for a year provided that certain additional security and undertakings were given to the bank and provided that the bank's position vis-à-vis the defendant under his personal guarantee of the liabilities of Modern Aluminum and Dunsmuir was fully preserved.

We are not concerned in this appeal with what would have happened if the bank had sued the guarantor at this stage. The learned trial judge found that the differences between the bank, Dunsmuir, Modern Aluminum, Haro Holdings Limited and the defendant were all settled by an exchange of letters early in May 1959. On May 8, 1959, Hoon wrote to the bank the following letter:

Dear Sir:

re:

Haro Holdings Ltd.,
Dunsmuir Construction Ltd.,
Modern Aluminum Ltd.

In confirmation of discussions between myself and the Bank of Nova Scotia with regard to loans made by the Bank to the three companies named above, I agree that any or all of the following measures be carried out in order to improve the Bank's security position and I will cause the companies concerned to execute and deliver to the Bank all necessary documents to implement the following steps:—

(1) That Haro Holdings Ltd. guarantee to the Bank the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

(2) That Haro Holdings Ltd. furnish to the Bank by way of additional security for loans to Haro Holdings Ltd., a mortgage payable on demand with interest at 6% per annum over Lot 20, Block 32, District Lot 185, Group 1, New Westminster District, Plan 92.

(3) That Haro Holdings Ltd. in support of its guarantee for the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd. furnish the Bank by way of additional security with a further mortgage over the aforesaid property, such mortgage to be payable on 29th April, 1960 with interest at 6% per annum.

(4) That Haro Holdings Ltd. deliver to the Bank and to Great West life Assurance Company a letter under seal in accordance with the copy attached hereto and initialled by me.

(5) That Haro Holdings Ltd. will furnish the Bank with a letter of undertaking to execute and deliver the mortgages referred to in paragraphs (2) and (3).

I acknowledge that the acquisition by the Bank of the foregoing securities or any of them shall in no way affect my liability as guarantor of the indebtedness to the Bank of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

On May 12 the bank wrote the following letter to Hoon confirming the settlement:

Dear Sir:

Re:

Haro Holdings Ltd.,
Dunsmuir Construction Ltd.,
Modern Aluminum Ltd.

We refer to our recent discussions concerning the indebtedness of the above companies and wish to confirm with you as follows:

(1) We are agreeable to deferring the repayment of our loans to Dunsmuir Construction Ltd., and Modern Aluminum Ltd., until April 29th, 1960, save that in the event of a sale being made prior to that date of the apartment building and property owned by Haro Holdings Ltd., situate on Lot 20, Block 32, District Lot 185, Group 1,

1966

HOON
v.
BANK OF NOVA SCOTIA

Judson J.

N.W.D. Plan 92, we shall have the right to call for the repayment of such loans forthwith.

(2) With regard to your guarantees to us of the indebtedness of Dunsmuir Construction Ltd., and Modern Aluminum Ltd., which are dated the 10th April, 1959, we will not call upon you for payment thereunder prior to the 29th April, 1960, unless the Haro Holdings property above referred to is sold prior thereto and we fail to receive the payment of our loans from the proceeds of sale.

(3) With regard to our loans to Haro Holdings Ltd., and the mortgage over the above referred to property given to us as additional security, we will release the said mortgage upon the receipt from the Great-West Life Assurance Company of the sum of $136,750.00 together with a further payment from Haro Holdings Ltd., of an amount equal to the interest accrued on our loans to that Company.

The further security promised was duly executed and delivered to the bank.

Before this agreement was made the bank had an immediate right of action against the two companies. It did not enforce that right. It did not agree to lend more money. With one of the companies, it applied a credit balance against a demand note. With the other, it insisted on deposits to cover cheques as they were presented. On the facts of this case it cannot be said even at this stage that the bank did not deal with the customer "in the way of its business as a bank." Masten J.A. in *Royal Bank of Canada v. Fleming et al.*[1] considered these very words in a bank guarantee and I am content to adopt his statement of what they demand of the bank:

> There is nothing in these words to deprive the Bank of its discretion in granting or refusing further advances which might be sought by the debtor company. All the words call for is that it shall carry on as a Banker for the company in the usual and ordinary manner, that is to say, retaining entire freedom to exercise its own banking judgment on each individual transaction as it arose and retaining entire freedom to act as circumstances might require in respect to the large over-draft then owing.

However, this is not the issue here. This guarantee by its express terms is a continuing guarantee and it was in existence at the time of the settlement. The settlement provided that the taking of the additional security was not to affect Hoon's liability as guarantor of the two companies. A binding extension of time given to the two companies was within the consideration recited in the guarantee and the defence of failure of consideration, in my opinion, fails. The case is not within the decision in *Royal Bank of Canada v. Salvatori*[2]. In that case it was held that the words

[1] [1933] O.R. 601 at 608. [2] [1928] 3 W.W.R. 501.

"continuing to deal with the customer in the way of its business as a bank" must involve some *bona fide* fresh transaction between the bank and the customer, and that if the bank did no more than keep the account open by merely receiving payment from time to time, the consideration was not satisfied. It is no authority for any principle that a binding agreement to extend time for payment is not within the consideration.

The above grounds are those on which the learned trial judge founded his judgment. I am in full agreement with them and I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitor for the defendant, appellant: I. Sara, Vancouver.

Solicitors for the plaintiff, respondent: Macrae, Montgomery & Co., Vancouver.

S. & S. INDUSTRIES INC. (*Defendant*) ..... APPELLANT;

AND

ROSS FREDERICK ROWELL, pursuing his busines under the firm name and style of Hops-Koch Products Reg'd. (*Plaintiff*) ..... RESPONDENT.

1965
*Dec. 7, 8
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Mar. 7

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Validity—Action for impeachment—Declaration of invalidity—Claim by plaintiff for damages based upon threats of legal proceedings—Malice—Patent Act, R.S.C. 1952, c. 203, ss. 28(1)(b), 46—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 7(a), (e), 52.

The plaintiff, a manufacturer of wire, sued for a declaration that a patent of which the defendant was the assignee was invalid. The patent related to the construction of frames of flat wire to be used in the manufacture of brassières. The trial judge declared the patent invalid.

In his action for impeachment, the plaintiff had also claimed damages on the ground that certain steps taken by the defendant had caused him to suffer serious losses in his trade and commercial goodwill. These steps included the institution in Ontario of an infringement action

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

1966

S. & S. INDUSTRIES INC. v. ROWELL

against a large department store; the settlement of that action by an agreement to which a manufacturer of brassières using wire supplied by the present plaintiff was made a party, with provision that both those companies were debarred from contesting the patent or assisting anyone else to do so; the publication in a trade paper of a warning notice based upon the above-mentioned infringement action; and a warning letter to another manufacturer of brassières. The trial judge awarded to the plaintiff damages in an amount to be determined by the registrar of that Court.

The defendant company appealed to this Court. At the conclusion of the argument on behalf of the appellant, the appeal in so far as it declared the patent invalid was dismissed, and, after hearing counsel on the question as to whether the plaintiff had established a claim for an award of damages, judgment on that question was reserved.

Held: The appeal should be dismissed.

Per Fauteux, Abbott, Martland and Hall JJ.: The plaintiff's claim for damages can properly be founded upon s. 7(*a*) of the *Trade Marks Act*, 1952-53 (Can.), c. 49. The combined effect of that section and of s. 52 of that Act is to create a statutory cause of action for which damages may be awarded if a person is damaged by false or misleading statements by a competitor tending to discredit the claimant's business, wares or service. There is no express requirement that the false or misleading statements be made with knowledge of their falsity or that they be made maliciously. The natural meaning of s. 7(*a*) is to give a cause of action in respect of statements which are, in fact, false, and the presence or absence of malice would only have relevance in relation to the assessment of damages. The circumstances of this case bring the plaintiff within the provisions of s. 7(*a*).

Per Spence J.: In an action based on s. 7 of the *Trade Marks Act*, the plaintiff needs only prove the action of which he complains and the damages which he incurred as a result thereof, and need not prove malice or lack of reasonable cause on the part of the defendant. However, in the present case, it was not necessary to rely upon the principle that the plaintiff is not required to prove the defendant's malice. A consideration of the circumstances in this case demonstrates that there was evidence to show that what the defendant stated was so stated without reasonable and probable cause. There was, therefore, evidence of malice upon which the trial judge could have found for the plaintiff even if such were a necessary element of the proof. His judgment should not be interfered with.

Brevets—Validité—Action pour invalidation—Déclaration d'invalidité—Réclamations par le demandeur pour dommages basés sur des menaces de poursuites judiciaires—Malice—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 28(1)(b), 46—Loi sur les Marques de commerce, 1952-53 (Can.), c. 49, arts. 7(a), (e), 52,

Le demandeur, un fabricant de fils métalliques, institua une action pour obtenir une déclaration à l'effet qu'un brevet dont la compagnie défenderesse était la cessionnaire, était invalide. Le brevet se rapportait à la construction de montures en fil métallique plat devant être employées dans la fabrication de soutiens-gorge. Le juge au procès a déclaré le brevet invalide.

Dans son action pour invalidation, le demandeur a aussi réclamé des dommages pour le motif que certaines mesures prises par la défenderesse lui avaient causé de sérieuses pertes dans son achalandage commercial. Ces mesures comprenaient l'institution en Ontario d'une action pour contrefaçon contre un grand magasin à rayons; le règlement hors de cour de cette action par une entente à laquelle un fabricant de soutiens-gorge se servant de fils métalliques fournis par le présent demandeur est devenu partie, avec la condition qu'il était interdit à ces deux compagnies de contester le brevet ou d'aider qui que ce soit à le faire; la publication dans un journal commercial d'une mise en garde basée sur cette action pour contrefaçon; et une lettre de mise en garde adressée à un autre manufacturier de soutiens-gorge. Le juge au procès a accordé des dommages au demandeur pour un montant à être déterminé par le registraire de cette Cour.

La compagnie défenderesse en appela devant cette Cour. Advenant la fin de la présentation de l'exposé en faveur de l'appelante, l'appel a été rejeté quant à l'invalidité du brevet, et, après avoir entendu les procureurs sur la question de savoir si le demandeur avait établi une réclamation pour dommages, le jugement sur cette question fut pris en délibéré.

Arrêt: L'appel doit être rejeté.

Les Juges Fauteux, Abbott, Martland et Hall: La réclamation du demandeur pour dommages peut proprement être basée sur l'art. 7(*a*) de la *Loi sur les Marques de commerce,* 1952-53 (Can.), c. 49. L'effet combiné de cet article et de l'art. 52 de cette Loi est de créer une cause d'action statutaire en vertu de laquelle des dommages peuvent être accordés si une personne a subi des dommages par suite de déclarations fausses ou trompeuses de la part d'un concurrent tendant à discréditer l'entreprise, les marchandises ou les services du réclamant. Il n'est pas requis expressément que les déclarations fausses ou trompeuses soient faites avec connaissance de leur fausseté ou qu'elles soient faites malicieusement. L'article 7(*a*), dans son sens naturel, donne une cause d'action relativement à des déclarations qui sont, en fait, fausses, et la présence ou l'absence de malice n'aurait de pertinence que relativement à l'évaluation des dommages. Les circonstances, en l'espèce, font tomber le demandeur sous les dispositions de l'art. 7(*a*).

Le Juge Spence: Dans une action basée sur l'art. 7 de la *Loi sur les Marques de commerce,* le demandeur n'a besoin que de prouver l'acte dont il se plaint et les dommages qu'il a encourus comme résultat, il n'a pas besoin de prouver la malice ou le manque de cause raisonnable de la part du défendeur. Cependant, dans la cause présente, il n'était pas nécessaire de s'appuyer sur le principe que le demandeur n'est pas requis de prouver la malice du défendeur. Une considération des circonstances, en l'espèce, démontre qu'il y avait une preuve à l'effet que ce que la défenderesse avait déclaré avait été déclaré sans cause raisonnable et probable. Il y avait, en conséquence, une preuve de malice sur laquelle le juge au procès pouvait se prononcer en faveur du demandeur même si la malice était un élément nécessaire de la preuve. Il n'y avait pas lieu d'intervenir.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada,[1] déclarant un brevet invalide et accordant des dommages dans une action d'invalidation. Appel rejeté.

[1] [1965] 1 Ex. C.R. 118, 28 Fox Pat. C. 79.

1966

S. & S. INDUSTRIES INC. v. ROWELL

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada,[1] declaring a patent invalid and awarding damages in action for impeachment. Appeal dismissed.

Christopher Robinson, Q.C., and *Russell S. Smart*, for the defendant, appellant.

David Watson and *Jean D. Richard*, for the plaintiff, respondent.

The judgment of Fauteux, Abbott, Martland and Hall JJ. was delivered by

MARTLAND J.:—At the conclusion of the argument in this appeal, only one issue remained to be determined. That was as to whether, even though the appellant's patent was invalid, the respondent had succeeded in establishing a claim for an award of damages. The position taken by the appellant was that a patent had, in fact, been granted to it; that by virtue of s. 46 of the *Patent Act*, R.S.C. 1952, c. 203, such patent was, at all times material to the respondent's claim for damages, *prima facie* valid; and that the steps taken by the appellant to protect its position were taken with a view to protecting what the appellant conceived to be its own property rights.

The steps which were taken by the appellant are described in the judgment of my brother Spence. In summary, they included the institution in the Province of Ontario of an infringement action against Robert Simpson Company Limited; the settlement of that action by an agreement to which Peter Pan Foundations Inc. was made a party, with provision that both those companies were debarred from contesting the patent or assisting anyone else to do so; the publication, in "Women's Wear Daily", published in New York and circulated in Canada, of a warning notice based upon the abovementioned infringement action; and a warning letter to Exquisite Form Brassiere Canada Ltd. of Toronto.

The appellant's submission was that the respondent, in order to recover damages, must bring his claim within the requirements of the common law action, which has been described as "injurious falsehood", "slander of goods", and

[1] [1965] 1 Ex. C.R. 118, 28 Fox Pat. C. 79.

"trade libel". This assumes, probably correctly, that the respondent's cause of action, if one existed, arose in the Province of Ontario and would be governed by the laws of that Province. I will deal with the appellant's argument upon that basis, although, as will appear later, my opinion is that the respondent's claim for damages in this case can properly be founded upon a federal statute, and, accordingly, it is not necessary to decide that point in this case.

That a claim could be made at common law, provided the necessary conditions of liability were established, for damages resulting from the threat of legal proceedings in respect of alleged infringement of an invalid patent or trade mark has been established by English authorities. The first, in respect of a patent, was *Wren v. Weild*[1]. This was followed by *Halsey v. Brotherhood*[2]. The necessary requirements for the success of an action of this kind were summarized by Lord Davey in a case dealing with a trade mark, *The Royal Baking Powder Company v. Wright, Crossley & Co.*[3], as follows:

> To support such an action it is necessary for the Plaintiffs to prove
> (1) that the statements complained of were untrue;
> (2) that they were made maliciously—i.e., without just cause or excuse;
> (3) that the Plaintiffs have suffered special damage thereby.

It was the submission of the appellant that the second element abovementioned did not exist in the present case, and he relied upon the statement of Blackburn J. in *Wren v. Weild, supra,* at p. 737:

> The advisers of the plaintiffs seem to have thought it was enough to maintain this action to show that the defendant could not really have maintained any action, and that if well advised he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained; whereas, as we think, the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a *bona fide* claim in support of a right which, with or without cause, he fancied he had; but a *mala fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation.

To the same effect is the statement of Jessel M.R. in *Halsey v. Brotherhood, supra,* at p. 517:

> It is said that he (the defendant) is not entitled to tell persons buying the plaintiff's engines that they are infringements and that those persons

[1] (1869), L.R. 4 Q.B. 730, 20 L.T. 1007.
[2] (1880), 15 Ch. D. 514, 43 L.T. 366.
[3] (1900), 18 R.P.C. 95 at 99.

1966

S. & S. INDUSTRIES INC. v. ROWELL

Martland J.

are liable to an action; and that he is not entitled even to give a notice that these engines are infringements of his patent rights unless he follows up that notice by some legal proceeding. I must entirely dissent from that proposition. There is, as far as I am aware, no law in this country compelling a man to assert his legal right by action. He may, if he thinks fit, give notice to persons, the notices being given *bona fide*, that they are infringing his legal rights.

In England the matter of threats of proceedings for alleged patent infringement was dealt with by statute, in s. 32 of the *Patents Act of 1883*, but no similar provision is included in the Canadian *Act*. The respondent, however, relies upon the provisions of s. 7(*a*) of the *Trade Marks Act*, c. 49, Statutes of Canada 1952-53, as creating a statutory cause of action, similar in nature to the action for injurious falsehood, limited to claims in respect of statements made by a competitor, but in which malice is no longer an ingredient. That section provides as follows:

> 7. No person shall
>
> (*a*) make a false or misleading statement tending to discredit the business, wares or services of a competitor;

The *Act* imposes no penalty by way of fine or imprisonment for a breach of this provision, but s. 52 provides as follows:

> 52. Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to the provisions of this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

Section 7 of the *Trade Marks Act* replaced s. 11 of *The Unfair Competition Act*, c. 38, Statutes of Canada 1932. So far as s. 7(*a*) is concerned, the scope of the subsection was extended beyond s. 11(*a*) by making it applicable to a "misleading statement" as well as to a false statement.

The combined effect of ss. 7(*a*) and 52 of the *Trade Marks Act* is to create a statutory cause of action for which damages may be awarded if a person is damaged by false or misleading statements by a competitor tending to discredit the claimant's business, wares or services. The essential elements of such an action are:

1. A false or misleading statement;
2. Tending to discredit the business, wares or services of a competitor; and
3. Resulting damage.

There is no express requirement that the false or misleading statements be made with knowledge of their falsity, or that they be made maliciously. To interpret these provisions as though such elements were implied would be to construe them as merely restating rules of law which already existed. I do not think this approach is a proper one. *The Unfair Competition Act* was a statutory code to provide for fair dealing in trade. Section 11 was based upon Article 10 bis of the *International Convention for the Protection of Industrial Property,* made at the Hague, November 6, 1925, to which Canada was a party. When interpreting the provisions of a code, the correct course is that stated by Lord Herschell in *Bank of England v. Vagliano Brothers*[1]. He was there discussing the approach taken by the Court of Appeal in construing a provision of the *Bills of Exchange Act,* in relation to the state of the law before the Act was passed, and he said:

> My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

In my opinion, the natural meaning of s. 7(*a*) is to give a cause of action, in the specified circumstances, in respect of statements which are, in fact, false, and the presence or absence of malice would only have relevance in relation to the assessment of damages.

The circumstances of this case bring the respondent within the provisions of s. 7(*a*) and accordingly, in my opinion, the appeal should be dismissed with costs.

SPENCE J.:—This is an appeal from the judgment of Dumoulin J. in the Exchequer Court of Canada[2] pronounced on the 9th of September 1964. That judgment granted a declaration that the appellant's Canadian Letters Patent No. 525962 dated the 5th of June 1956 were invalid and awarded to the respondent damages in an amount to be determined by the Registrar of that Court.

[1] [1891] A.C. 107 at 144, 64 L.T. 353.
[2] [1965] 1 Ex. C.R. 118, 28 Fox Pat. C. 79.

1966

S. & S. INDUSTRIES INC. v. ROWELL

Spence J.

After hearing the submissions made on behalf of the appellant, this Court dismissed the appeal in so far as it declared the said Letters Patent invalid and reserved judgment upon the issue of whether the respondent was entitled to recover damages.

The said Canadian Patent No. 525962 was one which was concerned with the construction of arcuate frames of flat wire to be used in the manufacture of brassières.

It is the appellant's submission that even if the patent upon which it relied be found to be invalid no action lay for damages. It is the appellant's contention that by s. 46 of the *Patent Act*, R.S.C. 1952, c. 203, the patent was *prima facie* valid and so long as it acted honestly to protect the patent no legal wrong was committed even if in subsequent proceedings the patent were found to be invalid.

The respondent bases his claim for damages on s. 7 of the *Trade Marks Act*, 1952-53 Statutes of Canada, c. 49, and particularly paras. (*a*) and (*e*) thereof which provide:

> No person shall
>
> (*a*) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
>
> * * *
>
> (*e*) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

The respondent pointing out the specific right to damages granted by s. 52 of the same statute and the jurisdiction entrusted to the Exchequer Court by s. 54 thereof, makes an alternative submission: firstly, that the respondent is entitled to recover damages under the provisions of the paragraphs of s. 7 of the *Trade Marks Act* which I have cited whether or not the respondent proves *mala fides* and, secondly, in the alternative, that even if *mala fides* is necessary then the circumstances in the present case have revealed such *mala fides*.

A review of the English authorities cited and others convinces me that certainly under the common law action of slander of title *mala fides* was a necessary element. The matter was put concisely by Baggallay L.J. in *Halsey v. Brotherhood*[1]:

> It appears to me that an action for slander of title will not lie unless the statements made by the defendant were not only untrue, but were made without what is ordinarily expressed as reasonable and probable

[1] (1881), 19 Ch. D. 386 at 389-90.

cause, and this rule applies not only to actions for slander of title strictly and properly so-called with reference to real estate, but also to cases relating to personality, or personal rights or privileges.

Baggallay L.J. continued at p. 390:

Therefore, what we have to consider is whether there is any thing to shew that what the Defendant has stated was stated without reasonable and probable cause, even assuming it to be untrue, a question upon which at the present moment we have no means of forming an opinion.

It must be remembered that in *Halsey v. Brotherhood* the Court of Appeal was considering an appeal from the judgment of Jessel M.R., reported in (1880), 15 Ch. D. 514, by which at the commencement of the trial and before any evidence was heard the action was dismissed. The pleadings alone were considered and indeed the dismissal was without prejudice to the bringing of a fresh action.

Bowen L.J. in *Skinner v. Perry*[1], speaking of the common law and equity rights apart from subsequent statutory provisions, said:

At common law there is a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse. Under that class of action came the action of slander of title, whether the subject of the slander was real or personal property. If a man falsely and maliciously—because the malice would show there was no just cause—made a statement about the property of another which was calculated to do, and which did do, damage to the other in the management of that property, an action would lie at Common Law, and the damages would be recoverable; and at Chancery, I suppose, that even if you could not prove actual damage had occurred, the Court might, if actual damage was likely to occur, prevent the wrongful act by injunction.

This view was held by the courts in England despite the recognition of the difficulty in proving malice on the part of the defendant.

Lord Coleridge L.C.J. said in *Halsey v. Brotherhood, supra,* at p. 389:

I feel strongly that there is great force in what Mr. Ince has said about the difficulty in which a plaintiff may be placed by the conduct of a person in the position of the Defendant. I do not pretend to be able to answer his observations on that head, but unless there is *mala fides,* it is one of those instances in which the law, in the interests of society, permits an injury to be done without any remedy commensurate with it.

Section 7 of the *Trade Marks Act* replaced s. 11 of the *Unfair Competition Act,* Statutes of Canada 1932, c. 38. There are variations in that the words "or misleading" now in para. (*a*) of s. 7 did not appear in s. 11 of the *Unfair Competition Act* nor did the words "do any act or" and "in

[1] (1893), 10 R.P.C. 1 at 6.

1966

S. & S. INDUSTRIES INC. v. ROWELL

Spence J.

Canada" now in para. (*e*) of s. 7 appear in para. (*c*) of s. 11 of the *Unfair Competition Act*. In my view, additional words do not assist in the determination of whether or not *mala fides* is a necessary element of proof.

It was the opinion of Dr. Harold G. Fox, Q.C., as stated in his authoritative work, Canadian Patent Law and Practice, 3rd ed., vol. II, that s. 11 of the *Unfair Competition Act* was statutory authority for the common law action of slander of title or trade libel and on pp. 963-4 the learned author states:

> A reading of the section will show that a cause of action is given merely when disparaging statements are made which are false. Malice need not be shown. This is a most important result for, as we have seen, the necessity of proving malice takes away much of the force and utility of a common law action.

This view was repeated in the same author's work, Canadian Patent Law of Trade Marks, 2nd ed., vol. II, at p. 717, where he continued:

> The statutory provision is quite clear that the false or misleading character and the discrediting tendency of a statement are sufficient to give a right of action. Malice, bad faith or lack of reasonable cause are not mentioned and therefore do not need to be proved.

Authority in Canada is very sparse indeed. In *Reliable Plastics Ltd. v. Louis Marx & Co. Inc.*[1], the plaintiff brought an action for impeachment of the defendant's patent and also claimed damages for threats. The latter claim was based on three grounds: (1) s. 11(*a*) of the *Unfair Competition Act*, (2) the common law action, and (3) an action under the *Statute of Monopolies*. Thorson P. found that the statement complained of was not false and therefore, of course, no action lay under s. 11 of the *Unfair Competition Act* or under common law. The issue, therefore, of whether or not malice were required did not arise. The editorial note to the case made by the same learned author, Dr. Fox, reads, in part:

> It is regrettable that the claim for damages for threats of infringement failed for the reasons found by the learned president...

There is much force to the argument that by the enactment of these sections, firstly, in the *Unfair Competition Act* and then, in the *Trade Marks Act*, Parliament has intended to give a right of action whether or not the plaintiff may prove *mala fides*. As I have said, the necessity

[1] (1958), 17 Fox Pat. C. 184, 29 C.P.R. 113.

for that proof at common law has been clearly established in decisions including those of the House of Lords. If Parliament had intended that the ingredient should be a necessary one for the statutory cause of action which it granted in the aforesaid sections, surely it would have made such a reservation in the legislation. It must be remembered that the provision is in no sense criminal law and that *mala fides* or malice, or lack of reasonable cause, no matter what term is used, is, therefore, not a necessary ingredient. It should also be remembered that in ordinary libel law, apart from cases of qualified privilege, malice need not be proved and there is no valid distinction between the harm wrought to a plaintiff's reputation in business and the harm wrought to the wares he sells.

Moreover, the person seeking to defend his patent has a choice of immediately commencing an action for infringement and applying for an injunction to restrain the continuance of such prejudice to his patent rights, or of bringing action for damages against those who use, in their business, the wares manufactured by the alleged infringer. If he chooses the first alternative, he may join as parties defendants all who purchase from the alleged infringer to use in their business. The injunction having been granted only upon his undertaking to pay the damages incurred thereby should he fail, he proceeds at his own risk. There would seem to be no valid reason why rather than choosing that forthright course he should be permitted to proceed by threats against the purchasers from the alleged infringer without rendering himself liable for damages unless his *mala fides* could be proved.

For these reasons, I am of the opinion that in an action based on s. 7 of the *Trade Marks Act* the plaintiff need only prove the action of which he complains and the damage which he incurred as a result thereof and need not prove *mala fides* or lack of reasonable cause on the part of the defendant. However, in the particular case, it is not necessary to rely upon the principle that the plaintiff is not required to prove the defendant's *mala fides*.

The proof of malice need not be by admission of the defendant in the course of litigation or otherwise. In *Manitoba Free Press Co. v. Nagy*[1], Davies J. dealing with

[1] (1907), 39 S.C.R. 340.

1966

S. & S. INDUSTRIES INC. v. ROWELL

Spence J.

the necessity of proving malice in an action for slander of title, said at p. 348:

> The defendant was bound to prove malice. But malice in this connection is a question of *mala fides* or *bona fides*. If the absence of *bona fides* is shewn or *may fairly and reasonably be inferred from the facts proved* then I take it that the ingredient of malice is sufficiently proved. It is laid down by Mr. Pollock in his work on Torts, page 301, that in actions of this kind
>
> > "the wrong is a malicious one in the only proper sense of the word, that is, the absence of good faith is an essential condition of liability".
>
> (The italics are my own.)

In determining whether there was evidence of malice, the task of this Court is, as was that of the Court of Appeal in *Halsey v. Brotherhood, supra,* to consider "whether there is anything to show that what the defendant has stated was stated without reasonable and probable cause". In so doing, we have the advantage of considering the sworn evidence given at the trial on behalf of the plaintiff, here respondent. The only witnesses who gave evidence on behalf of the defendant, here appellant, were a brassière designer employed by it and two expert witnesses.

The plaintiff testified that he had known of the defendant's U.S. Patent as early as 1955 having received information as to it when dealing with an unconnected matter, but had not manufactured flat wire for use in brassières until 1958. In that year he did so after a customer had produced to him drawings requesting him to duplicate the product there illustrated. He testified that he does not yet know whether these drawings were in fact the defendant's as they appeared to be the customer's drawings. The plaintiff continued to manufacture flat wire for brassière frames supplying customers in both Canada and the U.S. On August 13, 1959, the defendant caused to be forwarded to the plaintiff a letter which read:

August 13, 1959.

Hops-Koch Products,
733 Maria Avenue,
MONTREAL 30, Quebec.
Attn: Mr. R. Rowell

I represent S. & S. Industries Inc. of New York, who is the owner of Canadian Letters Patent No. 525,962 issued on June 5, 1956 for a flat wire bent in to an arcuate shape for insertion into brassieres.
I have been credibly informed that you are making such flat wire bent in arcuate shape for use in brassieres and we have obtained samples of your product.

You are hereby advised that unless you inform us within the week that you will immediately cease and desist from the manufacture, sale and use of such flat arcuate wires for use in brassieres, you will leave us with no other alternative but to forward the matter to my Canadian associates for institution of legal proceedings for infringement of the aforesaid patent. Your reply is awaited.

Very Truly Yours,
"IRVING SEIDMAN"

The defendant, however, instituted no such "legal proceedings for infringement of the aforesaid patent" as it had threatened. One cannot but note that such an action would have been the forthright method which the defendant might have utilized to protect its patent if it honestly believed the patent were valid, and that in such an action by virtue of s. 59 of the *Patent Act*, the defendant could have obtained an injunction completely protecting its alleged rights. The defendant, however, turned to other methods of "protecting its patent".

On December 7, 1959, it delivered to the Robert Simpson Co. Ltd. a statement of claim in an action in the Supreme Court of Ontario, No. 7587 for 1959. In that action, the said Robert Simpson Company had been named the sole defendant. In the statement of claim, damages were claimed for the infringement of the patent held by the defendant in this action by the sale of brassières manufactured by Peter Pan Foundations using wire supplied by the plaintiff in this action. On December 14, 1959, the defendant wrote to Exquisite Form Brassière Canada Ltd., of Toronto, a very large manufacturer. In attempting to force that manufacturer to purchase its flat wire from the defendant, it said in part:

We have been informed by our Attorneys that retailers who sell garments containing Flat Wire that do not emanate from us, or any of our licensees, may be subjected to suit. Our point to Mr. Reiner was that in order that we may best protect our interests, we would be forced to go to the stores and involve them in law suits. This brings with it the extreme loss of time on the part of all executives in the store who become involved in lengthy pre-trial examinations as well as expense involved. It is evident that such stores would be reluctant to handle a line which can implicate them in these circumstances.

Three days later, on December 17, 1959, the defendant inserted an advertisement in the widely circulated trade paper known as "Women's Wear Daily" showing a torn clipping reporting the action against the Robert Simpson Co. Ltd. to which I have referred and with the warning

1966

S. & S. INDUSTRIES INC. v. ROWELL

Spence J.

"Please protect yourself—See S. & S. reprint enclosed", inscribed thereon. The words of Bowen L.J. in *Skinner v. Perry, supra,* are relevant:

> Now, every person of common sense knows what is involved in patent actions, and what the expense of them is, and everybody knows that to be threatened with a patent action is about as disagreeable a thing as can happen to a man in business, and the thing most calculated to paralyse a man in his business, even if he be innocent of any infringement of patent law.

The plaintiff gave evidence as to the effect of these actions by the defendant:

> MR. HENDERSON: Q. Mr. Rowell, I asked you if you would identify Exhibit 11 as the page in Women's Wear that you saw. Would you tell the Court what happened after the publication of that page in Women's Wear? A. The same day that it was published I received phone calls from various customers of mine wanting to know what it is all about.
>
> Q. What was the effect in terms of your customers; the effect on your business? A. I lost the American market.
>
> Q. Did you lose any particular customer in Canada? A. I lost Peter Pan round wires, flat wire, sorry, and the Robert Simpson.
>
> HIS LORDSHIP: You say you lost the American market: did that represent an important proportion of your clients or your clientele.
>
> THE WITNESS: At that time, yes, my Lord, and at the present.
>
> MR. HENDERSON: Q. Did you ever hear of a company called Exquisite Form? A. Yes.
>
> Q. What happened there. A. Well, Exquisite Form, New York City, never sent any more orders after—I had just started with the Exquisite Form Inc. and I lost them as a customer in the States and in Canada.

These very actions by the defendant, who had however, refrained from instituting any infringement action, caused the plaintiff in turn to take the action outlined in para. 17 of the statement of claim of this action:

> 17. The Plaintiff through its Patent Attorney, Mr. E. N. Fetherstonhaugh, did notify the Defendant Company on January 25, 1960, that the Defendant Company had caused the Plaintiff great harm and damages and that the Plaintiff would be forced to institute legal proceedings to recover the damages so suffered.

The defendant neither specifically admitted nor denied receipt of that letter, nor was the letter produced. It is, of course, quite plain that the defendant, upon receipt of that letter, would have had the clearest possible notice that the plaintiff strenuously denied any infringement of a valid patent. Despite that notice, it would appear that the defendant hastened to conclude its litigation with the Robert Simpson Co. Ltd. On February 2, 1960, it executed Minutes of Settlement of the action whereby both the defendant therein, the Robert Simpson Company Ltd., and its sup-

plier, Peter Pan Foundations Inc., acknowledged the validity of Canadian Patent No. 525962 and undertook not to directly or indirectly contest the validity thereof nor aid or assist others in any such proceeding in order to make, use or sell arcuate wire frames embodying the invention unless the same were manufactured by the present defendant.

It should be noted that neither the named defendant in that action, the Robert Simpson Company Ltd., nor its supplier, Peter Pan Foundations Inc., were required to pay any sum as damages or royalties to the defendant in this action and that both were permitted to dispose of their inventories on hand.

It would appear, therefore, that the defendant, after it had received express notice that the plaintiff denied he was guilty of infringement and intended to claim damages for such actions on the part of the defendant as are the subject of the claim in this action, proceeded with the most significant expedition to settle an action avoiding any test therein of the validity of its patent, and also effectively removing any contest thereof or assistance in the contest by a large manufacturer and a very large distributor. In addition, the defendant deprived the plaintiff of an opportunity to sell his wares in a very considerable market.

Therefore, in my view, this consideration of the circumstances demonstrates that there was evidence to show that what the defendant stated was so stated without reasonable and probable cause. There was, therefore, evidence of malice upon which the learned Exchequer Court Judge could have found for the plaintiff even if such were a necessary element of the proof and his judgment should not be interfered with.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Smart & Biggar, Ottawa.

Solicitors for the plaintiff, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1965
*Nov. 17, 18, 19, 22, 23
1966
Mar. 11

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT;

AND

W.H. HOTEL LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Arbitration—Option to purchase certain lands—One component of purchase price determined by arbitration—Arbitrator's award reduced by Court of Appeal—Interpretation of option's terms.

Three parcels of land, referred to as the Walker House lot, the Petrie Garage lot and the Elgin Motors lot, were owned by the appellant City in fee simple subject to leases which it had granted of each property. Under the lease between the City and the respondent company the latter leased from the City the land and buildings composing the Walker House Hotel and as a term of the said lease was granted an option to purchase the said lands upon which the hotel stood and also the adjacent lands covered by the Petrie and Elgin leases. The hotel building on the Walker lot was dealt with specifically in the option and the price for its transfer settled. The buildings on the other two lots were owned by the respective lessees who were separate companies. The two leases gave right of renewal and certain rights of compensation for the buildings if the City refused a renewal, as it had the right to do.

The option was divided into two periods, firstly, that running from the date of the execution of the lease, August 1, 1956, to February 1, 1958; secondly, from February 1, 1958, to the end of the term of the lease, July 31, 1966. According to para. 2 of the option, the purchase price when the option was exercised during the currency of the lease but after February 1, 1958, the event which occurred, contained three components. The parties failed to agree on the second of these components, which was "such amount as the parties shall agree upon as the then value of the lands (excluding buildings) in Schedules 'A' and 'B' as the parties shall agree upon, and failing such agreement, the then value of such lands as determined by arbitration pursuant to the provisions of *The Municipal Arbitrations Act*, R.S.O. 1950, Chapter 244". The question was submitted to the arbitrator and he fixed the component at $780,000. The Court of Appeal reduced the arbitrator's award to $422,057.08.

The arbitrator, after a review of the option terms, concluded that "the amount to be determined in this arbitration is the value of the land without regard to the buildings, i.e. as if vacant". The Court of Appeal, on the other hand, held that there were substantial errors in arriving at that conclusion caused in the main by the erroneous construction placed upon the option terms by the arbitrator and held that the option was to be construed in the light of the provisions as to renewals and as to payments for buildings erected upon refusal of renewal in both the Elgin and Petrie leases. The Court of Appeal, in addition, in construing para. 2 in the option held that due weight must be given to the purchase price which would have been effective during the first eighteen months of the option term.

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

Held (Judson J. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Hall and Spence JJ.: As to the latter conclusion of the Court of Appeal, it was agreed that this transaction being an ordinary commercial transaction it was the duty of the Court in interpreting the agreement to avoid such an interpretation as would result in commercial absurdity. *Reddy v. Strople* (1911), 44 S.C.R. 246; *Grey v. Pearson* (1857), 26 L.J. Ch. 473; *Diederichsen v. Farquharson Brothers* (1898), 1 Q.B. 150, referred to.

The approach of the Court of Appeal was a correct one, and what should be calculated in order to determine "as the then value of the lands (excluding buildings) in Schedules 'A' and 'B' is the fee simple in the Walker House lands less the agreed upon valuation of the buildings thereon plus the reversionary interest of the [lessor] in the rest of the site with all its interests, advantages and burdens". Accordingly, the appeal should be dismissed subject, however, to the right of the appellant, if it is of the opinion that part of the sum deducted in reference to a bar premises on part of the Petrie lot is for tenant's fixtures, to require the arbitrator to consider this item and to reduce it by any amount which, in the opinion of the arbitrator, did not represent value of the building upon the lands leased to Petrie.

Per Judson J., *dissenting*: The arbitrator was not in error in his interpretation of the agreement. What he had to ascertain was the value of the land. With the exercise of the option in December 1962, the buildings would become the problem of the optionee company when it took an assignment of the leases on the Petrie and Elgin lots. It then became the landlord and would have to decide whether to renew the leases or pay for the buildings. There was, in fact, no problem because of the common control of the three companies and it was never expected that there would be. Further, if the option had been exercised after the expiry of the Petrie and Elgin leases, whatever sum the City had been compelled to pay by way of compensation for the buildings would have been payable by the optionee company in addition to the value of the land.

APPEAL from a judgment of the Court of Appeal for Ontario, reducing an award made by the Official Arbitrator under the provisions of *The Municipal Arbitrations Act*, R.S.O. 1950, c. 244. Appeal dismissed, Judson J. dissenting.

M. E. Fram and *D. C. Lyons*, for the appellant.

W. L. N. Somerville, Q.C., and *J. D. Holding*, for the respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the vendor, the Corporation of the City of Toronto, from the judgment of the Court of Appeal for Ontario pronounced on November 13, 1964. By that judgment, the Court of Appeal for Ontario decreased the award of the Official Arbitrator made on August 22, 1963. That award had fixed the amount of one

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Spence J.

component of the purchase price as provided in an option to purchase contained in the lease between the parties dated August 1, 1956. The premises in question composed property in the City of Toronto on the south side of Front Street commencing at the westerly limit of York Street and running westerly 317.42 feet.

In the year 1955, these lands had been owned by the vendor, the Corporation of the City of Toronto, and had been subject to three leases as follows:

(1) A lease to the Walker House Hotel Company for a period of 21 years expiring on April 30, 1955, and covering the westerly 112 feet.

(2) A lease to Petrie's Parking Place Limited for 21 years expiring on September 30, 1965, which contained an option exercisable by the lessee for a further 21-year period. This lease covered the property from the westerly boundary of the Walker House Hotel property westerly for 165.42 feet.

(3) A lease to Elgin Motors Limited dated May 29, 1942, and expiring on December 31, 1962, which lease also contained an option exercisable by the lessee for a further 21-year period and which covered the westerly 40 feet of the property.

Mr. J. D. Crashley owned a controlling interest in Elgin Motors Ltd. and Mr. Crashley's father, with others, owned all of the shares in Petrie's Parking Place Ltd. Mr. Crashley approached the city with proposals for the development of the whole parcel and in view of the irregular termination of the leases covering the property it was suggested to Mr. Crashley that he enter into negotiations with the Estate of the late George Wright who controlled Walker House Hotel Company.

Mr. Crashley caused to be incorporated W.H. Hotel Ltd. and that company bought out Walker House Hotel Company. This transaction entailed the purchase of the balance of the term of the lease held by Walker House Hotel Company from the City of Toronto and also the purchase from that company of the building which it had erected on the said lands, *i.e.*, Walker House Hotel. This building, W.H. Hotel Ltd. sold to the Corporation of the City of Toronto, the owner of the fee, for $310,000. W.H. Hotel Ltd. then leased from the Corporation of the City of

Toronto the land and buildings composing the Walker House Hotel and as a term of the said lease were granted an option to purchase the lands upon which the hotel stood and also the lands to the west thereof covered by the aforesaid leases to Petrie's Parking Place Ltd. and to Elgin Motors Ltd. The terms of this option were as follows:

In consideration of the rent hereby reserved to the Lessor, the Lessor hereby agrees to sell to the Lessee at the Lessee's option the lands more particularly described in Schedules "A" and "B" hereto annexed, subject to the terms and conditions following:

1. If the option is exercised by the Lessee on or before the first day of February, 1958, the purchase price of the lands shall be the sum of Four Hundred and Seventeen Thousand and Eighty-one Dollars ($417,081.00) plus an amount equal to the present value of the buildings on the lands in Schedule "A" (as hereinafter defined);

2. If the option is exercised by the Lessee after the first day of February, 1958, the purchase price of the lands shall be an amount equal to the present value of the buildings on the lands in Schedule "A" as aforesaid, plus such amount as the parties shall agree upon as the then value of the lands (excluding buildings) in Schedules "A" and "B" as the parties shall agree upon, and failing such agreement, the then value of such lands as determined by arbitration pursuant to the provisions of The Municipal Arbitrations Act, R.S.O. 1950, Chapter 244; plus the amount or amounts, if any, which the Lessor shall have paid to the Lessees of the lands in Schedule "B" as compensation for the buildings situate hereon, as provided in (*a*) a certain lease dated the 21st day of March, 1945 made between The Corporation of the City of Toronto as Lessor and Petrie's Parking Place, Limited as Lessee and (*b*) a certain lease dated the 28th day of May, 1942 made between The Corporation of the City of Toronto as Lessor and H.W. Petrie Co. Limited as Lessee.

The "present value" of the buildings on the lands in Schedule "A" for the purposes aforesaid shall be determined by ascertaining the value at the date of the exercise of the said option of the sum of Three Hundred and Ten Thousand Dollars ($310,000.00) amortized over a period of thirty years from the first day of August, 1956, at the rate of six per centum per annum, premising that rent paid by the Lessor to such date had been paid on account, firstly, of the accrued interest on such sum calculated monthly, and the balance to the reduction of the principal, less the amount of all insurance proceeds theretofore paid to the Lessor and not used or applied to the repair, restoration or rebuilding of the building on the demised premises pursuant to the foregoing provisions of this Lease.

3. The foregoing option shall be in force during the full term of this Lease.

4. Notice of election to purchase under this option by the Lessee or its assigns shall be in writing and shall be delivered to the Lessor at Toronto

5. It is understood that the purchase price shall be paid in such manner, at such time or times and on such terms as the parties hereto might in good faith agree upon at the time of the exercise of the said option and failing such agreement shall be paid in cash or by certified cheque.

Upon payment to the Lessor of the full amount of the purchase price the Lessee shall be entitled to a conveyance of the said lands free of

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Spence J.

encumbrances except such encumbrances as have been made or created by the Lessee.

6. Unless otherwise agreed the contract of purchase and sale shall be completed within ninety days of the date referred to in the said notice of election as being the date of the exercise of the said option.

It will be noted that the option is divided into two periods, firstly, that running from the date of the execution of the lease to February 1, 1958, *i.e.*, a period of 18 months, dealt with in para. 1; secondly, from February 1, 1958, to the end of the term of the lease, July 31, 1966. This period is dealt with in para. 2.

The option was exercised on December 21, 1962. As I have said, both the leases to Petrie's Parking Place Ltd. and to Elgin Motors Ltd. contained options to renew at the option of the lessees. Both the said leases also contained a provision which permitted the city to refuse to accept this renewed term upon the city paying the value of the buildings erected on the said lands by the lessees. These terms will be referred to particularly hereafter. I note now, however, that the exercise of the option to purchase by W. H. Hotel Ltd. occurred immediately before the expiry of the lease to Elgin Motors Ltd. which would have occurred on December 31, 1962, and, of course, prior to the expiry of the lease to Petrie's Parking Place Ltd. which would have occurred on September 30, 1965, and therefore before the City of Toronto had to comply with either lessee's demand for a renewal or, in refusing that demand, pay the value of the buildings erected on the said lands by the said lessees.

The purchase price applicable to the first 18-month period is set out accurately in para. 1 of the said option as being $417,081 plus an amount equal to the present value of the buildings on the lands in Schedule "A" as defined in the said lease. That present value set out in para. 2 would, during the first 18-month period, have amounted very close to the purchase price of the buildings of $310,000 so that the purchase price, had the option been exercised during that period, would have been close to $727,081.

According to para. 2 of the option, the purchase price when the option was exercised during the currency of the lease but after February 1, 1958, the event which occurred, contained three components: (1) the present value of the lands in Schedule "A" as defined in para. 2, (2) "such amount as the parties shall agree upon as the then value of

the lands (excluding buildings) in Schedules 'A' and 'B' as the parties shall agree upon, and failing such agreement, the then value of such lands as determined by arbitration pursuant to the provisions of *The Municipal Arbitrations Act*, R.S.O. 1950, Chapter 244", (3) plus the amount or amounts, if any, "which the lessor shall have paid to the lessees in Schedules 'A' and 'B'", *i.e.*, to Petrie's Parking Place Ltd. and Elgin Motors Ltd. Since no amount had been paid to either of the lessees, the third component may be omitted in calculation of the purchase price. The parties failed to agree upon the second component and therefore in accordance with the provisions of the option the question was submitted to the Official Arbitrator under the provisions of *The Municipal Arbitrations Act*, referred to above as R.S.O. 1950, c. 244, now R.S.O. 1960, c. 250. The Official Arbitrator, Mr. John C. Risk, Q.C., fixed the component at $780,000. The Court of Appeal for Ontario amended that award to fix the component at $422,057.08. Since in both cases the first component of the purchase price, *i.e.*, the present value of the buildings, amounted to an agreed figure of $282,143.92, the purchase price under the option according to the award of the arbitrator would have been $1,062,143.92, while according to the judgment of the Court of Appeal it was $704,201, a difference of $357,942.92.

The detailed evidence as to values was given really by only two witnesses, Mr. James Innes Stewart on behalf of the purchaser, and Mr. Robert A. Davis on behalf of the vendor.

As pointed out by the learned arbitrator:

> Mr. Davis valued the land, as if vacant and "unencumbered" at $989,000. Mr. Stewart valued "the whole site, fee simple, without leases or encumbrances", at $1,155,000, and he said that in transferring the prices of his comparables to the subject property he had tried to reflect the total value as though clear of all buildings and lessees' interests. The difference between these two figures, while a considerable sum of money, is not unduly great in proportion to the large amounts involved and the difficulties in appraising a property which is on the fringe of other developments but whose greatest potential may not be realized for ten years. The great disparity between the final amounts reached by these two eminent appraisers was the result of the opposing views as to the proper construction of the option.

It is, of course, apparent that the great disparity between the award of the Official Arbitrator and the judgment of the Court of Appeal for Ontario is in the interpretation which it places upon the words contained in the option and

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Spence J.

particularly in para. 2 thereof. The arbitrator, after a review of the option terms, concluded that "the amount to be determined in this arbitration is the value of the land without regard to the buildings, i.e. as if vacant". The Court of Appeal for Ontario, on the other hand, held that there were substantial errors in arriving at that conclusion caused in the main by the erroneous construction placed upon the option terms by the learned arbitrator and held that the option was to be construed in the light of the provisions as to renewals and as to payments for buildings erected upon refusal of renewal in both the Elgin Motors Ltd. and Petrie's Parking Place Ltd. leases.

The Court of Appeal, in addition, in construing para. 2 in the option held that that due weight must be given to the purchase price which would have been effective during the first eighteen months of the option term.

To refer first to the latter conclusion, I agree that this transaction being an ordinary commercial transaction it is the duty of the Court in interpreting that document to avoid such an interpretation as would result in commercial absurdity. Duff J. in *Reddy v. Strople*[1], at p. 257, added to the canon that the primary meaning if unambiguous should be adopted, the proviso that it should be "sensible with reference to the extrinsic circumstances. . .". In such a course the learned late Chief Justice of this Court adopted in terms the "golden rule of interpretation" as stated by Lord Wensleydale in *Grey v. Pearson*[2], at p. 481. I suggest it is also put with accuracy and relevancy to the question here at issue by Rigby L.J. in *Diederichsen v. Farquharson Brothers*[3], at p. 159:

> If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result.

As I have pointed out, the purchase price for the eighteen-month period under para. 1 of the option would have been around $727,081, while the purchase price adding both components under the learned arbitrator's award would have been $1,062,143.92. The arbitrator's award was made as of December 21, 1962, and the witness Stewart, whom the learned arbitrator described as "an appraiser of

[1] (1911), 44 S.C.R. 246.
[2] (1857), 26 L.J. Ch. 473.
[3] [1898] 1 Q.B. 150.

the highest qualifications and great experience", testified that the values at the time of the option were, if anything, slightly lower at the date of the lease.

Moreover, the real difference between the cost to the purchaser under the option in the first eighteen-month period and that as fixed by the arbitrator might well be even more startling. Under the arbitrator's theory, the price that he had to fix was the price as if the lands had been vacant. The purchaser then buying the lands would have been faced with the situation which was to occur at the expiry of the Petrie's Parking Place Limited lease and the Elgin Motors lease. By the terms of those leases, the lessees had the right to demand their renewal for a twenty-one-year period at a rental to be fixed by agreement of arbitration, and the lessor's right to refuse that renewal was conditional upon the lessor paying to the lessee the value of the buildings erected by the lessee.

The learned arbitrator said, in his reasons,

> If the purchaser were allowed to deduct from its purchase price the value of the buildings or leasehold interest therein enjoyed by the other lessees there would be nothing to prevent them from asserting their own claims against the city in the future.

The Court of Appeal, in the judgment of Aylesworth J., on the other hand, noted,

> It is, I think, conceded that the lessor's obligations as to renewal of the Elgin and Petrie leases or payment for the Elgin and Petrie buildings will pass to appellant upon conveyance from respondent and that after conveyance the Lessees must look to appellant, not to respondent for fulfilment of those obligations; at any rate we think that is the legal situation.

In this Court, counsel for the appellant refused to concede such a result and submitted that upon exercise of the option the appellant was still bound by the covenants in the said leases.

Without having to decide whether the view of the learned arbitrator or that of Aylesworth J.A., speaking for the Court of Appeal, is the correct view, it is sufficient to realize that if the view of the Court of Appeal were correct, the cost to the purchaser would be increased over the $1,062,143.92 by $492,837, the cost of paying to the lessees the value of their buildings as of December 21, 1962, making the total cost to the purchaser $1,554,980.92 for lands which, according to the highest evidence given by an

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Spence J.

appraiser before the arbitrator, had a value for their fullest and best use of $1,155,000.

It is difficult to understand how an experienced businessman would enter into any commercial transaction calling for him to pay so many hundreds of thousands of dollars more than a stranger going into the property would offer, and more than double what the parties had arrived at by negotiation at arm's length as the purchase price to cover the first eighteen-month period.

In construing the terms of the option, in the light of the provisions as to rights of renewal and payments in lieu thereof contained in the Elgin and Petrie leases, we must consider what the vendor had to sell and therefore what the optionee had a right to purchase. It is, of course, true as said by counsel for the appellant that very often parties do make an agreement whereby the vendor agrees to sell what he does not then own with the intention that the vendor should acquire ownership in that which he agrees to sell in order to carry out his contract with the purchaser.

In the second period, however, the option is, in my view, to sell just what the city owned and what the city owned was the fee simple in the land and buildings in the Walker House Hotel property and the lessees' reversionary interest in the Petrie and Elgin Motors lands. The value of the buildings on the Walker House property was easily fixed as the city had purchased that building immediately prior to the execution of the lease containing the option, for $310,000 and the formula for fixing that value is set out in the option and applies in both periods A and B. By agreement of parties, application of that formula fixed the value of the said Walker House building at the time of the exercise of the option at $282,143.92. The value of the Walker House land and of the reversionary interest under the Petrie lease and Elgin Motors lease could not be fixed with such exactitude and called for a provision such as gave rise to this litigation.

On the lands to the Elgin Motors lease, there was a small brick and frame office building and since that lease expired only 10 days after the option to purchase was exercised the parties agreed that the lessee's reversionary interest was valued at only $19,600. However, on the lands under the Petrie lease there was originally an old brick and masonry

building known as the Cyclorama and that building had stood substantially unaltered from about the turn of the century until 1927. Then Petrie Parking Place Ltd. had built into the building a substantial parking garage. According to the evidence of Mr. Cross, a consulting engineer, that parking garage had a bricks and mortar value at the date of the exercise of the option of $298,776, and according to Mr. Stewart's evidence arrived at by capitalization of the annual revenues its value was some $38,000 greater.

By the provisions of the lease from the appellant to Petrie's Parking Place Ltd., the lessee was required to maintain the present building (the old Cyclorama) or any building of equal or greater value, and the provision permitting the lessor to refuse renewal of the lease required the lessor to pay "such reasonable sum as the buildings made and erected on the said premises shall then be worth; such value to be determined by mutual agreement or by the Official Arbitrator less the sum of $5,000 being the building as wholly or substantially situated upon the land hereby demised at the time of such determination . . .". Therefore, what the city had to sell as to the Petrie lands was the lessor's reversionary interest in a building which was the property of the lessor, it having been erected on its lands by the lessee with no reservation of title, subject to deduction therefrom of a sum representing its value less $5,000.

The Court of Appeal for Ontario accepted the sum of $298,776 less $5,000 as being the true value of the building upon the Petrie lands and I agree with the view expressed in the Court of Appeal that this is a proper valuation despite the fact that Mr. Cross in giving his estimate did not deal with any element of obsolescence. As noted by Aylesworth J.A., from the fact that Mr. Cross's valuation is $38,000 less than the capitalization value arrived at by Mr. Stewart and, according to Mr. Teperman the cost of demolishing the building, which was necessary for the development of the site, was $27,476, it would appear that the obsolescence must have been impliedly, although not expressly, considered in Mr. Cross's valuation.

Upon all of these considerations, I have therefore come to the conclusion that the approach of the Court of Appeal for Ontario was, with respect, a correct one, and that what

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Spence J.

should be calculated in order to determine "as the then value of the lands (excluding buildings) in Schedules 'A' and 'B' is the fee simple in the Walker House lands less the agreed upon valuation of the buildings thereon plus the reversionary interest of the respondent in the rest of the site with all its interests, advantages and burdens".

In the Court of Appeal for Ontario this calculation was set out as follows:

Value of the whole site in fee simple			$ 1,155,000.00
Deduct: (*a*) Value of Petrie lessee's interests	$293,776.00		
(*b*) Value of Swiss Bear bar, etc.	137,423.00		
(*c*) Value of Walker House building as agreed upon	282,143.92		
(*d*) Value of Elgin lessee's interests	19,600.00		732,942.92
Value of "the lands (excluding buildings)" to be paid by appellant			$ 422,057.08

I am concerned with only one element in this calculation—that set out in the item marked (*b*)—"value of Swiss Bear bar etc. – $137,423". This Swiss Bear was a bar premises erected by Petrie's Parking Place Ltd. on part of the lands leased to it by the appellant and then sublet by it to W.H. Hotel Ltd. The only evidence as to how that figure was arrived at is in the evidence of Albert C. Cartledge, a chartered accountant who gave evidence on behalf of the purchaser and who testified:

> Q. Now then, Mr. Cartledge, would you be good enough to tell us the sum of money which was expended to produce the Swiss Bear Cocktail Bar? A. There was expended on account of building improvements *and equipment* the total of $137,473.37.

(The italics are my own.)

There was no cross-examination whatsoever upon that answer, counsel for the appellant then appearing to rely upon the position which the appellant has taken throughout that only values of vacant land had to be considered in the arbitration. The witness identified as his work two exhibits, Nos. 3 and 4, and neither of those exhibits contained any such item.

Under the covenant between the appellant and Petrie Parking Place Ltd., the appellant was to pay "such reasonable sum as the buildings made and erected on the said demised premises shall then be worth". Therefore, if the sum of $137,423 represented the value of the building built

by the lessee upon the lands, it is a proper item of deduction as being an item which is part of the lessee's interest. If, on the other hand, part of the sum is represented by items of equipment which have not become attached to the land then the lessee upon the termination of the lease, would have had a right to remove the same and could not have claimed the value of such equipment from the appellant as part of the consideration which the appellant had to pay for its refusal to renew. There seem to be no means whereby we might determine this question upon any of the evidence now presented. I am, therefore, of the opinion that the appeal should be dismissed with costs subject, however, to the right of the appellant, if it is of the opinion that part of the sum deducted in reference to the Swiss Bear bar is for tenant's fixtures, to require the Official Arbitrator, at its own cost, to consider this item of $137,423 and to reduce it by any amount which, in the opinion of the Official Arbitrator did not represent value of the building upon the lands leased to Petrie Parking Place Ltd.

JUDSON J. (*dissenting*):—The Court of Appeal in reducing the arbitrator's award from $780,000 to $422,057.08, has held that he valued the interest of the city on a wrong principle and that his error was based upon a misinterpretation of the terms of the option.

The terms of the option are set out in full in the reasons of Spence J. There were three parcels of land involved which I will refer to as the Walker House lot, the Petrie Garage lot and the Elgin Motors lot. The city owned all three lots in fee simple subject to leases which it had granted of each property. The Walker House Hotel building was also owned by the city and is dealt with specifically in the option and the price for its transfer settled. The buildings on the other two lots were owned by two lessees who were separate companies. The two leases gave right of renewal and certain rights of compensation for the buildings if the city refused a renewal, as it had the right to do.

The occasion for the granting of the option, as the correspondence between J. D. Crashley and the city indicates, was that three companies interested in these three parcels of land were coming under common control. The arbitrator's finding on this point is stated in the following extract from his reasons:

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Judson J.

At all material times all the shares of W. H. Hotel Limited and Elgin Motors Limited were owned by Mr. John Douglas Crashley, who was President of these companies. As to Petrie's Parking Place Limited, in 1956 the controlling interest in this company was held by Mr. Crashley's father, and the son had about 300 or 400 shares in his name as nominee for his father, out of 2442 issued; by the time of the arbitration Mr. Crashley Jr. had acquired all but 398 shares and he had an agreement to purchase this remaining number.

What the city has to sell under this option is not in doubt. It was the complete interest in the Walker House property—land and buildings—and the reversionary interest in the Petrie garage lot and the Elgin Motors lot until the leases fell in and were not renewed. If the option was exercised before these two leases fell in, the city would fulfil its obligation by executing a conveyance of the fee—land and buildings in the Walker House property and a conveyance of the fee together with an assignment of the two leases in the case of the other two properties. If the option was exercised after these leases fell in, the price was to be increased by whatever sum the city had been compelled to pay as compensation for the buildings on a refusal to renew.

The price during the first period was $417,081 plus an agreed sum for the Walker House building, which at the date of the award was $282,143.92. This figure of $417,081 is one of the few certainties in the case. It was arrived at by assigning a value of $1,522 per foot frontage for the Walker House lot and $1,200 per foot frontage for the other two lots. If the option was exercised after February 1, 1958, the price was to be settled by agreement or by arbitration.

The arbitrator was confronted by two distinct methods of valuation. The city's expert, R. A. Davis, assumed a site that was vacant land and unencumbered. He valued this at $989,000. He broke this sum up into two, the city's interest as lessor at $881,000, and the lessees' interests of $108,000 for the unexpired terms. The other expert, J. S. Stewart, took a different approach. He valued the whole site, land and buildings, in fee simple, without leases or encumbrances, at $1,155,000. Then he deducted four items totalling $775,000. These were the value of the garage under the Petrie lease, the agreed value of the Walker House building, the cost of the Swiss Bear Bar, and the value of the Elgin building. This gave him a figure of $380,000 as the

market value of the city's interest in the whole site (excluding buildings). Then he had to add to this figure the depreciated value of the Walker House property, $282,-143.92, giving a total amount to be paid by the Walker House Company of $662,000.

The differences between the two appraisals, supposedly of the same thing, are serious, even startling—on the one side $881,000 and on the other, $320,000, and this for land in the centre of the City of Toronto. A comparison of the appraisals when it is broken down and dealt with lot by lot shows how this came about.

DAVIS:	*Valuation of city's reversionary interest in land only*	
Walker House lot	$353,525.00	(based on $30 per square foot)
Petrie lot	415,465.00	(based on $22.50 per square foot)
Elgin Motors lot	112,365.00	
TOTAL	881,355.00	

STEWART:	Land and Buildings		Buildings	Land
Walker House	$542,000.00		$282,143.92	$259,936.08
		Garage $336,000		
Petrie	514,000.00	Swiss		
		Bear		
		Bar 137,423	473,423.00	40,577.00
Elgin	99,000.00		19,600.00	79,400.00
TOTAL	$1,155,000.00			

The frontage of the three lots from east to west were (*a*) Walker House 112 feet; (*b*) Petrie, 165.42 feet; (*c*) Elgin Motors 40 feet. Each lot had the same depth. Taking Davis' calculation and using round figures one begins to wonder at valuations of land for these contiguous parcels at $260,000, $40,500 and $79,400. It is evident that much of the difference between the two appraisers is to be found in their treatment of the Elgin property. According to Stewart, more than 9/10 of the value of this property is to be attributed to buildings and I say without hesitation that

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Judson J.

this is totally unacceptable to me as is the residual valuation of $40,500 for the land. I can well understand why the arbitrator rejected Stewart's mode of valuation and preferred that of Davis, and when he did so he was not in error. I cannot understand where Stewart got his initial figure of $1,155,000 for the whole property—land and buildings. I cannot see how this figure comes from his analysis of other sales which he thought comparable. He is simply telling the arbitrator that a person who wanted to buy a hotel, an appendant bar room, a parking garage and a small office building, together with the land having a frontage of 317.42 feet, would pay this sum, having in mind that redevelopment was 10 years away. To me and probably to the arbitrator, this is a meaningless estimate, and when it results in a valuation of $40,500 for the Petrie frontage of 165.42 feet, it is worse than that.

The arbitrator was rightly suspicious of a valuation of $336,000 for the parking garage. Stewart began with a figure of $298,776, which was an engineer's estimate of cost of reproduction less accrued depreciation. He increased this figure to $336,000 because of a sub-lease made by the Petrie Company to the Avis Company. The arbitrator's criticism of the engineer's estimate was that it made no provision for obsolescence. This was an obvious criticism with a building of this kind, the shell of which was more than 60 years old and the inside 25 years old. In addition, the Petrie company had assumed to grant a sub-lease to Avis for a period much in excess of its own unexpired term. It is true that it had a right of renewal or compensation on a refusal to renew but the granting of a precarious sub-lease does not increase the right to increased compensation. I am not overlooking the fact that if the head lease had been renewed, any increased ground rent was the responsibility of Avis and not Petrie, but the problem of an increased ground rent and its effect upon land valuation was only three years away and was ignored by the appraiser.

Stewart's valuation of the Swiss Bear Bar is equally open to question. It is not a valuation but a mere repetition of a cost figure. It was built on Petrie land and leased by the Petrie Company to the Walker House Hotel. Its only utility was as an appendage to the hotel and yet he deducted the whole cost from his breakdown figure of $514,000 for the Petrie property.

1966

CITY OF TORONTO v. W.H. HOTEL LTD.

Judson J.

Stewart's valuation takes no account of the fact, which was generally admitted, that these buildings had but a limited life. Crashley had begun his negotiations with the city, intending an immediate redevelopment. According to all the evidence he was 10 years too soon.

I do not think that the arbitrator was in error in his interpretation of the agreement. What he had to ascertain was the price for the land. He was not concerned with buildings unless he was compelled to accept Stewart's method of valuation. With the exercise of the option in December 1962, the buildings would become the problem of the optionee company, W.H. Hotel Limited, when it took an assignment of the leases on the Petrie and Elgin lots. It then became the landlord and would have to decide whether to renew the leases or pay for the buildings. There was, in fact, no problem because of the common control of the three companies and it was never expected that there would be. Further, if the option had been exercised after the expiry of the Petrie and Elgin leases, whatever sum the city had been compelled to pay by way of compensation for the buildings would have been payable by the optionee company in addition to the value of the land.

I would allow the appeal with costs both here and in the Court of Appeal and restore the arbitrator's award.

Appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitor for the appellant: W. R. Callow, Toronto.

Solicitors for the respondent: Borden, Elliot, Kelley & Palmer, Toronto.

1966

*Feb. 14, 15
Apr. 26

PFIZER CORPORATION and PFIZER COMPANY LIMITED—LA COMPAGNIE PFIZER LIMITÉE ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Petition of right to recover tax paid under protest—Dietary aid "Limmits"—Whether exempt as "foodstuff" or taxable as "pharmaceutical"—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(cc), 30, 32, and Schedule III.

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* PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

1966

PFIZER CORPORATION *et al.* *v.* THE QUEEN

The two appellant companies sought, by way of petition of right, to recover sales tax paid under protest on a product in biscuit form sold and advertized for sale as a "limited calorie meal plan for weight control" under the trade mark "Limmits". The appellants claimed that these biscuits were exempt from sales tax as "foodstuff", more particularly as "bakers' biscuits or other similar articles", by reason of s. 32 and Schedule III of the *Excise Tax Act*, R.S.C. 1952, c. 100. The Crown contended that "Limmits" were subject to sales tax as "pharmaceuticals". The Exchequer Court dismissed the petition of right and ruled that "Limmits" were taxable. The taxpayers appealed to this Court.

Held (Ritchie J. dissenting): The appeal should be dismissed.

Per Abbott, Martland, Judson and Spence JJ.: The product "Limmits" was subject to sales tax. To be exempt from sales tax, a product must be a specific article described in Schedule III of the *Excise Tax Act*; in the present case, it had to be a "bakers' biscuit" or a "similar article". It had to be the ordinary product of the baker's art. It was certain that "Limmits" was not such a product. These biscuits were three times more expensive than baker's biscuits. They were advertised and sold not as a sweet or confection but as an elaborate, calorie-restricted meal for the purpose of reducing weight. Although manufactured by a baking company, they were produced for and under the specific direction of the appellants pursuant to a detailed formula supplied by them with ingredients compounded and provided by them, one of which was an inert appetite depressant.

Per Ritchie J., *dissenting:* Section 2(1)(*cc*) of the *Excise Tax Act*, by defining the meaning which Parliament intended to be attached to the word "pharmaceutical", does not have the effect of creating a distinct class of substance in contradistinction to and exclusion of the "foodstuffs" described in Schedule III. The character of a product for the purpose of entitling it to an exemption as a "foodstuff" under the Schedule is in no sense altered by the way in which it is sold or represented by the manufacturer or by the price charged for it. The product "Limmits" was a "bakers' biscuit" or at least a "similar article".

Revenu—Taxe de vente—Pétition de droit pour récupérer la taxe payée sous protêt—Produit diététique «Limmits»—Produit est-il exempt comme «denrée alimentaire» ou taxable comme «produit pharmaceutique»—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(cc), 30, 32, et Annexe III.

Les deux compagnies appelantes ont cherché, au moyen d'une pétition de droit, à récupérer la taxe de vente qu'elles avaient payée sous protêt sur un produit sous forme de biscuit qu'elles vendaient sous la marque de commerce «Limmits» et qu'elles annonçaient comme étant un régime amaigrissant à calories limitées. Les compagnies ont prétendu que ces biscuits étaient exempts de la taxe de vente comme «denrée alimentaire», et plus particulièrement comme étant des «biscuits de boulanger ou autres articles semblables», en se basant sur l'art. 32 et l'Annexe III de la *Loi sur la taxe d'accise*, S.R.C. 1952, c. 100. La Couronne a soutenu que le produit «Limmits» était sujet à la taxe de vente comme étant un «produit pharmaceutique». La Cour de l'Échiquier a rejeté la pétition de droit et a jugé que le produit «Limmits» était taxable. Les compagnies en ont appelé devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Ritchie étant dissident.

Les Juges Abbott, Martland, Judson et Spence: Le produit «Limmits» était sujet à la taxe de vente. Pour être exempt de la taxe de vente, un produit doit être un article spécifique décrit dans l'Annexe III de la *Loi sur la taxe d'accise*; dans le cas présent, il devait être un «biscuit de boulanger» ou un «article semblable». Il devait être le produit ordinaire de l'art du boulanger. Il est certain que le produit «Limmits» n'est pas un tel produit. Ces biscuits sont trois fois plus dispendieux que les biscuits de boulanger. Ils sont annoncés et vendus non pas comme une sucrerie ou une friandise, mais comme étant un mets à calories restreintes dont le but est de faire perdre du poids. Quoiqu'ils soient confectionnés par une boulangerie, ils sont produits pour et sous la direction spécifique des appelantes en vertu d'une formule détaillée fournie par celles-ci et avec des ingrédients composés et fournis par elles, un de ces ingrédients étant un coupe-appétit.

Le Juge Ritchie, *dissident:* En donnant une définition du sens que le Parlement voulait attacher aux mots «produit pharmaceutique», l'art. 2(1)(*cc*) de la *Loi sur la taxe d'accise* n'a pas l'effet de créer une classe distincte de substances en opposition avec et en exclusion des «denrées alimentaires» décrites à l'Annexe III. Le caractère d'un produit, lorsqu'il s'agit de l'exempter comme «denrée alimentaire» en vertu de l'Annexe, n'est aucunement changé par la manière dont il est vendu ou représenté par le manufacturier ou par son prix de vente. Le produit «Limmits» était un «biscuit de boulanger» ou au moins un «article semblable».

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], déclarant le produit «Limmits» sujet à la taxe de vente. Appel rejeté, le Juge Ritchie étant dissident.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], holding that the product "Limmits" was subject to sales tax. Appeal dismissed, Ritchie J. dissenting.

Hon. R. L. Kellock, Q.C., and *J. C. C. Chipman*, for the appellants.

C. R. O. Munro, Q.C., and *D. H. Aylen*, for the respondent.

The judgment of Abbott, Martland, Judson and Spence JJ. was delivered by

JUDSON J.:—In these proceedings, which are by way of petition of right, the two Pfizer Companies seek to recover sales tax paid under protest. The Customs and Excise Division began to exact this tax following a declaration of the Tariff Board in March of 1963, which held that "Metrecal", a product similar to the one with which we are here

[1] [1965] C.T.C. 394, 65 D.T.C. 5245.

1966

PFIZER CORPORATION *et al.* *v.* THE QUEEN

Judson J.

concerned, was not exempt from sales tax. The judgment of the Exchequer Court[1] was that the tax was payable. In my opinion this judgment should be affirmed.

The tax is imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, which reads as follows:

> 30. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
>
> (*a*) produced or manufactured in Canada.

In addition to this sales tax there is a 3 per cent old age security tax collected with it, making a combined tax of 11 per cent. This is imposed by R.S.C. 1952, c. 200, s. 10.

To be exempt the product must come within Schedule III of the *Excise Tax Act* and the appropriate part of the schedule reads:

> Bakers' cakes and pies including biscuits, cookies or other similar articles;

In 1963 the following words were added after "similar articles":

> but not including simulated chocolate bars or candy bars;

The addition of these words does not affect the decision in this case.

The product in question is sold under the trade mark "Limmits". Pfizer claims that it is a food product in biscuit form sold and advertised for sale as a "limited calorie meal plan for weight control". It was made and baked for Pfizer by Christie, Brown and Co. Limited, who are bakers. The baker receives its manufacturing instructions from Pfizer but not all the information as to the contents of the biscuit is communicated to the baker. Several of the ingredients are referred to by code letters alone.

In the reasons for judgment of Dumoulin J., there is a full reproduction of the material appearing on the packet of biscuits, including directions and a description of the composition of the product. Briefly, two biscuits are recommended to replace breakfast or lunch, together with tea or coffee, but no cream. The object is to provide a nutritious, satisfying, calorie-limited meal in biscuit form with the object of losing weight. The contents are described in the following paragraph:

> *Contents*: This package contains 6 Limmits. Each biscuit weighing 1.14 oz. contains soya, baking and whole meal flour, sugar, malt extract, glucose syrup, powdered milk, sodium carboxymethyl cellulose (50 mg.) and the following essential minerals and vitamins: vitamin A (as palmitate) 894 I.U.; vitamin B_1 0.31 mg.; riboflavin (vitamin B_2) 0.52 mg.; vitamin C

[1] [1965] C.T.C. 394, 65 D.T.C. 5245.

10.74 mg.; niacinamide 3.1 mg.; calcium (as dibasic calcium phosphate) 115.4 mg.; phosphorus (as dibasic calcium phosphate) 88.6 mg.; iron (as reduced iron) 2.5 mg.

An important ingredient mentioned is "carboxymethyl cellulose". This is described as "a bulking agent" without nutritional value which swells in the stomach and gives a feeling of fullness.

There is nothing distinctive about the shell of the biscuits. They are like other biscuits in this respect. Their peculiarity is to be found in the contents above described. I have real doubt whether they can be described as biscuits at all. I think this word means the ordinary, everyday product. But of this I am sure, they are not "bakers' biscuits". They are three times more expensive than bakers' biscuits. They are advertised and sold not as a sweet or confection but as an elaborate, calorie-restricted meal for the purpose of reducing weight. Although manufactured by a baking company, they are produced for and under the specific direction of Pfizer pursuant to a detailed formula supplied by Pfizer with ingredients compounded and provided by that company. Further, as already mentioned, a number of the ingredients are kept secret from the baking company. It is quite true that many foods are now sold with vitamins and other chemicals added. But to me the inert appetite depressant "sodium carboxymethyl cellulose" and its function to create the impression of fullness makes it impossible to hold that this product is a "bakers' biscuit".

It is unnecessary to go further than this. It is neither a "bakers' biscuit" nor a "similar article". Dumoulin J. put his judgment on three grounds. This is the only one I need to consider.

It is important to realize that under the *Excise Tax Act* all goods produced or manufactured in Canada are subject to tax. The exempting section 32(1) provides that

> 32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

It is not enough that a product may be described as a "foodstuff". To be exempt is must be a specific article described in Schedule III. The fact that one of the sections

1966

PFIZER CORPORATION *et al.* *v.* THE QUEEN

Judson J.

in Schedule III is headed "Foodstuffs" does not govern the decision. The article in question here must be a "bakers' biscuit" or a "similar article". This means the ordinary product of the bakers' art and it is certain that this article is not such a product.

I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment of my brother Judson in which he has outlined the circumstances giving rise to this appeal and has cited the provisions of the *Excise Tax Act* pursuant to which the appellants claim exemption for their products.

The question to be determined on this appeal, as I see it, is whether the appellants' products, which are sold under the trade name "Limmits", are disentitled to the exemption from sales tax which is extended to "bakers' . . . biscuits . . . or other similar articles" as "foodstuffs" within the meaning of Schedule III of the *Excise Tax Act*, by reason of the following facts:

(*a*) That they are sold or represented for use in the treatment, mitigation or prevention of a disorder or abnormal physical state in man, namely overweight;

(*b*) that they are produced for, and under the specific direction of, the appellants pursuant to a detailed chemical formula prescribed by them and for which they supply the ingredients.

In summarizing his reasons for deciding that "Limmits" were not "foodstuffs" within the meaning of the *Excise Tax Act*, Mr. Justice Dumoulin concluded in the following terms:

> Above all else, the '*suprema ratio decidendi*' is that 'Limmits', pursuant to the clear language of paragraph (*cc*), s-s. (1) of s. 2, are 'sold or represented' in such a way, and intended to secure specified results that unmistakably stamp them with the statutory qualifications of 'pharmaceuticals'.

The relevant provisions of s. 2(1) of the Act read as follows:

> (*cc*) 'pharmaceuticals' means any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, sold or represented for use in the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof, in man or animal, or for restoring, correcting or modifying organic functions in man or animal;. . .

In the course of his reasons for judgment, Mr. Justice Dumoulin placed the following interpretation on the words "sold or represented" as they occur in this subsection:

> In my humble opinion those three governing words have paramount sway over the Act and are mandatory unless superseded by an exception, expressed or logically inferred.
>
> It was convincingly shown, I believe, that the particular products, in biscuit form, called Limmits, were *'sold or represented'* to the public at large precisely in the manner and for the purposes forseen by s. 2(1)(*cc*). How, then, could they escape the consumption taxes of eight percent and two percent imposed, respectively, by the *Excise Tax* and *Old Age Security Acts*?

Later in his judgment, the learned judge explained what he found to be the mandatory condition of the tax exemption in Schedule III in the following terms:

> The determining, decisive, factor does not consist in the quantity of vitamins contained in, or calories excluded from, an edible substance; it is set and prescribed by the interpretative authority of s. 2(1)(*cc*) decreeing that: must be considered 'pharmaceuticals', unmentioned in Schedule III, 'any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, *sold or represented* for use in the. . . treatment, mitigation or prevention of a . . . disorder (or) abnormal physical state . . . in man'.

With the greatest respect for those who may hold a different view, I do not regard the subsection to which Mr. Justice Dumoulin refers as effective to do more than to define the meaning which Parliament intended to be attached to the word "pharmaceutical" as it is used from time to time in the *Excise Tax Act*, and I do not think that it has the effect of creating a distinct class of substance in contra-distinction to and exclusion of the "foodstuffs" described in Schedule III. If the definition of "pharmaceutical" had this effect it would mean, in my view, that "foodstuffs" which would otherwise come within the exemption provided by that Schedule would, if they were sold or represented for "use in . . . modifying organic functions in man or animal", cease to be "foodstuffs" for the purpose of the statute. It occurs to me that this would mean, for example, that upon a manufacturer representing that a particular "foodstuff" was beneficial for use by those suffering from indigestion, the product so represented would cease to be a "foodstuff" within the meaning of the schedule and would become subject to excise tax as a "pharmaceutical". In my opinion the character of the product for the purpose of entitling it to an exemption as a "foodstuff" under Schedule III is in no sense altered by

1966

PFIZER CORPORATION *et al.* v. THE QUEEN

Ritchie J.

the way in which it is sold or represented by the manufacturer or by the price charged for it.

The appellants' products are baked by a bakery company and each consists of two small biscuits between which is inserted a flavoured filling prepared according to a formula supplied by the appellants which contains chemical constituents, including the appetite depressant, sodium carboxymethylcellulose.

Although it is not expressly admitted that the so-called shells on each side of the filling are the same as the shell of any ordinary biscuit, the description given on behalf of the appellants by S.A.B. Dean remains uncontradicted. That witness said:

> The shells of the biscuit are baked in equipment used for the manufacture of all other types of biscuits; and the ingredients that enter into the process are of necessity the same type of ingredients that go into ordinary everyday biscuits...

It is, however, contended on behalf of the respondent that the chemical constituents of the filling distinguish the product from the usual bakers' biscuits and exclude it from the class of "Foodstuffs" prescribed by Schedule III of the *Excise Tax Act*.

The class of "Foodstuffs" under which the exemption is here sought is described in the Schedule as "bakers' cakes and pies, including biscuits, cookies *or other similar articles*" (the italics are my own). While I agree that the special properties contained in the filling which is inserted between the two small biscuits in the preparation of "Limmits" differentiate them from ordinary "bakers' biscuits", I am nevertheless of the opinion, with the greatest respect for those who hold a different view, that the effect of inserting the prepared filling is to make the finished products a somewhat unusual type of "bakers' biscuits" with special dietary qualities which are said to aid in the treatment of obesity, but that they remain "bakers' biscuits" and as such are exempt under the Schedule. Even if I were not satisfied that "Limmits" were "bakers' biscuits" within the meaning of the Statute, I would not be prepared to say that, baked as they are in a baker's oven with two sides which are indistinguishable from ordinary "bakers' biscuits" they are not, at least, "similar" to such biscuits and therefore "similar articles" within the meaning of the Schedule and entitled to the exemption for which provision

is made under s. 32(1) of the *Excise Tax Act*, which also applies to the tax imposed by the *Old Age Security Act*.

I would accordingly allow this appeal and order that the Pfizer Corporation is entitled to recover from the respondent the sum of $15,818.44 and that the Pfizer Company Limited is entitled to recover the sum of $43,417.18 being the amounts paid under the *Excise Tax Act* and the *Old Age Security Act* by way of sales tax and Old Age Security tax in respect of these products between February 25, 1963, and January 31, 1964, together with interest on both amounts at the rate of five percent from the date of service of the petition of right herein.

I would award the appellants their costs in this Court and in the Exchequer Court.

Appeal dismissed with costs, RITCHIE J. *dissenting.*

Solicitors for the appellants: Howard, Cate, Ogilvy, Bishop, Porteous and Hansard, Montreal.

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

HER MAJESTY THE QUEEN (*Plaintiff*) ..... APPELLANT;

AND

MEAD JOHNSON OF CANADA LIMITED (*Defendant*) ..... RESPONDENT.

1966
*Feb. 15
Apr. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Dietary aid "Metrecal"—Whether exempt as "foodstuff" or taxable as "pharmaceutical"—Jurisdiction of Exchequer Court re: previous Tariff Board decision not appealed—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(cc), 30, 32, 57, 58, and Schedule III.

The Crown claimed sales tax on a product known as "Metrecal", a controlling dietary aid manufactured by the defendant company in the form of powder, biscuit, liquid and soup. The defendant company contended that "Metrecal" was exempt from sales tax as "foodstuff" by reason of s. 32 and Schedule III of the *Excise Tax Act*, R.S.C. 1952, c. 100. Before the Exchequer Court, the Crown argued that the Court did not have jurisdiction to decide whether or not "Metrecal" in powder form was exempt because the Tariff Board, in 1963, had declared that this product was subject to sales tax as "pharmaceutical", and leave to appeal that decision had already been refused by the same Court. The Exchequer Court held that it was still open for a judge of the Court in other proceedings to make a finding contrary to the finding of the

* PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Tariff Board and ruled that "Metrecal" in all its forms was not subject to sales tax. The Crown appealed to this Court.

Held (Ritchie J. dissenting in part): The appeal should be allowed.

Per curiam: The declaration of the Tariff Board that "Metrecal" in powder form was taxable was final and conclusive and was not subject to review by the Court.

Per Abbott, Martland, Judson and Spence JJ.: The product "Metrecal" in all its forms was not exempt from sales tax. The product was similar to and competed with the product dealt with in the *Pfizer* case (ante p. 449), and the present case could be decided on the same grounds. As held in the *Pfizer* case, it was not enough that the product should be a "foodstuff". To be exempt "Metrecal" had to be a "foodstuff" that came within a specific definition in Schedule III of the *Excise Tax Act*. In biscuit form, "Metrecal" was not a "bakers' biscuit". In powder form, it was not a base or concentrate for making a food beverage. In liquid form, it was not a drink prepared from milk or eggs. In soup form, it was still "Metrecal", not a soup.

Per Ritchie J., *dissenting in part*: The fact that this product may be "sold or represented" for one or more of the purposes described in s. 2(1) (*cc*) of the *Excise Tax Act* necessarily excludes it from exemption from sales tax if it comes within any other classes of "foodstuffs" which are described in Schedule III of the Act. "Metrecal" as soup, wafer and liquid was included in the classifications described under "foodstuffs" in Schedule III and were therefore exempt from tax.

Revenu—Taxe de vente—Produit diététique «Metrecal»—Produit est-il exempt comme «denrée alimentaire» ou taxable comme «produit pharmaceutique»—Juridiction de la Cour de l'Échiquier re: décision préalable de la Commission du Tarif dont il n'y a pas eu appel—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(cc), 30, 32, 57, 58, et Annexe III.

La Couronne a réclamé une taxe de vente sur un produit diététique connu sous le nom de «Metrecal» et confectionné par la compagnie défenderesse sous les formes de poudre, biscuit, liquide et soupe. La compagnie défenderesse a prétendu que le produit «Metrecal» était exempt de la taxe de vente comme étant un «produit alimentaire» en se basant sur l'art. 32 et l'Annexe III de la *Loi sur la taxe d'accise*, S.R.C. 1952, c. 100. Devant la Cour de l'Échiquier, la Couronne a soutenu que la Cour n'avait pas juridiction pour décider de la question à savoir si le produit «Metrecal» sous forme de poudre était exempt parce que la Commission du Tarif, en 1963, avait déclaré que ce produit était sujet à la taxe de vente comme étant un «produit pharmaceutique», et que permission d'en appeler de cette décision avait déjà été refusée par la même Cour. La Cour de l'Échiquier a décidé qu'un juge de la Cour dans un autre procès pouvait encore déclarer le contraire de ce que la Commission du Tarif avait déclaré, et a jugé que le produit «Metrecal» sous toutes ses formes n'était pas sujet à la taxe de vente. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Ritchie étant dissident en partie.

Par la Cour: La déclaration de la Commission du Tarif que le produit «Metrecal» sous forme de poudre était taxable, était une déclaration finale et péremptoire et n'était pas sujette à revision par la Cour.

Les Juges Abbott, Martland, Judson et Spence: Le produit «Metrecal» sous

toutes ses formes n'était pas exempt de la taxe de vente. Le produit était semblable à et faisait concurrence au produit traité dans la cause de *Pfizer* (ante p. 449), et la présente cause pouvait être décidée sur les mêmes motifs. Tel que décidé dans la cause de *Pfizer*, il n'était pas suffisant que le produit soit une «denrée alimentaire». Pour être exempté, le produit «Metrecal» devait être une «denrée alimentaire» qui tombait sous une définition spécifique de l'Annexe III de la *Loi sur la taxe d'accise*. Sous forme de biscuit, «Metrecal» n'était pas un «biscuit de boulanger». Sous forme de poudre, il n'était pas une base ou concentré pour la fabrication de breuvages alimentaires. Sous forme de liquide, il n'était pas un breuvage à base de lait ou d'œufs. Sous forme de soupe, ce n'était pas une soupe mais toujours «Metrecal».

Le Juge Ritchie, *dissident en partie:* Le fait que ce produit peut être «vendu ou représenté» comme pouvant être employé à l'un ou plusieurs des buts décrits à l'art. 2(1)(*cc*) de la *Loi sur la taxe d'accise*, l'exclut nécessairement de l'exemption de la taxe de vente s'il tombe sous l'une des autres classes de «denrées alimentaires» qui sont décrites à l'Annexe III de la Loi. «Metrecal» comme soupe, biscuit et liquide était inclus dans les classifications décrites comme «denrées alimentaires» dans l'Annexe III et était en conséquence exempt de la taxe.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], déclarant le produit «Metrecal» non sujet à la taxe de vente. Appel maintenu, le Juge Ritchie étant dissident en partie.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], declaring that the product "Metrecal" was not subject to sales tax. Appeal allowed, Ritchie J. dissenting in part.

C. R. O. Munro, Q.C., and *D. H. Aylen*, for the plaintiff, appellant.

Hon. R. L. Kellock, Q.C., and *N. M. Simpson, Q.C.*, for the defendant, respondent.

The judgment of Abbott, Martland, Judson and Spence JJ. was delivered by

JUDSON J.:—The judgment of the Exchequer Court[1] in this case decides that the product known as "Metrecal", whether in the form of powder, liquid, biscuit or soup, is not subject to sales tax. This was decided before the judgment of the same Court in the *Pfizer*[2] case. There is obvious conflict between the two judgments. As far as the biscuit is concerned, I repeat what I said in the *Pfizer* case, that the biscuit containing Metrecal is not a "bakers' biscuit" and as such, within the exemption of Schedule III.

[1] [1965] C.T.C. 339, 65 D.T.C. 5181. [2] [1965] C.T.C. 394, 65 D.T.C. 5245.

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Judson J.

It is unnecessary to repeat what I said about the composition of the product in the *Pfizer* case. Metrecal is a similar and competing product. The Tariff Board on February 25, 1963, in proceedings instituted by Mead Johnson of Canada Ltd., the present respondent, declared that Metrecal in powder form was subject to sales tax.

These proceedings were taken under s. 57(1) of the *Excise Tax Act*, which reads:

> 57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the *Tariff Board Act* may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

Section 57(3) makes a declaration by the Tariff Board final and conclusive subject to a right of appeal given by s. 58 on a question of law provided leave to appeal is granted by the Exchequer Court or a Judge thereof. Leave to appeal was refused on May 1, 1963.

There can be no question that the Tariff Board was within its jurisdiction in making this declaration. The question of jurisdiction which arose in *Goodyear Tire and Rubber Company of Canada Limited v. T. Eaton Co. Ltd.*[1] does not arise here. By the terms of the Act the declaration of the Tariff Board is final and conclusive.

However, the judgment under appeal holds that Metrecal in all its forms is not subject to sales tax and that it is still open for a Judge of the Exchequer Court in other proceedings to make a finding contrary to the finding of the Tariff Board. The judgment also holds that Metrecal is a foodstuff, that it is not a pharmaceutical and that even if it is a pharmaceutical, the fact that it is also a foodstuff exempts it from tax. The ratio is contained in the following paragraph of the reasons for judgment:

> In any event, however, irrespective of whether the various forms of "Metrecal" are pharmaceuticals, the fact that they are also foodstuffs within Schedule III to the *Excise Tax Act* in my opinion exempts them from sales tax. It is my respectful opinion that, on a true interpretation of the Act, once it is found that an article is a foodstuff, then in order for it not to be exempt from taxation by reason of its being a pharmaceutical also there would have to be in Schedule III or elsewhere in the Act clear words denying the article exemption from sales tax by the employment of such words as "other than a pharmaceutical", as was done in the case of farm and forest products listed in Schedule III.

[1] [1956] S.C.R. 610, 56 D.T.C. 1060, 16 Fox Pat. C. 91, 28 C.P.R. 25, 4 D.L.R. (2d) 1.

In my opinion, the error in this ratio is that it is not enough that the product should be a foodstuff. Before it can be exempt, it must be found to be a foodstuff that comes within a specific definition in Schedule III. In biscuit form it is not a "bakers' biscuit". In powder form it is not a base or concentrate for making a food beverage. In liquid form it is not a drink prepared from milk or eggs. In soup form it is still "Metrecal", not a soup. The case can therefore be decided on the same grounds as those delivered in this Court in the case of *Pfizer*.

It is true that the Tariff Board when it held that "Metrecal Powder" was subject to tax said that it was a pharmaceutical. I have already stated that I think that this finding was conclusive. But whether or not the case had ever been before the Tariff Board, the result would be the same. I think that "Metrecal" in all its forms is not within Schedule III.

I would allow the appeal with costs both here and in the Exchequer Court. Judgment should be entered for the amount of taxes claimed and the penalties in accordance with s. 48(4) of the Act.

RITCHIE J. (*dissenting in part*):—I have had the privilege of reading the reasons for judgment of Mr. Justice Judson who has outlined the circumstances giving rise to this appeal and I agree with him that the refusal of the learned President of the Exchequer Court to grant leave to appeal to that Court in respect of the respondent's claim for exemption for "Metrecal powder" is not reviewable in this Court in the present proceedings and that the declaration of the Tariff Board in this regard is to be treated as final and conclusive.

Mr. Justice Gibson, however, has determined in the judgment from which this appeal is taken, that the respondent's product Metrecal in the form of a soup, a biscuit and a liquid is exempt from sales tax under the provisions of s. 32 and Schedule III of the *Excise Tax Act*.

As I have indicated in the *Pfizer*[1] case I do not think that the fact that these products may be *"sold or represented"* for one or more of the purposes described in s. 2(1)(*cc*) of the Act necessarily excludes them from exemption from sales tax if they come within any of the

[1] Ante p. 449.

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Ritchie J.

classes of "Foodstuffs" which are described in Schedule III of the Act.

It appears to me to be convenient to deal separately with the three forms in which the product is marketed:

1. Metrecal Soup:

The respondent claims that Metrecal tomato soup, split pea soup and clam chowder come within the exemption provided for "soups" by the terms of the Schedule. In this regard it is to be noted that more than 95 per cent of the constituents of each of these products consist of water, milk and its derivatives and tomato paste, split peas or clam meat and juice as the case may be. The remaining 5 per cent or less of the product consists mainly of a mixture of vitamins, minerals and chemicals. Mr. LeRiche, whose evidence on behalf of the respondent in this regard was uncontradicted, having testified that "corn oil is derived from corn, 10 per cent of corn is oil" and that butter fat is derived from milk, went on to describe the ingredients contained in the various metrecal soups as follows:

> Milk solids, derived from milk. Corn oil, the same as we said before. Butterfat, the same. Salt is a food, a pure chemical substance. Iodized salt, salt with another chemical added. Calcium caseinate, derived from milk. Vitamins, made synthetically, and minerals. Black pepper is a natural flavour. Tomato paste, derived from tomatoes. Peas, self-explanatory. Onion powder, derived from onions. Monosodium glutamate, a chemical substance which improves the flavour. Ham flavour, I don't know whether this is synthetic or not. Clam meat, minced, and potatoes, clam juice and water.

The product is assembled and packaged by General Milk Products Limited who are manufacturers of milk products, evaporated milk and similar products, and who supply the skim milk and butter fat to go into the Metrecal soup, while the remaining materials are supplied by the respondent company.

In my view, if these products contained nothing but milk and milk products, tomatoes, split peas or clam chowder and water, they would undoubtedly be "soups" within the meaning of the exemption contained in Schedule III and the question to be determined is whether they lose the character of a soup because certain vitamins, minerals and chemicals are added in accordance with the respondent's directions. As I have indicated, I do not think that the fact that the ingredients supplied by the respondent may be beneficial in the treatment of "overweight" and that the

product is "sold or represented" as having this quality, affects the matter, and, with the greatest respect for those who hold a different view, I am further of the opinion that a product which contains such a high percentage of ingredients normally found in "soups" does not cease to come within that category as specified in Schedule III of the *Excise Tax Act* by reason of the fact that a small quantity of other ingredients is added with a view to producing the effect of controlling obesity. I am therefore of opinion that Metrecal "soups" are one of the "Foodstuffs" classified as being exempt from sales tax under the provisions of Schedule III of the *Excise Tax Act*.

2. Metrecal Wafers:

The question of whether these so-called wafers are "bakers' biscuits . . . or similar articles" within the meaning of Schedule III is almost identical with that which was considered in the *Pfizer* case.

These so-called wafers are baked in a baker's oven, cooled and packaged by George Weston Limited who are described in the evidence as " . . . manufacturers of bakery goods generally . . . cookies, biscuits, breads, cakes". The constituents of the wafer are described by Mr. LeRiche as follows:

> Soybean protein, sir, derives from the soybean, and this would be mainly the original product. Wheat flour is the original wheat, with a great deal of the bran removed. Sugar is a chemical substance derived from either sugar-beet or sugar-cane. Calcium caseinate is a derivative from milk. Molasses is the end product or an end product in the manufacture of sugar. Corn oil is derived from corn; ten per cent of corn is oil. Coconut oil is self-explanatory. Yeast, this is derived from the brewing industry. Lecithin is a chemical that is also a food substance. Cottonseed flour is self-explanatory, and wheat bran also. Iodized salt is one of the chemical substances which are now being added to our food. *Cinnamon is a spice. Ammonium bicarbonate* is known as baking powder. Flavours, that is another self-explanatory item. Vitamins and minerals are orignal in foodstuffs, but now mainly synthetic.

It appears to me that the respondent's formula for the making of these wafers is in the nature of a recipe for the making of a biscuit which is alleged to be beneficial to those suffering from obesity. It is baked by a bakery company and I cannot see that its alleged quality as a weight reducer deprives it of its character as a "bakers' biscuit". Even if the chemicals, minerals and vitamins which form part of the recipe differentiate the Metrecal wafer from nearly all other "bakers' biscuits" in my view it nevertheless remains a "bakers' biscuit" or at least an

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Ritchie J.

article so similar thereto as to come within the phrase "similar articles" as used in Schedule III of the Act.

3. Metrecal Liquid:

The respondent seeks exemption for this product on the ground that it comes under the category "Drinks prepared from milk or eggs" for which an exemption is provided by Schedule III.

The formula for this product specifies the following milk products in the proportions noted:

Milk Solids, Non Fat (From fresh skim milk)	15.7
Butterfat (From fresh whole milk or cream)	0.6
Water (supplied largely by the skim milk)	78.08.

I do not think that the words "Drinks prepared from milk..." can be taken to mean "drinks consisting exclusively of milk" and I take the view that the fact that something over 90 per cent of this product is produced from milk is sufficient to bring it within the exemption. I do not think that addition of other ingredients, including flavouring, which have been supplied in accordance with the formula developed by the respondent, alters the essential quality of the drink as being one that was prepared from milk.

As I have indicated, I am of opinion, for the reasons stated by Mr. Justice Judson, that it was not open to Mr. Justice Gibson, nor is it open to this Court on the present appeal, to disturb the declaration made by the Tariff Board in respect to Metrecal "powder" and I would accordingly allow the appeal to the extent of setting aside the finding made by Mr. Justice Gibson that Metrecal "powder" is one of the foodstuffs listed in Schedule III and direct that the judgment herein of the Exchequer Court be varied accordingly. In all other respects I would dismiss this appeal.

In view of the fact that the respondent has been substantially successful it should have its costs of the appeal to this Court.

Appeal allowed with costs, RITCHIE J. *dissenting in part.*

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

Solicitors for the defendant, respondent: Blake, Cassels & Graydon, Toronto.

THE ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 ..... APPELLANT;

1966
*Mar. 11
Apr. 26

AND

THE LABOUR RELATIONS BOARD OF BRITISH COLUMBIA .....

AND

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115, BUILDING MATERIAL, CONSTRUCTION & FUEL TRUCK DRIVERS UNION, LOCAL 213 and TUNNEL AND ROCK WORKERS UNION, LOCAL 168 ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour relations—Application by respondent unions to be certified for unit of employees for whom appellant union already certified—Representation vote ordered—Cancellation of vote prior to counting of ballots—Power of Board to cancel vote and to certify respondents—Whether proper notice given—Labour Relations Act, R.S.B.C. 1960, c. 205 [am. 1961, c. 31] ss. 10(1)(c), 12, 17, 24, 62(8), 65(3).

Upon the application of the respondent trade unions to be certified for a unit of employees for whom the appellant union was already certified as the bargaining representative, the Labour Relations Board of British Columbia ordered the taking of a representation vote. Prior to the completion of the vote it was suggested to the Board, on behalf of the respondents, that there had been a breach of s. 12(9) of the *Labour Relations Act* by the employer by having increased the rates of pay of the employees before the vote was taken. This increase had been made in consequence of a collective agreement between the employer and the appellant. Subsequently, the Board cancelled its decision to hold the representation vote, ordered the destruction of the ballots and certified the respondents.

On an application by way of *certiorari*, the appellant obtained an order quashing the decision of the Board to certify the respondents and quashing the certification. On appeal this judgment was reversed. On the appeal to this Court the appellant raised two points: 1. Did the Board have power, after the representation vote had been directed by it, pursuant to s. 12(3) and after the ballots had been cast, to cancel its decision, and to certify the respondents without the result of the vote being known? 2. Did the Board act without jurisdiction or exceed

*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 v. LABOUR RELATIONS BOARD OF B.C.

its jurisdiction in doing what it did without giving notice to the appellant of its intention to cancel its decision as to the representation vote and of its intention to certify the respondents without such vote?

Held (Spence J. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Martland, Judson and Hall JJ.: It appeared that the reason for the decision to hold a representation vote was in order to ascertain whether a majority of the employees in the unit wished to be represented by the respondents. Whether or not a vote for that purpose was to be held was a matter for the discretion of the Board, as provided in s. 12(3)(*b*). A decision to hold such a vote was not final and absolute in view of the power conferred upon the Board by s. 65(3) to reconsider "any decision or order made by it under this Act" and to vary or cancel such decision or order.

The Board had the power to cancel its direction for the taking of the representation vote, and the position was not altered because the decision to cancel was made after the ballots had been cast but before they had been counted. The Board had the power during the period between the casting of the ballots and the counting thereof to consider facts relating to the taking of the vote, and had power to cancel the vote certainly up to the time that it had been completed by the counting of the ballots.

Whether or not the granting of the wage increase, without the permission of the Board, did or did not constitute a breach of s. 12(9), a question it was not found necessary to decide, the Board did reach the conclusion that, in view of the alteration of the conditions of employment, "the true wishes of the employees in the unit are not likely to be disclosed by a representation vote". This was a finding by the Board in respect of an issue of fact, which it was entitled to make. Having made that finding it had the right, under s. 65(3), to cancel its previous decision to hold a representation vote.

Once the decision to cancel the direction for the vote had been validly made, the position was the same as if no vote had ever been directed. In that situation, if the Board was satisfied that a majority of the employees in the unit were, at the date of application, members in good standing of the trade union, it was required by s. 12(4) to certify it. The Board was so satisfied, and stated also that it was not in doubt as to whether a majority of the employees in the unit wished to be represented by the respondents. On those findings, and in the absence of any legal requirement binding it to the outcome of the vote which it had cancelled, the certfiication of the respondents was properly made.

As to the question of notice, in the circumstances the Board had complied with the requirements of s. 62(8) and did not lose jurisdiction by failing to give to the appellant a fair opportunity to be heard.

Per Spence J., *dissenting:* Once the Board exercising the discretion given to it by s. 12(3) had directed a representational vote it was bound by the provisions of subss. (4) and (5) to either grant or refuse certification on the basis of the result of such vote. The power granted to the Board by s. 65(3) to cancel or vary its decisions was not a power to vary the provisions of the statute. Accordingly, subs. (3) of s. 65 did not permit a variation of the exact statutory provisions of s. 12(4) and (5).

Also, the Board in acting to cancel the representative vote and to certify the respondents, without adequate notice having been given to the

appellant of the intention to take such action, was in breach of s. 62(8) of the statute and so acted in excess of its jurisdiction. Its action should be quashed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Munroe J. Appeal dismissed, Spence J. dissenting.

W. J. Wallace, for the appellant.

A. W. Mercer, for the respondent, Labour Relations Board of British Columbia.

R. E. Cocking, for the respondent trade unions.

The judgment of Taschereau C.J. and Martland, Judson and Hall JJ. was delivered by

MARTLAND J.:—The appellant is a trade union. The respondents, other than the Labour Relations Board of the Province of British Columbia (hereinafter referred to as "the Board"), are also trade unions and are hereinafter referred to as "the respondents". The matter in dispute relates to the certification by the Board of the respondents as bargaining representative for employees of Zeballos Iron Mines Limited (hereinafter referred to as "the company") for whom the appellant had previously been the bargaining representative.

The appellant had been certified by the Board on May 2, 1961, and a collective agreement between the appellant and the company was in existence at the times material to these proceedings. On January 27, 1964, notice was given by the appellant to the company to commence collective bargaining, and thereafter meetings were held between representatives of the appellant and of the company. Presumably this notice was given under s. 17 [rep. & sub. 1961, c. 31, s. 13] of the *Labour Relations Act,* R.S.B.C. 1960, c. 205, which provides as follows:

17. Either party to a collective agreement, whether entered into before or after the coming into force of this Act, may, within three months and not less than two months immediately preceding the date of expiry of the agreement, by written notice require the other party to the agreement to commence collective bargaining.

On or about March 23, 1964, the respondents applied to the Board for certification as the bargaining representative

[1] (1965), 53 W.W.R. 385, 54 D.L.R. (2d) 516.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 v. LABOUR RELATIONS BOARD OF B.C. et al.

Martland J.

for the same unit. This application must have been made pursuant to the provisions of s. 10(1)(c) [am. 1961, c. 31, s. 6] of the Act, which provides:

10. (1) A trade-union claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may, subject to the regulations, apply to the Board to be certified for the unit in any of the following cases:

. . . .

(c) Where a collective agreement is in force, then only during the eleventh and twelfth months in each year of its term or of any renewal or continuation thereof, and during the last two months of the term of the agreement, except that a trade-union that is a party to the collective agreement but is not certified with respect to employees covered by the agreement may apply at any time.

On April 3 the registrar of the Board notified the appellant of the application by the respondents and advised that written submissions concerning the application would be considered by the Board if received by it within ten days. A written submission was made by the appellant on April 10.

As a result of the collective bargaining between the appellant and the company, on or about April 30 an agreement was reached as to terms to be incorporated in the renewal of the existing agreement, effective on May 1. These terms included, among other provisions, a wage increase of 15 cents an hour across the board, which went into effect on May 1, 1964.

Section 24 of the Act provides:

24. Each of the parties to a collective agreement shall forthwith, upon its execution, file one copy with the Minister.

No copy of the agreement above mentioned was filed with the Minister of Labour.

On June 5 the appellant received notice from the Board that a representation vote for the purpose of certification had been ordered by the Board, under s. 12 [am. 1961, c. 31, s. 7] of the Act, to be held on June 10. The relevant portions of s. 12 are as follows:

12. (1) Where a trade-union applies for certification for a unit, the Board shall determine whether the unit is appropriate for collective bargaining, and the Board may, before certification, include additional employees in, or exclude employees from, the unit.

(2) The Board shall make, or cause to be made, such examination of records and other inquiries as it deems necessary, including the holding of such hearings as it deems expedient to determine the merits of any application for certification, and the Board shall prescribe the nature of the evidence that the applicant shall furnish with or in support of the

application, and the manner in which the application shall be made.

(3) If the Board is in doubt

(a) as to whether a majority of the employees in the unit were, at the date of the application, members in good standing of the trade-union making the application, the Board shall direct that a representation vote be taken;

(b) as to whether a majority of the employees in the unit wish to be represented by the trade-union making the application, the Board may direct that a representation vote be taken.

(4) If, on the taking of a representation vote under subsection (3), a majority of the ballots of all those eligible to vote are cast in favour of the trade-union, or if the Board is satisfied that a majority of the employees in the unit were, at the date of the application, members in good standing of the trade-union, the Board shall certify the trade-union for the employees in the unit.

(5) If

(a) the Board is satisfied that less than a majority of the employees in the unit were, at the date of application, members in good standing of the trade-union; or

(b) on the taking of a representation vote under subsection (3), less than a majority of the ballots of all those eligible to vote are cast in favour of the trade-union; or

(c) the Board is satisfied that the trade-union has falsely represented membership in good standing,

the Board shall not certify the trade-union for the unit.

On June 10 ballots were cast by the company's employees. On the casting of the last ballot, the scrutineer for the respondents stated that he contested the vote because a violation of the Act had taken place. Thereafter, the ballot box was sealed by the returning officer, who advised that the ballots would be counted on June 19.

On June 12 the solicitors for the respondents wrote to the Board as follows:

We wish to confirm our telephone conversation of today with you wherein we advised that on behalf of the International Union of Operating Engineers, Local 115, Teamsters, Local 213 and Tunnel & Rock Workers Union, Local 168, we oppose the representative vote held on Wednesday, June 10, 1964, at Zeballos, B.C.

We are instructed that the application for certification by the above three Unions for a unit of employees at Zeballos Iron Mines Ltd. was made March 23, 1964. The payroll date selected was May 12, 1964, for "all employees of Zeballos Iron Mines Ltd. except office employees". Further delay then resulted and the vote did not take place until June 10, 1964.

During the above period of time, the Company granted a substantial wage increase retroactive. Further we are instructed that negotiations between the management and Mine, Mill were actively carried on and subsequently ratified at a meeting of Mine, Mill on Company property.

It is our submission that the Company's violation of Section 12(9) of the Labour Relations Act and the delay in taking the vote has caused prejudice to the applicant Unions. The matter is being investigated further and as soon as we have further details, we will communicate with you.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 v. LABOUR RELATIONS BOARD OF B.C. et al.

Martland J.

A copy of this letter was sent by the registrar of the Board to the appellant on June 19, advising that, if the appellant wished to make representations concerning the matter, they should be in the registrar's hands on or before June 29. The appellant replied to this letter on June 25 as follows:

I am in receipt of your communication of June 19th, 1964 and the attached copy of a letter from Mr. McTaggart.

We wish to submit for your information that notice from the Union to commence collective bargaining was given to the Company on January 27, 1964 and acknowledged by the Company, January 31, 1964.

Copies of this correspondence is enclosed.

Several bargaining meetings were held in Vancouver and at Zeballos.

These meetings resulted in a substantial improvement in wages and contract provisions. This, in our opinion, can in no way be misconstrued as a violation of any Section of the Labour Relations Act.

The Board sent a letter to the appellant on July 10 reading as follows:

On May 12th, 1964, the Labour Relations Board directed that a representation vote be taken upon an application of the International Union of Operating Engineers, Local No. 115; Building Material, Construction and Fuel Truck Drivers Union Local No. 213; and Tunnel and Rock Workers, Local No. 168, to be certified for a unit employed by Zeballos Iron Mines Limited. Prior to the completion of the vote, and while the application for certification was pending, the Board was informed that the employer had, contrary to Section 12(9) of the Labour Relations Act, altered conditions of employment of the employees affected by the application.

The Board is satisfied that under this circumstance the true wishes of the employees in the unit are not likely to be disclosed by a representation vote and therefore, pursuant to Section 65(3) of the Labour Relations Act, it has reconsidered its decision to take the said vote and has cancelled the said decision of May 12th, 1964. It has further directed that the ballots cast on June 19th, 1964, be destroyed.

As the Board is satisfied that a majority of the employees in the unit were, at the date of application for certification, members in good standing of the applicant trade-unions and is not in doubt as to whether a majority of the employees in the unit wish to be represented by the applicant trade-unions, it has, pursuant to Section 12(4) of the Labour Relations Act, certified the trade-unions. A copy of the certification is enclosed.

Sections 12(9) and 65(3) [enacted 1961, c. 31, s. 37 (*c*)] of the Act, to which reference is made, provide as follows:

12. (9) Where an application for certification is pending, no trade-union or person affected by the application shall declare or engage in a strike, and no employers' organization or employer shall declare a lockout, and no employer, without the written permission of the Board, shall increase or decrease rates of pay or alter any term or condition of employment of the employees affected by the application.

65. (3) The Board may, upon the petition of any employer, employers' organization, trade-union, or other person, or of its own motion,

reconsider any decision or order made by it under this Act, and may vary or cancel any such decision or order, and for the purposes of the Act the certification of a trade-union is a decision of the Board.

The ballots were destroyed by the returning officer on the morning of July 14, prior to the obtaining, on the afternoon of that day, of an *ex parte* injunction by the appellant's solicitors to restrain the destruction of the ballots. The appellant then applied, by way of *certiorari*, claiming that the Board lacked jurisdiction, or had exceeded its jurisdiction in granting certification other than in accordance with the outcome of the vote, and obtained an order quashing the decision of the Board to certify the respondents and quashing the certification.

On appeal[1] this judgment was reversed, Davey J.A. dissenting. Leave to appeal to this Court was granted by the Court of Appeal of British Columbia.

The appellant has raised two points on the appeal:

1. Did the Board have power, after a representation vote had been directed by it, pursuant to s. 12(3) and after the ballots had been cast, to cancel its decision, and to certify the respondents without the result of the vote being known?

2. Did the Board act without jurisdiction or exceed its jurisdiction in doing what it did without giving notice to the appellant of its intention to cancel its decision as to the representation vote and of its intention to certify the respondents without such vote?

As to the first point, the contention of the respondents is that the Board had the power to cancel its decision by virtue of s. 65(3). The appellant submits that that subsection cannot be invoked if the Board is precluded from cancelling its decision by a specific provision of the Act.

The issue here is as to whether the terms of s. 12(3) and (4) are to be construed so as to bind the Board, once a representation vote has been directed, to complete that vote and abide by its result, or whether the decision to take a vote, as in the case of decisions on other matters, can be cancelled or varied under s. 65(3).

The certification of a trade union as a bargaining representative for a unit of employees is a matter which the Act places in the hands of the Board. Under s. 12(2) it may

[1] (1965), 53 W.W.R. 385, 54 D.L.R. (2d) 516.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 v. LABOUR RELATIONS BOARD OF B.C. et al.

Martland J.

make such examination of records and other inquiries as it deems necessary.

A representation vote is only taken if the Board is in doubt in respect of one or other of the matters described in paras. (*a*) and (*b*) of subs. (3) of s. 12. Paragraph (*a*) requires a vote if the Board is in doubt as to whether a majority of the employees in the unit were, at the date of application, members in good standing of the applicant union. Paragraph (*b*) gives to the Board a discretion to direct a vote if it is in doubt as to whether a majority of the employees in the unit wish to be represented by the applicant trade union.

Paragraph (*b*) was added to s. 12 when that section was re-enacted in 1961 (Statutes of British Columbia, 1961, c. 31, s. 7). Its purpose would appear to be to enable the Board, at its discretion, to direct a representation vote even though a majority of employees in a unit are members in good standing of the applicant trade union, at the time of application, if it is in doubt as to whether a majority of the employees in that unit wish to be represented by that trade union.

It would appear, from the material before us, that, in the present case, the Board directed a representation vote under para (*b*). In its letter to the appellant, dated July 10, 1964, the Board says:

> The Board is satisfied that under this circumstance *the true wishes of the employees in the unit are not likely to be disclosed* by a representation vote and therefore, pursuant to Section 65(3) of the Labour Relations Act, it has reconsidered its decision to take the said vote and has cancelled the said decision of May 12th, 1964.

(The italics are my own.)

This indicates that the decision of May 12 to hold a representation vote was in order to ascertain whether a majority of the employees in the unit wished to be represented by the respondents. That this was the reason for the Board's direction is also a reasonable inference from the fact that the Board was being asked, not to certify a trade union for the first time, but to certify the respondents when there was already a certified trade union in existence.

Whether or not a vote for that purpose was to be held was a matter for the discretion of the Board. It was a means which the Board might use in order to resolve a

doubt regarding that question. A decision to hold such a vote was not, in my opinion, final and absolute in view of the power conferred upon the Board by s. 65(3) to reconsider "any decision or order made by it under this Act" and to vary or cancel such decision or order.

The scope of the power conferred under that subsection has been considered in this Court in *Labour Relations Board et al. v. Oliver Co-operative Growers Exchange*[1], and in *Bakery and Confectionery Workers International Union of America Local No. 468 v. White Lunch Limited*[2]. Both of those cases dealt with variations of an existing order, but in describing the extent of the power, Judson J., in the earlier case at p. 12, refers to it as "a plenary independent power" and as "a very necessary power to enable the Board to do its work efficiently".

In my opinion the Board had the power to cancel its direction for the taking of the representation vote. Nor do I think that the position is altered because the decision to cancel was made after the ballots had been cast but before they had been counted. In the present case the Board only became aware of circumstances which led it to cancel its direction after the ballots had been cast. The Board had fixed June 19 as the day for the counting of the ballots, nine days after the date which had been set for the voting. In my view, it had the power during that period to consider facts relating to the taking of the vote, and had power to cancel the vote certainly up to the time that it had been completed by the counting of the ballots. Whether or not it could have done so thereafter on the basis of irregularities in the taking of the vote, or for any other reason, is an issue which does not arise in the present case.

The decision of the Board to cancel the direction for the vote was made following the receipt of the letter of June 12 from the solicitors for the respondents suggesting that there had been a breach of s. 12(9) of the Act by the company by having increased the rates of pay of the employees before the vote was taken. This increase had, of course, been made from May 1 in consequence of the agreement between the company and the appellant. Sheppard J.A. in the Court below was of the opinion that s. 12(9) had no application to a wage increase granted as a consequence of collective

[1] [1963] S.C.R. 7. [2] [1966] S.C.R. 282.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 *v.* LABOUR RELATIONS BOARD OF B.C. *et al.*

Martland J.

bargaining carried on pursuant to the provisions of s. 19 of the Act, which requires the parties to a collective agreement to commence bargaining within five days after notice given by one of them under s. 17 (previously quoted). This view was shared by the other members of the Court.

The situation which arises where a trade union seeks certification for a unit of employees which already has a bargaining representative, which is a party to an existing collective agreement with the employer, presents problems. Under s. 17, notice to commence bargaining, where there is a collective agreement in effect, may be given within three months, but not less than two months immediately preceding the expiry date of the agreement. But under s. 10(1) the new applicant union cannot apply save in the last two months of each year of the agreement or of the term of the agreement. This means that the application for certification may often occur while collective bargaining is in progress between the employer and the trade union previously certified.

Section 12(9) permits a pay increase with the written permission of the Board, but, otherwise, prohibits the granting of such an increase *where an application for certification is pending*. The application for certification by the respondents was pending on May 1, 1964, when the wage increase took effect. Section 24 requires the filing of a copy of a collective agreement forthwith, upon its execution, with the Minister.

In the present case no copy of the agreement of April 30, 1964, had been filed, and there is nothing to indicate that the Board was aware of the pay increase granted by the company, effective May 1, until after the votes had been cast on June 10. Whether or not the granting of the increase, without permission of the Board, did or did not constitute a breach of s. 12(9), a question which I do not find it necessary to decide, the Board did reach the conclusion that, in view of the alteration of the conditions of employment, "the true wishes of the employees in the unit are not likely to be disclosed by a representation vote." This was, in my opinion, a finding by the Board in respect of an issue of fact, which it was entitled to make. Having made that finding it had the right, under s. 65(3), to cancel its previous decision to hold a representation vote.

Once the decision to cancel the direction for the vote had been validly made, the position was the same as if no vote had ever been directed. In that situation, if the Board was satisfied that a majority of the employees in the unit were, at the date of application, members in good standing of the trade union, it was required by s. 12(4) to certify it. The Board was so satisfied, and stated also that it was not in doubt as to whether a majority of the employees in the unit wished to be represented by the respondents. On those findings, and in the absence of any legal requirement binding it to the outcome of the vote which it had cancelled, the certification of the respondents was properly made.

The only other issue is as to whether or not proper notice had been given by the Board to the appellant. Section 62(8) of the Act provides that:

62. (8) The Board shall determine its own procedure, but shall in every case give an opportunity to all interested parties to present evidence and make representation.

The "case" in question before the Board was the application of the respondents to be certified. The Board gave notice of that application to the appellant, and gave it the opportunity to make written submissions. A written submission opposing the application was made.

To enable it to resolve a doubt which it then had as to whether a majority of employees in the unit wished to be represented by the respondents, the Board directed the taking of the representation vote. It received a submission from the solicitors for the respondents regarding that vote and it thereupon notified the appellant, enclosing a copy of that submission. The appellant was advised that it could make representations regarding that matter within a certain time. A written representation was made by the appellant. Thereafter the Board made its decision as to the cancellation of the representation vote and the certification of the respondents.

I agree with the conclusion of the majority in the Court below that in these circumstances the Board did not lose jurisdiction by failing to give to the appellant a fair opportunity to be heard. The Board did comply with the requirements of s. 62(8).

For these reasons, in my opinion, this appeal should be dismissed, with costs to the respondent trade unions.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 v. LABOUR RELATIONS BOARD OF B.C. et al.

SPENCE J. (*dissenting*):—I have had the privilege of reading the reasons of my brother Martland and I need not repeat the facts as he has set them out with sufficient clarity.

In my view, the appeal should be allowed for both of the grounds raised by counsel for the appellant. Firstly, I am of the view that the Board in the exercise of its powers under s. 65(3) of the *Labour Relations Act* was only permitted to act where under the provisions of the statute it was given a discretion. Therefore, that section did not permit it to contravene other statutory provisions. The Board has a discretion under s. 12(1) to determine whether the trade union which applied for certification was an appropriate unit. The Board has a further discretion under subs. (2) of s. 12 to make such examinations as it deemed fit and to prescribe the nature of the evidence that the applicant should furnish in support of an application for certification. By subs. (3) of s. 12 the Board was directed, if it were in doubt as to whether the majority of the employees were at the date of the application members in good standing of the trade union making the application or whether the majority of the employees in the unit wished to be represented by that trade union, to direct a representational vote to be taken. The Board in this case found that such a doubt existed and therefore exercising the power set forth in s. 12(3) of the statute as aforesaid, directed the taking of the representational vote. By s. 12(5)(*b*) if, on the taking of a representational vote under subs. (3), less than the majority of the ballots of all those eligible to vote are cast in favour of the trade union the Board shall not certify the trade union for the unit.

On the other hand, by subs. (4) of s. 12, if, on the taking of a representational vote, a majority of the ballots of those eligible to vote were cast in favour of the trade union, then the Board shall certify the trade union for the employees in the union. I am of the opinion that once the Board exercising the discretion given to it by s. 12(3) had directed a representational vote it was bound by the provisions of subss. (4) and (5) to either grant or refuse certification on the basis of the result of such vote.

The power granted by s. 65(3) of the statute is, as put by Judson J. in *Labour Relations Board et al. v. Oliver*

Co-operative Growers Exchange[1], at p. 12, a "plenary, independent power" and a "very necessary power to enable the board to do its work efficiently". It is not, however, a power to vary the provisions of the statute. I need not go so far as decisions in both British Columbia and Ontario in limiting the provisions to where no specific provision has been made by the statute, *e.g.* Bull J.A. in *Regina v. B.C. Labour Relations Board, ex parte White Lunch Ltd.*[2], at p. 80, but merely take the position that subs. (3) of s. 65 does not permit a variation of the exact statutory provisions of s. 12(4) and (5).

I also share the view expressed by Davey J.A. in his dissenting reasons given in the Court of Appeal of British Columbia that the action of the Labour Relations Board should be quashed because no adequate notice of the intention to take such action was given to the appellant. In this case, the Court need not consider the common law principle that every person has the right to be heard and that no judicial or quasi-judicial decision should be made against him without notice, as by the very provisions of the statute, *i.e.* s. 62(8), "the Board shall determine its own procedure but shall in every case give an opportunity to all interested persons to present evidence and make representation".

In the present case, as my brother Martland has pointed out, on June 12, the solicitor for the respondents wrote to the Board stating that they confirmed their telephone conversation opposing the representative vote, alleging a breach of s. 12(9) of the statute, and concluding "matter is being investigated further and as soon as we have further details we will communicate with you". The respondent Board forwarded to the appellant a copy of that letter in its letter of June 19 advising that if the appellant wished to make representations it should do so on or before June 29. The appellant did make representations simply alleging that the action of concluding a collective agreement with the increase in wages which was included therein was part of the ordinary procedure under the statute. Then, without further notice, the Board on July 10 notified the appellant that it was cancelling the representative vote and was certifying the respondents.

[1] [1963] S.C.R. 7. [2] (1965), 51 D.L.R. 72.

1966

ZEBALLOS DISTRICT MINE & MILL WORKERS UNION, LOCAL 851 *v.* LABOUR RELATIONS BOARD OF B.C. *et al.*

Spence J.

As Davey J.A. pointed out, the action of the Board in purporting, under s. 65(3) of the statute, to cancel its previous order for a representational vote and to certify the respondents was not part of the proceeding for such representational vote at all but was an extraordinary move to rescind something already ordered and on which the parties were entitled to rely in the absence of notice to the contrary. I adopt the statement of Davey J.A. "But it is not too much to expect the board to give notice of proceedings to reconsider and rescind decisions already taken and promulgated, couched in language sufficiently explicit to inform a layman of what is to be considered, and the case to be met". I am, therefore, of the opinion that the Board in acting to cancel the representative vote and to certify the respondents was in breach of s. 62(8) of the statute and so acted in excess of its jurisdiction. Its action should be quashed.

For these reasons, I would allow the appeal with costs against the respondent union only and direct the restoration of the order of Munroe J. made on August 24, 1964.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the appellant: Bull, Housser & Tupper, Vancouver.

Solicitors for the respondent, Labour Relations Board of British Columbia: Paine, Edmonds, Mercer, Smith & Williams, Vancouver.

Solicitors for the respondent trade unions: McTaggart, Ellis, Melvin & Cocking, Vancouver.

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

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*Mar. 2
Apr. 26

AND

HELEN RYRIE BICKLE, JUDITH RYRIE WILDER, WILLIAM PRICE WILDER and CHARTERED TRUST COMPANY, Executors of the Estate of EDWARD WILLIAM BICKLE RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Will—Charitable gift—Direction to pay duty out of charitable gift—Computation of deduction allowed by Act for gift—Estate Tax Act, 1958(Can.), c. 29, s. 7(1)(d).

By his will, the testator left the balance of his estate, after payment of debts, all estate taxes and succession duties and after setting aside fifty per cent of the remaining balance for the benefit of his family, to a charitable foundation within the meaning of s. 7(1)(*d*) of the *Estate Tax Act*, 1958 (Can.), c. 29. In computing the "aggregate taxable value" within the meaning of the Act, the Minister used a method known as "successive approximations" to compute the amount of deduction under s. 7(1)(*d*). The amount of the charitable gift could not be ascertained without first knowing the estate tax payable, and, in turn, the amount of the estate tax payable depended upon the amount of the charitable gift. The Exchequer Court ruled that the method used by the Minister was the wrong one. The Minister appealed to this Court. At the hearing, the executors made the submission for the first time that the charitable deduction was the full value of the charitable residue, on the basis that the last paragraph of s. 7(1)(*d*) did not apply to this particular will because under the will "no part of any estate, legacy, succession or inheritance duty...is... payable out of the property comprised in such gift," or payable by the charity "as a condition of the making of such gift".

Held (Spence J. dissenting in part): The appeal of the Minister should be allowed.

Per Abbott, Judson, Ritchie and Hall JJ.: The Minister's method of calculation was the correct one. The successive calculations of estate duty were required in this case because of the provisions of s. 7(1)(*d*), which allow as a deduction from aggregate net value of the estate only the actual value of the gift that ultimately finds its way to the charity. The will gave to the charity the residue of the estate charged with the burden of the payment of the duty. Under the Act, the Minister must value this interest, and the value of this interest for purposes of deduction from aggregate net value is to be reduced by the amount of the duties. The duties were payable out of the property comprised in the gift and were payable by the donee as a condition of the making of the gift.

Per Spence J., *dissenting in part*: If s. 7(1)(*d*) of the *Estate Tax Act* applies, the course adopted by the Minister was the correct one.

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

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Under the will, the estate tax and succession duties were not directed to be payable out of the property comprised in the gift to the foundation, nor were they payable by the foundation as a condition of the making of the gift to it. What the charity was entitled to receive was the residue of the residue after performance of all trusts including the payment of taxes; it was only in the residue of the residue that the charity had any property interest. The executors were, therefore, entitled to the benefit of the exemption and were not caught by the "minus" provision at the end of s. 7(1)(*d*).

Revenu—Impôt successoral—Testament—Don de charité—Paiement des droits à même le don—Calcul de la déduction permise par la Loi lorsqu'il s'agit d'un tel don—Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 29, s. 7(1)(d).

Par son testament, le testateur a légué à une organisation de charité, dans le sens de l'art. 7(1)(*d*) de la *Loi de l'Impôt sur les biens transmis par décès*, 1958 (Can.), c. 29, le reliquat de sa succession, après paiement des dettes, de tous les impôts successoraux et des droits de succession et après avoir mis de côté pour le bénéfice de sa famille 50 pour-cent de la balance. En calculant la «valeur globale imposable» dans le sens de la Loi, le Ministre s'est servi de la méthode par approximations successives pour calculer le montant de la déduction en vertu de l'art. 7(1)(*d*). Le montant du don de charité ne pouvait pas être établi sans savoir au préalable le montant de l'impôt successoral payable, et, alternativement, le montant de l'impôt successoral payable dépendait du montant du don de charité. La Cour de l'Échiquier a jugé que la méthode dont s'était servi le Ministre était la mauvaise. Le Ministre en a appelé devant cette Cour. Advenant l'audition, les exécuteurs de la succession ont soumis pour la première fois que la déduction de charité était la pleine valeur du reliquat de charité, pour le motif que le dernier paragraphe de l'art. 7(1)(*d*) ne s'appliquait pas au testament en question parce qu'en vertu du testament «aucune fraction des droits visant une masse des biens, un legs, une succession ou un héritage . . . est . . . payable sur les biens compris dans cette donation» ou payable par l'organisation charitable «comme condition de l'octroi d'une telle donation».

Arrêt: L'appel du Ministre doit être maintenu, le Juge Spence étant dissident en partie.

Les Juges Abbott, Judson, Ritchie et Hall: La méthode de calcul dont s'est servi le Ministre était la bonne. Les calculs successifs de l'impôt successoral étaient requis dans ce cas à cause des dispositions de l'art. 7(1)(*d*) qui permettent comme déduction de la valeur globale nette des biens transmis seulement la valeur actuelle du don qui en fin de compte tombe entre les mains de l'organisation charitable. Le testament a légué à l'organisation charitable le résidu de la masse lequel était chargé de payer les droits. En vertu de la Loi, le Ministre doit évaluer cet intérêt, et la valeur de cet intérêt pour les fins de déduction de la valeur globale nette doit être réduite par le montant des droits. Les droits étaient payables sur les biens compris dans le don et étaient payables par le donataire comme condition de l'octroi du don.

Le Juge Spence, *dissident en partie*: Si l'art. 7(1)(*d*) de la *Loi de l'Impôt sur les biens transmis par décès* s'applique, la conduite adoptée par le Ministre était la bonne.

En vertu du testament, l'impôt successoral et les droits de succession n'étaient ni payables sur les biens compris dans le don à l'organisation charitable, ni payables par l'organisation comme condition de l'octroi du don. Ce que l'organisation charitable avait droit de recevoir était le reliquat du reliquat après l'exécution de toutes les fiducies y compris le paiement des droits; l'organisation charitable n'avait d'intérêt que sur le reliquat du reliquat. En conséquence, les exécuteurs avaient droit au bénéfice de l'exemption et ne tombaient pas sous la disposition commençant par le mot «moins» à la fin de l'art. 7(1)(*d*).

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], rejetant la cotisation faite par le Ministre. Appel maintenu, le Juge Spence étant dissident en partie.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], setting aside an assessment made by the Minister. Appeal allowed, Spence J. dissenting in part.

Hon. R. L. Kellock, Q.C., and *G. W. Ainslie*, for the appellant.

John J. Robinette, Q.C., for the respondents.

The judgment of Abbott, Judson, Ritchie and Hall JJ. was delivered by

JUDSON J.:—The question in issue in this appeal is how the Minister must compute the deduction allowed by s. 7(1)(*d*) of the *Estate Tax Act* for charitable gifts when there is a direction to pay duty out of the charitable gift.

The *Estate Tax Act* imposes a tax upon the aggregate taxable value of all property passing on the death of every person domiciled in Canada at the time of his death. Section 7(1)(*d*) of the Act, which provides for the deduction of charitable gifts in computing aggregate taxable value, is in the following terms:

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

* * *

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

(i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were

[1] [1965] 1 Ex. C.R. 664, [1964] C.T.C. 208, 64 D.T.C. 5134.

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Judson J.

devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada all or substantially all of the resources of which were so devoted, and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or

(ii) Her Majesty in the right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,

minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is, either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift;

The difficulty of the problem is that the value of the charitable gift is, by definition, the value of the gift minus duty where there is a direction to pay duty out of the charitable gift. One cannot ascertain the amount of the charitable gift without first knowing the estate tax payable, and, in turn, the amount of the estate tax payable depends upon the amount of the charitable gift.

It is necessary to set out in outline the structure of the will. Everything is given to trustees and the only trusts with which we are concerned in the decision of this appeal are these:

1. "To pay out of the capital of the residue of my estate my just debts, funeral and testamentary expenses and all estate, legacy, succession and inheritance taxes or duties, whether imposed by or pursuant to the law of any domestic or foreign jurisdiction whatsoever, that may be payable by any beneficiary of this my Will or any Codicil hereto in connection with the property passing (or deemed to pass by any governing law) on my death . . ."
2. To set aside a sum equal to 50 per cent of the estate, such sum to be ascertained after the deduction of debts only, and debts are not to include succession duty and estate duty.
   (This trust was for the benefit of members of the family.)
3. To pay or transfer the residue of the estate to the E. W. Bickle Foundation.

The E. W. Bickle Foundation is admitted to be a charitable organization which qualifies under s. 7(1)(*d*). The parties agree:

(1) that the aggregate net value of the property passing on death was $5,242,455.21;

(2) that the value of the residue out of which the estate and succession duties were by the will directed to be paid was $2,261,847.64;

(3) that the amount payable for Ontario succession duty was $600,212.95.

The Minister contends that the estate tax payable is $1,132,922.35. The figure computed by the learned trial judge[1] was $1,004,994.75. The Minister arrived at his figure as a result of ten successive calculations. Under the scheme of this Act you cannot determine the value of the charitable gift until you have determined the amount of duty. It should be possible to state the Minister's proposition in such a way that an actuarial training is not needed to understand it. First of all, you have a charitable fund of determined amount which is not taxable but from which must be deducted the amount of estate duty. You first calculate the amount of the estate duty on the balance of the estate ignoring the charitable fund. This gives you the first figure that must be deducted from the charitable fund but it is not the final figure. This first calculation of duty must be transferred from the charitable fund to the taxable portion of the estate. This calculation was repeated ten times until the tenth calculation showed little or no difference from the ninth. This then was the amount of estate duty which had to be deducted from the value of the charitable gift. This is the figure that the Minister contended for and, in my opinion, the mode of calculation is correct and the one required by the Act. The evidence also indicates that the same result may be obtained by the application of an elaborate algebraic formula.

The learned trial judge held that the assessment was wrong because it applied succession duty principles in the computation. With respect, I do not think that this criticism is well-founded. Where a will makes a gift to a beneficiary together with the succession duty on this gift,

[1] [1965] 1 Ex. C.R. 664, [1964] C.T.C. 208, 64 D.T.C. 5134.

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Judson J.

the beneficiary must pay succession duty not only on the gift but on the gift of duty. There is no analogy between this tax and estate tax, which is a single levy not on any succession but upon the value of the whole estate. The successive calculations of estate duty are required in this case because of the provisions of s. 7(1)(*d*), which allows as a deduction from aggregate net value of the estate only the actual value of the gift that ultimately finds its way to the charity.

The learned trial judge also found that only two calculations were required by s. 7(1)(*d*). First you calculate the tentative estate tax without reducing the exempt gift either by estate duty or succession duty. Then you calculate the estate tax once again after reducing the exempt gift by a combination of the estate tax first found and the admitted figure for succession duty. I think that there is no justification for stopping at the first stage, having regard to the provisions of s. 7(1)(*d*).

In this Court the submission was made for the first time that the charitable deduction was the full value of the charitable residue, namely, $2,261,847.64. The basis for this submission was that the clause in s. 7(1)(*d*) commencing with the word "minus" does not apply to this particular will because "no part of any estate, legacy, succession or inheritance duty or any combination of such duties is . . . payable out of the property comprised in such gift", or payable by the charity "as a condition of the making of such gift".

I have already set out a summary of the trusts contained in the will and it is argued that what the charity is entitled to receive is the residue of the residue after performance of the trusts, including the payment of taxes, and that it is only in this residue of residue that the charity has any property interest. Therefore, these duties are not payable out of "the property comprised in such gift" or "payable by the donee as a condition of the making of such a gift".

I do not agree with these submissions. This will gives the charity the residue of the estate charged with the burden of the payment of the duty. It is not disputed that until the trusts under a will have been performed, a residuary beneficiary cannot put his hands on a specific piece of

property and claim ownership with all the consequences of ownership. This is all that the cases of *Sudelay v. Attorney-General*[1], and *Barnardo v. Commissioners for Special Purposes of the Income Tax Acts*[2] decide. In the first case foreign mortgages were comprised in a husband's estate. This estate was not fully administered when the wife, a residuary beneficiary, died. Her executors unsuccessfully contended that because she would have been ultimately entitled to an interest in these foreign mortgages, that interest was not an English asset of her estate and subject to probate duty. In *Barnardo,* income, on which tax had been deducted at the source, was received by executors before the estate had been administered and the residue ascertained. The charity as the residuary beneficiary claimed a refund of the tax. It was held that until the residue had been ascertained, the charity had no property in this specific investment from which this income had been derived and that the claim for a refund failed.

These cases, in my opinion, afford no help to anyone in the application of s. 7(1)(*d*). The value of the charitable gift is established at $2,261,847.64. Admittedly, this is a residuary interest and the charity cannot claim ownership *in specie* of any particular piece of property comprised in the estate, before the estate has been administered. What was given to the charity was the residuary interest. The Act says that the Minister must value this interest and that the value of this interest for purposes of deduction from aggregate net value will be reduced by the amount of the duties. I think that the duties are payable out of the property comprised in the gift and are payable by the donee as a condition of the making of the gift.

I would allow the appeal with costs both here and in the Exchequer Court and direct that the assessment made by the Minister be restored.

SPENCE J. (*dissenting in part*):—I have had the privilege of reading the reasons of my brother Judson and agree with his view that if s. 7(1)(*d*) of the *Estate Tax Act,* Statutes of Canada 1958, c. 29, as amended by Statutes of Canada 1960, c. 29, s. 4(1) applies then the course adopted by the Minister is correct and, with respect, that adopted by Gibson J. in the Exchequer Court[3] is in error.

[1] [1897] A.C. 11, 75 L.T. 398. [2] [1921] 2 A.C. 1, 125 L.T. 250.
[3] [1965] 1 Ex. C.R. 664, [1964] C.T.C. 208, 64 D.T.C. 5134

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Spence J.

The *Estate Tax Act* provides:

> 7. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:
>
> * * *
>
> (*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to
>
> (i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada all or substantially all of the resources of which were so devoted, and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or
>
> (ii) Her Majesty in right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,
>
> minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is, either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprise in such gift or payable by the donee as a condition of the making of such gift;

Therefore, the section permits, for the purpose of computing the aggregate taxable value of the property passing, deduction of the value of any gift made by the deceased to any organization constituted exclusively for charitable purposes. By the final paragraph of the subsection, such deduction is to be reduced by such part of any estate, legacy, succession or inheritance duties as is, whether by will or contract or otherwise, payable out of the property comprised in the gift, or payable by the donee as a condition of making such gift. It is agreed that the E. W. Bickle Foundation is a charitable organization under the provisions of s. 7(1)(*d*) of the statute and, therefore, the executors are entitled to the deduction permitted by s. 7(1)(*d*) thereof.

The problem is whether such deduction is to be reduced by the estate taxes because of the final words of the said s. 7(1). The gift in question is set out in para. III of the Last Will and Testament of the testator as follows:

III. I GIVE, DEVISE AND BEQUEATH the whole of my property of every nature and kind and wheresoever situate including any property over which I may have any general power of appointment to my said Trustees upon the following trusts, namely:—

* * *

(*d*) To pay out of the capital of the residue of my estate my just debts, funeral and testamentary expenses and all estate, legacy, succession and inheritance taxes or duties, whether imposed by or pursuant to the law of any domestic or foreign jurisdiction whatsoever, that may be payable by an beneficiary of this my Will or any Codicil hereto in connection with the property passing (or deemed to pass by any governing law) on my death or in connection with any insurance and/or annuities on my life or in connection with any gift or benefit given or provided by me either in my lifetime to or for any such beneficiary, or by survivorship, or by this my Will or any Codicil thereto, or to or for the benefit of any beneficiary of any trust or settlement created by me during my lifetime, and whether such taxes and duties be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to commute or prepay any such taxes or duties.

(*e*) To set aside a sum equal to fifty per centum (50%) of my estate. For the purpose of determining the sum to be so set aside, my estate shall be deemed to comprise all property which by paragraph III of this my Will I give, devise and bequeath to my Trustees less any debts (but such debts shall not include any succession duties or estate taxes) owing by me at my death and the value to be placed on such property shall be the value thereof as fixed for the purposes of the Ontario Succession Duty Act or, if no such Act is in force at the time of my death, the value thereof as fixed for the purposes of The Canada Estate Tax Act. The sum so set aside shall be disposed of as follows:

* * *

(*f*) To pay or transfer the residue of my estate to E. W. Bickle Foundation.

In my view, the testator has directed first that there be paid out of his estate the debts and succession duties. Secondly, the testator has directed his executors to divide equally the whole estate less debts but not succession or other estate duties into two halves, and has dealt with the first half as set out in para. (*e*) and directed the payment of the second half to the E. W. Bickle Foundation. The only gift, therefore, to the respondents is a gift after the payment of the debts and the payment of all succession, legacy, and estate duties. It is true that the duties are to be paid from "the second half" of the residue as so decided but they are to be paid, by the provisions of para. III (*d*) of the Will before any amount is to be payable to either the beneficiary under para. III (*e*) or the E. W. Bickle Foun-

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Spence J.

dation under para. III (*f*). Therefore, in my view, such "estate, legacy, succession or inheritance duties" were not directed by the will to be payable out of the property comprised in the gift to the foundation, nor were they payable by the foundation as a condition of the making of the gift to it.

I agree with the statement made by counsel for the respondents in his factum—"What the charity is entitled to receive is the residue of the residue after performance of all trusts including the payment of taxes; it is only in the residue of the residue that the charity has any property interest". In reaching this conclusion, I have not considered as particularly applicable either *Sudeley v. Attorney General*[1] or *Bernardo v. Commissioners for Special Purposes of the Income Tax Acts*[2]. I have simply interpreted the words of s. 7(1) of the *Estate Tax Act* and of the testator's last Will in their ordinary grammatical sense. It might well have been the purpose of the legislator in the drafting of that section to have it apply to such a situation as exists under the will in question. If so, in my view, the legislator has not succeeded and it is not the duty of this Court to legislate. The executors are entitled to the benefit of the exemption and are not caught by the "minus" provision at the end of the subsection. I am, therefore, of the opinion that the order asked for by the respondents is the order which should be made by this Court.

I would dismiss the appellant's appeal with costs but would set aside the assessment made by the Minister with a direction that the Minister should re-assess on the basis that the aggregate taxable value of the estate is $2,920,-607.57, *i.e.*, at an amount obtained by deducting from the aggregate net value of the estate $5,242,455.21, only the aggregate net value of the gift to the charity of $2,261,-847.64 and the basic survivor's exemption allowed by s. 7(1)(*a*) of the *Estate Tax Act*.

Appeal allowed with costs, SPENCE J. *dissenting in part.*

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondents: McCarthy & McCarthy, Toronto.

[1] [1897] A.C. 11, 75 L.T. 398. [2] [1921] 2 A.C. 1, 125 L.T. 250.

LOUIS J. HARRIS ..... APPELLANT;

AND

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

1966
*Mar. 8
Apr. 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital cost allowance—Lease-option agreement—Option to purchase property for stated price after 200 years—Rule against perpetuities—"Price fixed by contract or arrangement"—Artificial reduction of income—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), 18, 137(1).

In April 1960, a service station, recently purchased by company D for a sum of $31,000, was leased to an oil company for a period of 25 years at an annual rental of $3,900. The oil company was given the right to renew its lease or purchase the property under certain conditions. In October 1960, the appellant, a physician, was granted by company D a concurrent lease on the service station property. This lease was for a term of 200 years at an annual rental of $3,100 and contained an option exercisable by the appellant to purchase the property for $19,500 at the expiration of the 200-year period. The appellant deposited $10,000 with company D as a security for the performance of his covenants. The appellant authorized company D to collect the $3,900 rent from the oil company, deduct the $3,100 rent payable by the appellant and remit the $800 balance to him.

In his income tax return for 1960, the appellant included in his income from investments the amount representing the rental for 3 months, and, relying on s. 18 of the *Income Tax Act*, R.S.C. 1952, c. 148 (repealed in 1963), contended that by his "contract or arrangement" he was deemed to have acquired the property at a capital cost of $639,516. This amount was made up of the rent of $3,100 for 200 years plus the option price of $19,500, minus the value of the land. This would entitle him to a deduction of capital cost allowance of $30,425.80 from his other income for that year. The Minister disallowed the deduction of capital cost and allowed a deduction for the rent paid in the year. The Exchequer Court ruled that the capital cost at which the appellant was deemed to have acquired the property was $19,500. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The transaction embodied in the lease to the appellant was not one to which s. 18 of the *Income Tax Act* applied. The applicability of that section depends on the existence of a valid option pursuant to which, on the satisfaction of a condition, the demised property will vest in the lessee. The clause purporting to give the appellant an option to purchase the property at the end of 200 years offended the rule against perpetuities and was void.

On this view of the matter, the Exchequer Court was right in refusing to interfere with the allowance of $775.02 as rental expense.

On the assumption that s. 18 of the Act applied, the Exchequer Court was right in ruling that the "price fixed by the contract or arrangement" at

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

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

which the appellant should "be deemed to have acquired the property" was $19,500.

Furthermore, on the assumption that s. 18 of the Act applied and that on its true construction, the appellant was *prima facie* entitled to make the deduction of the capital cost allowance claimed by him, such a deduction would be in respect of an expense incurred in respect of a transaction that, if allowed, would artificially reduce the appellant's income, and, consequently, would be forbidden by the terms of s. 137(1) of the Act.

Revenu—Impôt sur le revenu—Coût en capital à titre d'allocation—Convention de bail avec option—Option d'acheter une propriété pour un prix déterminé après 200 ans—Règle contre la perpétuité—«Prix fixé par le contrat ou arrangement»—Réduction de façon factice du revenu —Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(a), 18, 137(1).

Durant le mois d'avril 1960, une station-service, récemment achetée par la compagnie D pour une somme de $31,000, fut louée à une compagnie d'huile pour une période de 25 ans à un loyer annuel de $3,900. La compagnie d'huile avait le droit de renouveler son bail ou d'acheter la propriété sous certaines conditions. En octobre 1960, la compagnie D a concédé à l'appelant, un médecin, un bail sujet à la servitude du premier bail sur la même propriété. Ce bail était pour un terme de 200 ans à un loyer annuel de $3,100 et contenait une option en faveur de l'appelant d'acheter la propriété pour $19,500 à l'expiration de la période de 200 ans. L'appelant a déposé une somme de $10,000 entre les mains de la compagnie D comme garantie de l'exécution de sa convention. La compagnie D fut autorisée par l'appelant à percevoir le loyer de $3,900 de la compagnie d'huile, à déduire le $3,100 de loyer payable par l'appelant et à lui remettre la balance de $800.

Dans son rapport d'impôt sur le revenu pour l'année 1960, l'appelant a inclus le montant représentant le loyer de 3 mois dans son revenu de placements, et, se basant sur l'art. 18 de la *Loi de l'Impôt sur le revenu*, S.R.C. 1952, c. 148 (abrogé en 1963), a prétendu qu'en vertu de son «contrat ou arrangement» il était réputé avoir acquis la propriété à un coût en capital de $639,516. Ce montant était formé du loyer de $3,100 pour 200 ans en plus du prix de l'option de $19,500, et moins le montant de la valeur du terrain. Ceci lui accorderait une déduction du coût en capital à titre d'allocation de $30,425.80 de ses autres revenus pour l'année en question. Le Ministre a rejeté la déduction du coût en capital et a permis la déduction pour le loyer payé durant l'année. La Cour de l'Échiquier a jugé que l'appelant était réputé avoir acquis la propriété à un coût en capital de $19,500. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La convention incorporée dans le bail de l'appelant n'était pas une à laquelle l'art. 18 de la *Loi de l'Impôt sur le revenu* s'appliquait. L'applicabilité de cet article dépend de l'existence d'une option valide en vertu de laquelle, dès qu'il a été satisfait à une condition, la propriété transmise sera attribuée au locataire. La clause censée donner à l'appelant une option d'acheter la propriété à l'expiration de 200 ans violait la règle contre la perpétuité et était nulle.

Dans ces vues, la Cour de l'Échiquier a eu raison de refuser d'intervenir dans l'allocation de $775.02 comme dépense de loyer.

Dans l'hypothèse que l'art. 18 de la Loi s'applique, la Cour de l'Échiquier a eu raison de juger que «le prix fixé par le contrat ou arrangement» auquel l'appelant devait «être réputé avoir acquis la propriété» était $19,500.

De plus, dans l'hypothèse que l'art. 18 de la Loi s'applique et qu'en vertu de l'interprétation qu'on doit lui donner, l'appelant avait droit *prima facie* à la déduction du coût en capital à titre d'allocation qu'il réclamait, une telle déduction serait à l'égard d'une dépense contractée relativement à une affaire qui, si elle était permise, réduirait de façon factice le revenu de l'appelant, et, en conséquence, serait prohibée par les termes de l'art. 137(1) de la Loi.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], rejetant un appel d'une décision de la Commission d'appel de l'impôt. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an appeal from a decision of the Tax Appeal Board. Appeal dismissed.

John J. Robinette, Q.C., for the appellant.

D. S. Maxwell, Q.C., and *D. G. H. Bowman*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Thurlow J. dismissing an appeal from a decision of the Tax Appeal Board which dismissed the appellant's appeal from an assessment whereby income tax in the sum of $18,690.42 was levied in respect of his income for the 1960 taxation year.

The appellant practises medicine in the City of Toronto specializing in obstetrics and gynaecology. He has a substantial income from his practice and some income from investments.

In his income tax return for the year 1960 the appellant included in his income from investments $975 being rental for three months from a service station on Lorne Park Road in the Township of Toronto hereinafter sometimes referred to as "the service station", and claimed in respect of the same property a deduction by way of depreciation or capital cost allowance of $30,425.80. The Minister disallowed this claim *in toto* and allowed instead a rental

[1] [1965] 2 Ex. C.R. 653, [1964] C.T.C. 562, 64 D.T.C. 5332.

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

Cartwright J.

expense of $775.02. This appeal relates solely to these two items.

By deed dated March 31, 1960, one Charles Gotts conveyed the service station to Douglas Leaseholds Limited. The property conveyed has a frontage of 150 feet on the south side of Lorne Park Road by a depth of 100 feet. The total consideration was $31,000, one half of which was paid in cash and the other secured by mortgage.

By an indenture dated April 4, 1960, Douglas Leaseholds Limited leased the service station to BP Canada Limited for the term of twenty-five years to be computed from the first day of the month following the installation by the lessor of two 2,000 gallon tanks which together with certain other equipment were to be supplied by the lessee and installed by the lessor. The rent was $3,900 a year payable $325 on the first of each month. The lessee covenanted to pay taxes and to make repairs. This lease gives the lessee a right of preemption in the event of the lessor receiving an offer to purchase the demised premises during the term which it is willing to accept. It also contains a provision that if during the term the lessor receives an offer to lease the demised premises upon the termination of the lease, which it is willing to accept, it will first offer to lease the premises to the lessee on the terms contained in the offer except that the rent payable by the lessee shall be 90 per cent of the rent set out in the offer.

Between March 31, 1960, and October 1, 1960, Douglas Leaseholds Limited expended about $8,500 on improvements to the property. Mr. Douglas the president of Douglas Leaseholds Limited stated that the property was carried in the company's books at $39,000, apportioned $30,000 to the building and $9,000 to the land.

By indenture dated October 1, 1960, Douglas Leaseholds Limited demised the service station to the appellant for a term of two hundred years from the date of the lease at an annual rental of $3,100.08 payable $258.34 on the first day of each month commencing with October, 1960. The lessee covenants to pay taxes and to make repairs. This lease contains the following provisions:

PROVIDED always and it is expressly agreed between the Lessor and Lessee that this lease is subject in all respects to a lease dated the 4th day of April, 1960, entered into between Douglas Leaseholds Limited and BP Canada Limited.

The Lessee convenants and agrees to deposit with the Lessor the sum of $10,000.00 as security for the performance of all his covenants contained in the within lease. The Lessor agrees that if the Lessee observes and performs all the covenants herein contained it will return to the Lessee the said sum of $10,000.00 at the expiration of the term hereby demised.

At the expiration of the term hereby demised, and provided the Lessee is not in default hereunder, said Lessee shall have the option of purchasing the demised premises from the Lessor at the price of Nineteen Thousand Five Hundred ($19,500.00) Dollars. The Lessee may exercise the said option by giving to the Lessor three (3) months' notice in writing that he intends to purchase the demised premises and upon the exercise of the said option the sale shall be completed within a thirty (30) day period after the option has been exercised.

In the event that the demised premises are expropriated by any municipal or governmental authority or in the event the Tenant Oil Company should exercise any option contained in its lease hereinbefore referred to which would result in the Tenant Oil Company becoming the owner of the demised premises, then the Lessor agrees that it will lease to the Lessee a similar gasoline service station, such lease to comply with the following requirements, that is to say:

The lease shall be in the same form as the within lease, save for the following:

i. The Term of the lease shall be for the unexpired portion of the within lease.

ii. The rental payable under the new lease shall be $800.00 per annum less than the annual rental payable by the Oil Company leasing the premises from Douglas Leaseholds Limited.

iii. The lessee shall have the option of purchasing the premises demised under the new lease at a purchase price equal to five times the annual rental provided for in the lease between Douglas Leaseholds Limited and the Tenant Oil Company, the said option to be subject to the same conditions as the option hereinbefore set out.

By a document dated October 1, 1960, the appellant authorized Douglas Leaseholds Limited as his agent to collect the rent falling due from BP Canada Limited under the lease of April 4, 1960.

The appellant's claim to the capital cost allowance of $30,425.80 is based on s. 11(1)(*a*) of the *Income Tax Act*, the regulations made thereunder and section 18 of the *Income Tax Act*.

Section 11(1)(*a*) reads as follows:

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

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

It is common ground that if the appellant's claim is well founded the capital cost allowance in respect of the building on the demised premises is fixed by regulation at five

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

Cartwright J.

per cent of the undepreciated capital cost thereof to him as of the end of the taxation year.

Section 18 has since been repealed but as in force during the taxation year with which we are concerned sub-section (1) thereof read as follows:

18. (1) A lease-option agreement, a hire-purchase agreement or other contract or arrangement for the leasing or hiring of property, except immovable property used in carrying on the business of farming, by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property is leased or hired (hereinafter in this section referred to as the 'lessee') or in a person with whom the lessee does not deal at arm's length shall, for the purpose of computing the income of the lessee, be deemed to be an agreement for the sale of the property to him and rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property and not for its use; and the lessee shall, for the purpose of a deduction under paragraph (*a*) of subsection (1) of section 11 and for the purpose of section 20, be deemed to have acquired the property,

(*a*) in any case where, at the time the contract or arrangement was entered into, the lessee and the person in whom the property was vested at that time (hereinafter referred to as the 'lessor') were persons not dealing at arm's length, at a capital cost equal to the capital cost thereof to the lessor, and

(*b*) in any other case, at a capital cost equal to the price fixed by the contract or arrangement minus the aggregate of all amounts paid by the lessee

(i) in the case of a contract or arrangement relating to movable property, before the 1949 taxation year, and

(ii) in the case of any other contract or arrangement, before the 1950 taxation year,

under the contract or arrangement on account of the rent or other consideration.

The appellant submits that the lease from Douglas Leaseholds Limited to himself is "a lease-option agreement or other contract or arrangement for the leasing of property by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee", that pursuant to s. 18(1) it is, for the purpose of computing his income, to be deemed an agreement for the sale of the demised premises to him, that the rent paid shall be deemed to be on account of the price of the property and not for its use and that he must, pursuant to s. 18(1)(*b*) be deemed to have acquired the property at a capital cost equal to the price fixed by the contract or arrangement, that is to say, by the lease. It will be observed that the deductions contemplated by sub-clauses (i) and (ii) of clause (*b*) of s. 18(1) have no application on the facts in the case at

bar. The case has been dealt with throughout on the assumption that the appellant and Douglas Leaseholds Limited were dealing at arm's length.

The condition on the satisfaction of which the demised premises may vest in the lessee is his performance of all the lessee's covenants contained in the lease throughout the term of 200 years, the giving of the necessary notice to exercise the option and the payment of the price of $19,500.

The appellant submits that as the rent paid "shall be deemed to be on account of the price of the property and not for its use" the price should for the purpose of computing his income be deemed to be $608,516, this amount being arrived at as follows:

Annual rental of $3100.08 for 200 years	$620,016.00
Option price to purchase property	19,500.00
	$639,516.00
Less land at fair market value as of October, 1960	31,000.00
	$608,516.00

Five per cent of this amount is $30,425.80 which is the capital cost allowance claimed by the appellant.

The above figures are taken from the appellant's income tax return. It would seem from the evidence that the fair market value of the land as of October, 1960, was $9,000 rather than $31,000 but the question of importance is whether the appellant's method of calculating the capital cost at which he is deemed to have acquired the demised property is correct.

Counsel for the respondent submitted that s. 18 has no application to the appellant's lease on the following grounds:

(*a*) that it was not established that the price of $19,500 was less than 60 per cent of the fair market value of the demised property at the time the lease was entered into and consequently the application of s. 18 was excluded by sub-section (4);

(*b*) the transaction evidenced by the lease was not really a lease at all and the appellant at the relevant time was not a lessee of the property but merely the holder of an *interesse termini*;

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

Cartwright J.

(*c*) that the option contained in the lease is void as it offends the rule against perpetuities.

If, contrary to these submissions, it should be held that s. 18 did apply to the transaction counsel for the respondent argued that the appellant was not entitled to the allowance of $775.02 for rental expense but at most to a capital cost allowance of $525 (being 5 per cent of $10,500, the price fixed by the lease, $19,500, less the value of the land, $9,000) on the following grounds:

(*d*) that the transaction was not entered into for the purpose of gaining income but solely, or in the alternative primarily, for the purpose of reducing the appellant's income tax and thus fell within the prohibition or exception provided by Regulation 1102(1)(*c*);

(*e*) that the deduction claimed represented an expense made or incurred in respect of a transaction which, if allowed, would unduly and artificially reduce the appellant's income and its deduction was therefore prohibited by s. 137(1) of the Act;

(*f*) (i) that on the correct interpretation of s. 18, as applied to the transaction, the deduction must be based on a capital cost of $19,500 for the property since this is the price fixed for it by the contract, and (ii) that in the event of this contention being upheld the re-assessment should be referred back to the Minister to allow the proper deduction on this basis and to disallow the rental expense item.

Thurlow J. gave effect to the first contention of the respondent set out in ground (*f*) and so found it unnecessary to deal with grounds (*a*), (*b*), (*c*), (*d*) or (*e*).

For reasons that will appear, I do not think that the transaction embodied in the lease to the appellant is one to which s. 18 applies. On the assumption that the section does apply I would agree with the view of Thurlow J. that on the true construction of s. 18 as applied to the lease in question the "price fixed by the contract or arrangement" being the capital cost at which under s. 18(1)(*b*) the appellant should "be deemed to have acquired the property" is $19,500 and not the figure contended for by the appellant.

I am in substantial agreement with the reasons of Thurlow J. for reaching this conclusion and wish to add only a few words on this point. If the submission of the appellant were given effect it would bring about the result that for the purpose of calculating his income tax he would be deemed to have acquired a property in 1960 at a capital cost of $639,516 although on the evidence the highest value which could be attributed to that property was $39,500. The power of Parliament to so enact is not doubted, but to bring about so extraordinary a result it would be necessary to use explicit words which admitted of no other interpretation. I have already indicated my agreement with the conclusion of Thurlow J. that far from requiring such an interpretation the words of the statute properly construed necessitate its rejection.

This would be sufficient to dispose of the appeal if it were not for the contention pressed by counsel for the respondent that Thurlow J. should have held that the rental allowance of $775.02 ought not to have been made, that a capital cost allowance of $525 should have been made instead and that the re-assessment should have been referred back to the Minister accordingly. On this point I agree with the conclusion of Thurlow J. but prefer to base my decision on a different ground.

In my view, the position taken by counsel for the respondent in ground (*c*) set out above is well taken. The clause in the lease giving the option to purchase has been quoted above. It creates an equitable interest in the land demised which would vest on the giving of the required notice and payment of the purchase money. This interest will not necessarily vest within the period prescribed by law for the creation of future estates and interests, indeed it cannot vest until long after the expiry of that period which in the case at bar, since no life is specified, is 21 years. The right to exercise the option does not arise until the expiration of 200 years from the date of the lease. The grant of the option therefore offends the rule and is void. The effect of this is that the lease takes effect as if the void limitation created by the option were omitted. The applicability of s. 18(1) depends on the existence of a valid option pursuant to which, on the satisfaction of a condition, the

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

Cartwright J.

demised property will vest in the lessee. The purported option being void the section has no application.

That an option to purchase land gives rise to a contingent equitable interest in the land, the contingency being the election to exercise the option and payment of the price, is settled by the judgment of Judson J., speaking for the majority of the Court in *Frobisher Ltd. v. Canadian Pipe-Lines and Petroleums Ltd.*[1]. The accepted rule in regard to such an option contained in a lease is succinctly and accurately stated in Gray, The Rule Against Perpetuities, 4th ed., p. 234, s. 230.3, as follows:

> An option to a tenant for years to purchase the fee, exercisable at a remote time, is bad as violating the Rule against Perpetuities.

For the appellant, however, it is argued that even if the clause giving the option in so far as it creates a limitation of land is bad for perpetuity it also evidences a personal contract between Douglas Leaseholds Limited and the appellant which is unaffected by the rule against perpetuities and can be enforced by the lessee or his personal representatives against the lessor so long as it has not disposed of the property. The argument proceeds that in the year 2160, Douglas Leaseholds Limited may still own the property in question and if so Dr. Harris' descendants or assigns could on duly exercising the option obtain a decree of specific performance against the lessor and that this possibility brings the case within s. 18(1), stress being laid on the use of the word "may" in the sub-section. It is argued that the suggested circumstances may occur and therefore the property may vest in the lessee and that this is sufficient to satisfy the requirements of the sub-section.

This argument is based chiefly on the following cases: *South Eastern Railway Co. v. Associated Portland Cement Manufacturers Ltd.*[2], a decision of the Court of Appeal in England, affirming, on different grounds, a judgment of Swinfen Eady J.; *Hutton v. Watling*[3], a decision of Jenkins J., as he then was, and *Kennedy v. Beaucage Mines Limited*[4], a decision of the Court of Appeal for Ontario.

The decision in the first of these cases, usually referred to as the *Cement Company's* case has been the subject of much adverse criticism; See Williams on Vendor and

[1] [1960] S.C.R. 126 at 169, 171, 21 D.L.R. (2d) 497.
[2] [1910] 1 Ch. 12. [3] [1948] Ch. 26. [4] [1959] O.R. 625.

Purchaser, 4th ed., vol. 1, p. 424, note (i); Gray op. cit. page 366 et seq, ss. 330.2 and 330.3; Articles by Mr. T. Cyprian Williams in 42 Sol. J. 628 and 650 and in 54 Sol. J. 471 and 501; and articles by Mr. Charles Sweet in 27 L.Q.R. 150 and 32 L.Q.R. 70.

The decision in *Hutton v. Watling,* which followed and was founded on that in the *Cement Company's* case, has been criticized by Dr. Walford in an article "Options to Purchase and Perpetuities" (1948) Conv. (N.S.) 258.

These cases are not binding upon us but the *Cement Company's* case was one of those referred to in a passage in Halsbury's Laws of England, 2nd ed., vol. 25 at p. 109, which has been referred to with approval in two recent judgments of this Court. The passage is as follows:

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; *or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages,* or against his personal representatives in damages only. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

The *Cement Company's* case is quoted in the footnote as authority for the words in the passage which I have italicized. It may be observed in passing that in the 3rd Edition of Halsbury, the corresponding passage is found in volume 29, page 297, and is in the same words except that for the concluding words of the penultimate sentence "or against his personal representative in damages only" there have been substituted the words "or against his personal representative in damages or possibly by specific performance".

The cases in this Court referred to above in which this passage was quoted are the *Frobisher* case, *supra,* at page 147 and *Prudential Trust Company v. Forseth*[1]. In my opinion neither of these cases binds us to accepting the passage quoted in its entirety or to approving the decision in the *Cement Company's* case. In the Frobisher case the

[1] [1960] S.C.R. 210 at 226, 30 W.W.R. 241, 21 D.L.R. (2d) 587.

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

Cartwright J.

passage was quoted in the course of rejecting an argument sought to be based upon a supposed analogy with some of the cases upon which it was founded. In *Forseth*, Martland J. delivering the unanimous judgment of the Court said at page 226: "The law regarding the subject of contracts relating to rights in the future has been well summarized in Halsbury's Laws of England, 2nd ed., vol. 25, at p. 109, as follows"; and then quoted the passage; but, immediately before this he had said:

> Finally it was contended that, in any event, the provision of the assignment regarding the option to lease was void as offending against the Rule against Perpetuities.
>
> In view of the fact that there are eight producing oil wells on this property, it would seem to me that this issue is really academic, since the option can only be exercised after the termination of the Imperial Oil Limited lease. We are being asked, therefore, to determine questions of law which are unlikely to arise and which, if they arise at all, can only arise in the remote future.
>
> It is sufficient to say that at this stage I would not be prepared to hold that the option is void.

and following the quotation he continued:

> I am not prepared to say that the assignment did not constitute a personal contract by Forseth, especially when it is borne in mind that the agreement contemplates a future petroleum and natural gas lease to be granted, not by Forseth only, but by both Forseth and Prudential as co-owners. The real effect of his covenant was to give assent to a leasing of his share of the petroleum and natural gas rights along with the share of his co-owner Prudential.

This judgment appears to me to have left open the question whether the clause regarding the granting of an option was void; it was not necessary to decide it in order to dispose of the appeal and it appeared unlikely that it would ever require decision.

In *Hutton v. Watling, supra,* at pp. 35 and 36, Jenkins J., as he then was, said:

> The *Associated Portland Cement Manufacturers* case therefore, appears to me to provide clear authority, which is, of course, binding on me, to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance to such a case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement.

The judgment of Jenkins J. was affirmed in the Court of Appeal but, in that Court, the question of the effect of the

Rule against Perpetuities was neither argued nor considered.

In my respectful opinion, the passage last quoted above, whether or not it finds support in what was said in the judgments in the *Cement Company's* case, is not a correct statement of the law. The Rule against Perpetuities is founded on grounds of public policy and by it a contract by the owner of property to convey the property on such terms that it will not vest until the happening of a contingent event beyond the period permitted by the rule is not allowed to be made.

In my view the law is accurately stated in the following passage in the judgment of Jessel M.R. in *London and South Western Railway Co. v. Gomm*[1]:

> It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognised exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.
>
> It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, what is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from Mr. Lewis's well-known book on Perpetuities at page 164. He cites with approbation this passage from Mr. Sanders' Essay on Uses and Trusts: 'A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity'. Then Mr. Lewis adds these words: 'In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation'.
>
> Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and One Hundred Pounds paid by B. or his heirs to A. or his heirs the estate shall vest in B. and his heirs, and a contract that whenever such notice is given and such payment made by B. or his heirs to A. or his heirs, A. shall convey to B. and his heirs? It seems to me that in a Court of Equity it is impossible to

[1] (1882), 20 Ch. D. 562 at 581, 582.

1966

HARRIS
v.
MINISTER
OF
NATIONAL
REVENUE

Cartwright J.

suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other.

It is true, of course, that in *Gomm's* case the Railway Company was seeking to enforce the option not against Powell who had granted it but against Gomm to whom the subject matter of the option had been conveyed and who had taken with full notice of the option; but, properly understood, there is not a word in the judgment of Jessel M.R. or the other judgments delivered in the Court of Appeal to support the suggestion that the option could have been enforced against Powell had he still retained the property.

In the *Cement Company's* case, by an accommodation works agreement of May 31, 1847, the plaintiff Railway Company who were purchasing a strip of land for their line, agreed that the landowner, his heirs, appointees or assigns might at any time thereafter make a tunnel thereunder to join the lands severed thereby. The purpose of the tunnel was to enable the landowner to excavate chalk from the land on the south side of the railway after that on the north side had been worked out. On December 31, 1847, the landowner conveyed the strip to the Railway Company by deed poll, reserving to himself, his heirs, appointees and assigns the privilege of making a tunnel. The landowner died in 1880. The tunnel was not required by the lessees of the land to whom the privilege of making it had been duly assigned, until some time after the year 1900 when they proposed to construct it. The Railway Company objected and brought an action to restrain the making of the tunnel. The action was dismissed by Swinfen Eady J. and his judgment was affirmed by the Court of Appeal. Other points were raised and dealt with but we are concerned only with those parts of the judgments which deal with the Railway Company's submission, that the provision as to the tunnel was void for perpetuity. Swinfen Eady J. rejected this argument on the ground that what was reserved to the landowner was not a right to arise at some future time but an immediate right which arose directly the conveyance was executed.

In the Court of Appeal the opinion was expressed that the right to construct the tunnel could be enforced against

the Railway Company which was still the owner of the strip of land. At page 29 of the report, Cozens-Hardy M.R. after stating the facts in *Gomm's* case said that as he read that case it was a clear and distinct authority for the view that the contract there under consideration could have been enforced against Powell.

He continued at pp. 29 and 30:

> Kay J. from whom the appeal was brought, says 'A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity.' That means as between the contracting parties, and Sir George Jessel expressly draws the distinction in these words: 'If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land.' And Lindley L.J. says: "How is Gomm to be held bound by this covenant? He did not enter into it, he is not bound at law.' So far from that being an authority that Powell would not have been bound by the covenant, and that the London and South Western Railway Company could not have enforced the covenant against Powell, I think the observations of all the members of the Court plainly indicate that in that case there would have been a perfectly enforceable covenant by Powell at the instance of the London and South Western Railway Company, and the whole doctrine of the rule against perpetuities would have had absolutely nothing to do with it. So that, if Mr. Calcraft were now alive, I think there could be no answer to an action by him against his living covenantor claiming to enforce the rights under the covenant in the agreement of 1847.

With respect this passage appears to me to indicate a misunderstanding of the judgment in *Gomm.* Jessel M.R. was distinguishing between contracts which are merely personal and contracts which create an interest in land, the former are not affected by the rule against perpetuities but the latter if the interest created will not necessarily vest within the permitted period are void just as much against the original covenantor as against his assigns.

Farwell L.J. at page 33 of the report of the *Cement Company's* case said:

> It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities.

He then referred to *Witham v. Vane,* a decision of the House of Lords, (1883) Challis on Real Property, 2nd Ed. App. V, page 401, in which the covenant in question did not create any interest in land, and continued:

> But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding

1966

HARRIS v. MINISTER OF NATIONAL REVENUE

Cartwright J.

on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.

It appears that Farwell L.J., in the passage quoted, was considering two types of contract one "merely personal" and the other "creating an interest in land". The meaning of the phrase "an agreement merely personal" as he used it is simply an agreement which does not create an interest in land. So understood the only objection to accepting what he has said appears to me to be the difficulty of suggesting a single contract which could be at once "merely personal" and one creating an interest in land.

Be that as it may, I am satisfied that as a matter of construction the clause granting the option to the appellant which we are considering in the case at bar is one agreeing to create a contingent future interest in the land demised and nothing else and that it is void as infringing the rule against perpetuities. If the agreement to create the contingent future interest is taken out of the clause there is no agreement left to be described as a personal contract.

It is not necessary to express an opinion as to whether the actual result reached in the *Cement Company's* case was correct. It may well be supported on the ground on which Swinfen Eady J. proceeded, but, with respect, it does appear to me that *Hutton v. Watling, supra,* and *Kennedy v. Beaucage Mines Limited, supra,* which followed it, were wrongly decided and ought not to be followed.

In the case of *Auld v. Scales*[1], the question was raised whether an option contained in a lease was void as offending the rule against perpetuities. The Court was unanimous in holding that the grant of the option there under consideration did not offend the rule because the future interest which it created was, within the period permitted by the rule, destructible by the lessor without the concurrence of the lessee, but it appears to me to be implicit in all the reasons delivered that if this had not been so and the option had consequently offended the rule it would have

[1] [1947] S.C.R. 543, 4 D.L.R. 721.

been void and unenforceable although the action was between the original parties to the lease.

For these reasons I am of opinion that the clause in the lease to the appellant purporting to give him the option to purchase the demised premises at the expiration of the term of 200 years offends the rule against perpetuities and is void. On this view of the matter Thurlow J. was right in refusing to interfere with the allowance of $775.02 as rental expense.

While, in view of the conclusions at which I have arrived on the points dealt with above, it is not necessary to express an opinion upon the other grounds on which counsel for the respondent opposed the appeal, I propose to state briefly my opinion on the position taken in ground (*e*) set out above which was fully argued.

Section 137(1) of the *Income Tax Act* reads as follows:

137. (1) In computing income for the purposes of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

If, contrary to the views I have expressed, we had accepted the appellant's submission that the transaction embodied in the lease was one to which s. 18 applied and that on the true construction of the lease and the terms of that section the appellant was *prima facie* entitled to make the deduction of the capital cost allowance of $30,425.80 claimed by him, I would have had no hesitation in holding that it was a deduction in respect of an expense incurred in respect of a transaction that if allowed would artificially reduce the income of the appellant and that consequently its allowance was forbidden by the terms of s. 137(1). The words in the sub-section "a disbursement or expense made or incurred" are, in my opinion, apt to include a claim for depreciation or for capital cost allowance, and if the lease were construed as above suggested the arrangement embodied in it would furnish an example of the very sort of "transaction or operation" at which s. 137(1) is aimed.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: John J. Robinette, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

1965
*Déc. 8
1966
Avr. 26

REMER BROS. INVESTMENT CORPORATION (*Demanderesse*) ... } APPELANTE;

ET

CONRAD ROBIN (*Défendeur*) ..... INTIMÉ.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Immeubles—Offre d'achat—Acceptation sous réserve de pouvoir donner un titre clair—Titres non fournis—Action en résolution de contrat et en dommages—Quantum des dommages—Code Civil, art. 1074.

La demanderesse a offert d'acheter au prix de $31,000 une terre appartenant au défendeur. Ce dernier accepta l'offre sous la réserve qu'advenant le cas où il ne pourrait donner un titre clair, le contrat deviendrait nul *ipso facto*, sans indemnité de sa part, le chèque de $4,000 qui accompagnait l'offre devant être retourné à la demanderesse. Plusieurs mois plus tard, la demanderesse, qui n'avait pas reçu les titres convenus, institua une action dans laquelle elle demandait la résolution du contrat, une condamnation pour dommages de $66,750 et le retour du chèque déposé avec l'offre d'achat. La Cour Supérieure accueillit l'action mais réduisit les dommages à la somme de $5,775. La Cour d'Appel, par un jugement majoritaire, rejeta l'appel de la demanderesse quant au quantum des dommages et rejeta le contre-appel du défendeur sur la question de sa responsabilité. La demanderesse en appela devant cette Cour, et comme il n'y a pas eu de contre-appel de la part du défendeur, le seul point à considérer se limitait à la question du quantum des dommages.

Arrêt: L'appel doit être maintenu.

En vertu de l'art. 1074 du *Code Civil*, le défendeur était tenu des dommages que le bon père de famille avait pu prévoir. La preuve au dossier démontrait qu'en raison des développements nombreux et considérables, des subdivisions de terres, dans la région en question, la valeur réelle de la terre devait s'apprécier en fonction de la valeur commerciale des terres récemment vendues dans les environs, tenant compte du facteur de spéculation, et non en fonction de la valeur que pouvait avoir cette terre pour exploitation agricole. Le bon père de famille pouvait noter ces facteurs et en prévoir l'intervention, comme cause étrangère, dans la réalisation du dommage que causerait l'inexécution de l'obligation, et que ce dommage pourrait, quant à la quotité, être substantiellement à la mesure de celui que la preuve justifiait ici, à l'époque de la contravention. Dans l'espèce, cette preuve justifiait un dommage de $47,750, montant auquel s'est arrêté le juge dissident en Cour d'Appel.

Immovables—Offer to purchase—Acceptation provided clear title can be given—Titles not given—Action to annul contract and in damages—Quantum of damages—Civil Code, art. 1074.

The plaintiff offered to purchase from the defendant an immovable property for the sum of $31,000. The latter accepted the offer provided that if he could not give clear title, the contract would become null *ipso facto*, without indemnity on his part, the cheque for $4,000 which was

*CORAM: Les Juges Fauteux, Abbott, Martland, Judson et Ritchie.

deposited with the offer to be then returned to the plaintiff. Several months later, the plaintiff, who had not received the titles, instituted an action in which it asked for the annulment of the contract, a condemnation in damages in the amount of $66,750 and the return of the cheque deposited with the offer to purchase. The Superior Court maintained the action and awarded $5,775 in damages. The Court of Appeal, by a majority judgment, dismissed the appeal of the plaintiff as to the quantum of damages and dismissed the cross-appeal of the defendant on the question of his liability. The plaintiff appealed to this Court, and as there was no cross-appeal on behalf of the defendant, the only question to be considered was limited to the quantum of damages.

Held: The appeal should be allowed.

Under art. 1074 of the *Civil Code,* the defendant was liable for the damages which a prudent administrator might have foreseen. The evidence in this case established that by reason of the numerous and considerable developments, of the subdivision of properties, in the area, the real value of the property had to be appreciated in relation to the commercial value of the properties recently sold in the neighbourhood, taking into account the factor of speculation, and not in relation to the value which this property could have as a farm. The prudent administrator could note these factors and foresee their intervention, as an external cause, in the realization of the damages which would be caused by the non-execution of the obligation, and that this damage could be, as to the quantum, substantially such as was justified by the evidence in this case, at the time of the violation. In the present case, this evidence justified damages in an amount of $47,750, as found by the dissenting judge in the Court of Appeal.

APPEAL from a majority judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], dismissing an appeal from a judgment of Caron J. Appeal allowed.

APPEL d'un jugement majoritaire de la Cour du banc de la reine, province de Québec[1], rejetant un appel d'un jugement du Juge Caron. Appel maintenu.

M. S. Yelin, C.R., pour la demanderesse, appelante.

Jacques Guérin, pour le défendeur, intimé.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:— Suivant contrat formé entre les parties, le 12 juin 1953, à Montréal, l'appelante offrit d'acheter de l'intimé qui accepta et offrit de lui vendre, au prix de $31,000, une terre située, en banlieue de Montréal, en la paroisse de St-Vincent-de-Paul, comté de Laval. L'offre d'achat spécifiait que les titres devaient être clairs et nets.

[1] [1965] B.R. 889, *sub nom. Remer Spring Manufacturing Co. Ltd. v. Robin.*

1966

REMER BROS. INVESTMENT CORPORATION v. ROBIN

Le Juge Fauteux

De plus, cette offre était accompagnée d'un chèque accepté, au montant de $4,000, fait par l'appelante à l'ordre de l'intimé, pour être appliqué en acompte sur le prix de vente ou devenir sa propriété suivant que l'appelante donnerait ou ne donnerait pas suite à l'entente. D'autre part, l'acceptation de l'offre de vente fut consentie, par l'intimé, sous la réserve qu'advenant le cas où il ne pourrait donner un titre clair, le contrat deviendrait nul *ipso facto*, sans indemnité de sa part, le chèque de $4,000 devant alors être retourné à l'appelante.

Par la suite plusieurs mois s'écoulèrent. Advenant décembre 1954, l'appelante, n'ayant pas reçu les titres convenus, s'adressa à la Cour supérieure et, dans une action prise contre l'intimé, allégua que celui-ci avait refusé de lui livrer les titres en question et demanda la résolution du contrat, la condamnation de l'intimé à lui payer la somme de $66,750 pour dommages et une déclaration qu'elle était propriétaire du chèque de $4,000 déposé avec son offre d'achat. En défense l'intimé plaida qu'en raison d'une substitution affectant partie des biens faisant l'objet du contrat, il ne pouvait donner un titre valable et que dans cette éventualité, le contrat, en vertu de la réserve sous laquelle il avait accepté et promis vendre, devenait nul *ipso facto*, sans indemnité de sa part et le chèque de $4,000 devait retourner à l'appelante.

La Cour supérieure considéra que l'intimé n'avait pas prouvé l'impossibilité pour lui de livrer un titre clair et net, qu'il ne pouvait en conséquence réclamer le bénéfice de la clause de nullité par lui invoquée et qu'il était responsable des dommages que l'inexécution de son obligation avait causés à l'appelante. La Cour rejeta la défense et accueillit l'action et ses conclusions, en réduisant, cependant, à la somme de $5,775, le quantum des dommages réclamés.

Ce jugement donna lieu (i) à un appel (n° 7246) de la part de la compagnie Remer, qui demanda que le jugement soit infirmé en autant que le quantum des dommages était concerné et qu'on lui accordât le montant réclamé par son action, soit $66,750, et (ii) à un contre-appel (n° 7266) de la part de Robin, qui demanda le rejet de l'action, soumettant qu'il lui était impossible de livrer un titre clair, qu'il n'avait commis aucune faute et ne pouvait, en conséquence, être tenu à payer aucuns dommages.

Disons immédiatement que le contre-appel de Robin fut rejeté par un jugement majoritaire. La majorité, formée de MM. les Juges Rinfret, Montgomery et Rivard, jugea que le Juge de première instance avait eu raison de conclure à la faute, la responsabilité et condamnation en dommages de l'intimé. Dissidents, MM. les Juges Hyde et Brossard auraient fait droit à ce contre-appel et rejeté l'action. Aucun appel n'ayant été logé à la Cour Suprême à l'encontre de ce jugement, il y a désormais chose jugée sur la faute, la responsabilité de l'intimé et le fait que la compagnie appelante a subi des dommages imputables à ce dernier.

D'autre part, l'appel de la Compagnie Remer fut aussi rejeté par un jugement majoritaire; pour MM. les Juges Hyde et Brossard, c'était là l'inévitable conséquence de leurs conclusions sur le contre-appel de Robin, et quant à MM. les Juges Rinfret et Rivard ce rejet est fondé sur l'accord qu'ils donnent au Juge de première instance tant sur le quantum des dommages que sur le raisonnement et la base suivis pour en faire la détermination. Dissident, M. le Juge Montgomery, adoptant une base différente, aurait maintenu l'appel de la Compagnie Remer et augmenté le montant des dommages à la somme de $47,750.

De là le présent appel de la Compagnie Remer. Il n'y a pas de contre-appel de la part de l'intimé. Ainsi donc et à ce stade des procédures, le seul point à considérer et à déterminer se limite à une question de quantum.

Dans son action, la Compagnie Remer a réclamé $66,750, en adoptant, comme mesure de son préjudice, la différence entre, d'une part, le prix de vente arrêté par les parties au contrat, soit $31,000, et, d'autre part, la somme de $97,750, dont $96,250 et $1,500 représentent respectivement, suivant elle, la valeur réelle de la terre et du roulant. Dans sa défense, l'intimé n'a pas contesté, du moins spécifiquement, le montant des dommages réclamés; il s'est contenté d'alléguer qu'il n'avait commis aucune faute, pour conclure qu'il n'avait aucune responsabilité ou dommages à payer.

La preuve au dossier est très simple. Elle consiste dans le témoignage d'un expert, produit par l'appelante, Maurice Giroux, et du relevé, fait par ce dernier, des ventes récentes dans les environs de la terre en question. Les qualifications de Giroux, ingénieur professionnel, expert en évaluation et agent d'immeubles, ont été admises par l'intimé. Son témoignage n'a pas été contredit. En raison des développements

1966

REMER BROS. INVESTMENT CORPORATION v. ROBIN

Le Juge Fauteux

nombreux et considérables, des subdivisions de terres, dans la région où se trouve la terre de l'intimé, l'expert a considéré que la valeur réelle de cette terre devait s'apprécier en fonction de la valeur commerciale des terres récemment vendues dans les environs, tenant compte du facteur de spéculation et non en fonction de la valeur que pouvait avoir cette terre pour exploitation agricole. Pour ces raisons, il n'a tenu aucun compte des bâtiments et roulant s'y trouvant. Se basant sur le relevé des ventes, sur son expérience de la valeur des terres sur l'Île Jésus et spécialement à St-Vincent-de-Paul, il a témoigné qu'à l'époque de son examen, ce qui correspond en somme à l'époque de la contravention de l'intimé, la valeur réelle de cette terre était de $550 l'arpent donnant ainsi une valeur totale de $96,250 pour cette terre ayant 175 arpents. En contre-interrogatoire, l'expert a déclaré qu'une ferme pour l'agriculture se vendait au prix de $150 à $200 l'arpent. Mais la valeur pour fins de subdivision, et voilà, a-t-il ajouté, ce qui se faisait surtout, dans la région de la terre en question, est de $550 l'arpent.

Le Juge de première instance jugea que la terre devait être évaluée comme terre d'exploitation agricole; il écarta ainsi l'opinion, reposant sur des considérations valables et non contredites, de l'unique expert entendu sur la question, voulant que la valeur réelle de cette terre devait s'apprécier en fonction du fait qu'elle était située dans un milieu déjà affecté à des développements nombreux, considérables, et économiquement propre à lotissement. Pour ainsi juger, le Juge au procès référa (i) au fait que l'appelante n'avait pas reçu spécifiquement, par ses lettres patentes, le pouvoir de se livrer à des entreprises spéculatives et (ii) à certaines stipulations du contrat, d'où il inféra une intention de l'appelante d'acheter la terre pour fins d'exploitation agricole et non pour fins de spéculation. Ayant dès lors jugé que la valeur réelle devait s'apprécier en fonction d'une exploitation agricole, il établit à $210 l'arpent, la valeur de la terre, en s'inspirant du relevé des ventes indiquant que certaines terres avaient été vendues pour exploitation agricole à un prix variant de $200 à $225 l'arpent. C'est par ce procédé qu'il arriva à une évaluation totale de $36,750 dont il déduisit le prix de vente, soit $31,000, pour déterminer à $5,775 le montant des dommages subis par l'appelante.

En Cour d'Appel, ces vues reçurent l'accord de MM. les Juges Rinfret et Rivard, mais non de M. le Juge Montgomery. A son avis, l'intention, que pouvait peut-être avoir l'appelante en achetant la terre, n'est pas, en l'espèce, une raison pertinente ou suffisante pour écarter l'opinion non contredite de l'expert quant à la valeur basée sur les ventes des propriétés avoisinantes. De plus, il considéra comme non pertinente et au surplus mal fondée l'appréciation des pouvoirs de la Compagnie Remer. S'appuyant sur *Bonanza Creek Gold Mining Co. v. R.*[1], il déclara que la Compagnie Remer, incorporée en vertu de la *Loi des compagnies de Québec,* a les pouvoirs d'une personne naturelle et que, de plus, le pouvoir de faire des actes d'acquisition et de disposition en matière immobilière lui est expressément donné suivant le texte ci-après de ses lettres patentes:

To buy, take, lease, sell and assign, hypothecate, exchange, transfer and otherwise deal in, and dispose of property immoveable, and assets generally, either absolutely as owner or by way of collateral security, or otherwise . . .

Notant, ensuite, que l'expert Giroux s'était appuyé sur des ventes faites à des prix variant de $437 à $547 l'arpent et que l'intimé, lui-même, avait fait produire par Giroux, en contre-interrogatoire, deux actes de ventes indiquant, l'un, un prix de $500, et l'autre, un prix de $511 l'arpent, il déclara ne pouvoir justifier un prix unitaire inférieur à $450, soit un prix total de $78,750 pour la terre, somme dont il déduisit le prix de vente, pour déterminer à $47,750 la quotité des dommages subis par l'appelante.

En toute déférence pour ceux qui sont d'opinion contraire, je dois dire, qu'à mon humble avis la conclusion à laquelle est arrivé M. le Juge Montgomery est conforme avec les principes de droit régissant l'espèce telle qu'elle se présente d'après la preuve au dossier. Le débiteur, dont la contravention n'est pas accompagnée de dol, n'est tenu, suivant l'art. 1074 du *Code Civil,* qu'aux dommages-intérêts qui ont été prévus ou qu'on a pu prévoir au temps où l'obligation a été contractée. En l'espèce, le dommage de l'appelante est proportionnel au gain dont elle a été privée par suite de la contravention et équivaut à la différence entre le prix fixé au contrat et le prix représentant la valeur au marché de cette terre, au temps de la contravention. L'entente n'indique pas et ne pouvait d'ailleurs difficilement indiquer, dans les circonstances, une date précise à

[1] [1916] 1 A.C. 566, 25 Que. K.B. 170, 26 D.L.R. 273, 10 W.W.R. 391.

1966

REMER BROS. INVESTMENT CORPORATION v. ROBIN

Le Juge Fauteux

laquelle l'intimé devait exécuter son obligation de fournir les titres convenus. Ce qui est clair, c'est que sa contravention, devenue manifeste lors de la mise en demeure en août 1954, persistait lors de l'expertise de Giroux en octobre, et lors de l'institution de l'action, en décembre de la même année. La valeur au marché à cette époque ne pouvait adéquatement s'établir, sans tenir compte des développements nombreux et considérables, des subdivisions, dans la région, et des fluctuations et hausses du marché en résultant. Voilà ce qui ressort de la seule preuve au dossier, de l'opinion non contredite de l'expert Giroux. Prenant tous deux ces faits en considération, l'expert Giroux, d'une part, fixa la valeur à $550 l'arpent en s'appuyant sur le plus haut prix unitaire du marché, alors que M. le Juge Montgomery, d'autre part, s'arrêta à une valeur de $450 l'arpent en s'inspirant plutôt de la moyenne des prix unitaires du marché. Et c'est ainsi que ce dernier détermina à $47,750 —somme que l'appelante déclara trouver équitable, à l'audition devant nous—le gain dont celle-ci fut privée ou le dommage qu'elle a subi, à l'époque et par suite de la contravention. Reste à considérer si ce gain ou ce dommage de $47,750, que la preuve justifie, était prévisible à la formation du contrat, en juin 1953. La prévisibilité du dommage, envisagée au jour du contrat, doit s'apprécier *in abstracto*. Il ne s'agit pas, en effet, du dommage que le débiteur a pu prévoir, mais «*qu'on a pu prévoir*», dit l'art. 1074, du *Code Civil*, ce qui veut dire: que le type abstrait du bon père de famille, de l'homme prudent et avisé a pu prévoir. Mazeaud et Tunc, Responsabilité civile délictuelle et contractuelle, 5 éd., vol. 3, p. 514, n° 2381-2. Déjà avant juin 1953,—Giroux et le relevé des ventes en témoignent, —des terres avoisinantes avaient été vendues au prix de $500 l'arpent. A mon avis, un bon père de famille, un homme prudent et avisé pouvait, dès lors, noter ces développements, ces subdivisions, cette fluctuation, cette hausse des prix, et en prévoir l'intervention, comme cause étrangère, dans la réalisation du dommage que causerait l'inexécution de l'obligation et que ce dommage pourrait, quant à la quotité, être substantiellement à la mesure de celui que la preuve justifie ici, à l'époque de la contravention.

Je dirais donc—et en tout respect pour l'opinion contraire, je ne puis voir, au dossier, aucune raison d'éluder la

1966

REMER BROS. INVESTMENT CORPORATION v. ROBIN

Le Juge Fauteux

conclusion—que les dommages-intérêts auxquels l'intimé est tenu envers l'appelante sont de $47,750.

Pour ces raisons, je maintiendrais l'appel, infirmerais le jugement de la Cour du banc de la reine et, modifiant le jugement de la Cour supérieure en tant que le quantum des dommages est concerné, condamnerais l'intimé à payer à l'appelante la somme de $47,750, avec intérêts et les dépens de toutes les Cours.

Appel maintenu.

Procureur de la demanderesse, appelante: M. S. Yelin, Montréal.

Procureurs du défendeur, intimé: Guérin, Taillefer & Brunet, Montréal.

1966

*Mar. 4
Apr. 26

THE CLARKSON COMPANY LIMITED, Trustee in Bankruptcy of the Estate of John Ritchie Limited (*Plaintiff*) ..... APPELLANT;

AND

THE CANADIAN BANK OF COMMERCE and GELS GENERAL CONTRACTORS LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Sum of money received by contractor on account of contract price deposited in bank—Appropriation thereof by bank in reduction of contractor's overdraft—Unpaid subcontractors—Payments out of contractor's own funds in fulfilment of contract—Effect of s. 3 of The Mechanics' Lien Act, R.S.O. 1960, c. 233.

The plaintiff as trustee for certain lien claimants brought action against the defendant bank and the defendant construction company for breach of trust. The company was alleged to have received a certain cheque for $31,999.01 as trustee under s. 3(1) of *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, and to have misapplied it by enabling the bank to pay off an overdraft out of the proceeds of this cheque. The trial judgment declared that the sum of $31,999.01 received by the company and deposited to the credit of its account in the defendant bank, or so much thereof as the plaintiff and all others on whose behalf it sues should be found entitled to, constituted a trust fund under s. 3 of *The Mechanics' Lien Act*, directed a reference and judgment against the

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

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE *et al.*

bank for the amount found due on the reference with interest and costs. The judgment provided that the declaration as to the trust fund should be binding on the company but that otherwise the action as against it should be dismissed. On appeal, the Court of Appeal allowed the appeal and dismissed the action.

Held (Judson J. dissenting): The appeal should be allowed, the judgment of the Court of Appeal set aside and the trial judgment restored.

Per Cartwright, Martland, Hall and Spence JJ.: The appeal succeeded on two grounds. Firstly, it having been established that the $31,999.01 came into the possession of the company impressed with the trust created by subs. (1) of s. 3 of *The Mechanics' Lien Act* and that there were unpaid subcontractors who were *prima facie* entitled to the trust fund, the onus of proving the facts, if they existed, which would bring the case within the exception created by subs. (3) lay upon the bank and that onus was not satisfied. Secondly, even if the state of the accounts at the date when the $31,999.01 was received by the company was such that it was entitled under subs. (3) to retain that sum for its own use, its decision whether or not to do so involved the exercise of a discretion vested in it as trustee and the only inference that could reasonably be drawn from the evidence was that it decided to exercise that discretion in favour of the plaintiff and those on whose behalf it sued and not in its own favour.

Per Judson J., *dissenting*: As held by the Court of Appeal, s. 3(3) did not mean retention as part of the trust fund but enabled the contractor, where the conditions of the subsection were met, to use the money for the discharge of his own obligations. The Court of Appeal was right in finding on a review of the facts of the case that subs. (3) applied, that there was no breach of trust in the deposit of this cheque into an overdrawn account and that the bank was entitled to apply it on the overdraft.

[*Passage in Fonthill Lumber Ltd. v. Bank of Montreal*, [1959] O.R. 451 at p. 470, disapproved; *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.*, [1955] S.C.R. 694, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Gale J., now C.J.H.C., and dismissing an action brought by the appellant as trustee for certain lien claimants. Appeal allowed, Judson J. dissenting.

J. J. Robinette, Q.C., and *D. I. Bristow*, for the plaintiff, appellant.

Hon. R. L. Kellock, Q.C., and *J. W Garrow*, for the defendants, respondents.

The judgment of Cartwright, Martland, Hall and Spence J.J. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a

[1] [1965] 1 O.R. 197, 47 D.L.R. (2d) 289, 6 C.B.R. (N.S.) 312, *sub nom. John Ritchie Ltd. v. Canadian Bank of Commerce et al.*

judgment of Gale J., as he then was, and dismissing the action with costs payable to the respondent the Canadian Bank of Commerce. The judgment of Gale J. declared that a sum of $31,999.01 received by the defendant Gels General Contractors Limited and deposited to the credit of its account in the defendant bank, or so much thereof as the plaintiff and all others on whose behalf it sues should be found entitled to, constituted a trust fund under s. 3 of *The Mechanics Lien Act*, directed a reference and judgment against the bank for the amount found due on the reference with interest and costs. The judgment provided that the declaration as to the trust fund should be binding on the defendant Gels General Contractors Limited but that otherwise the action as against it should be dismissed without costs.

The defendant Gels General Contractors Limited, hereinafter sometimes referred to as "Gels", entered into a contract with the Board of Education for the City of Toronto for the construction of a school. The contract in question is dated November 9, 1959. The contract price was approximately $833,000. Gels entered into subcontracts with various subcontractors for part of the work and material including a subcontract with the plaintiff company covering the plumbing and heating. Work on the main contract commenced about December 1, 1959. As the job progressed part of the work was done by Gels through its own employees and part by the subcontractors through their employees. Some of the materials were obtained by Gels from suppliers with whom it dealt and some were supplied by the subcontractors. Gels paid the wages of its employees when the wages were earned and paid its suppliers as the materials were invoiced without waiting for any progress certificate from the architects. About once a month the subcontractors billed Gels for the value of the work estimated by them to have been done to date and Gels in turn prepared and submitted to the Board through the architects a requisition for payment on account of the contract price, the amount of the payment being calculated by reference to the total value of the work done and material supplied to date and to the total contract price and giving credit for any payments previously made on account. The total value of the work done to the date of

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE et al.

Cartwright J.

the requisition included work done and material supplied by Gels through its employees and suppliers. The requisition was checked by the architects and the amount as approved by them, less the statutory holdback of 15 per cent, was paid by the Board to Gels and deposited by Gels in its bank account with the defendant bank. Gels would then issue cheques to the subcontractors for amounts owing by it to them. During the intervals between the submitting of the requisition and the receipt of payment from the Board work on the job continued so that by the time the subcontractors received payment there was an additional amount owing to them by Gels and an additional amount owing to Gels by the Board.

The sum of $31,999.01 in question in this action was paid by the Board on October 27 pursuant to a progress certificate issued by the architects to Gels dated October 13, 1960, following a requisition by Gels dated September 30, 1960. The amount actually approved by the architects was $31,-899.01 but by error the cheque was issued for the larger amount. Gels deposited the cheque in its account with the respondent Bank on October 27.

On October 28 Gels issued cheques to the subcontractors including one to the plaintiff for $14,450 but these cheques were dishonoured because the bank applied the whole of the $31,999.01 on an overdraft in the Gels account thereby reducing the overdraft to $6,419.70.

At the date of entering into the contract with the Board Gels had its bank account in the Avenue Road and Dunblaine Branch of the respondent bank in the City of Toronto and it continued to do all its banking there during all relevant times. From November, 1959, to the end of the year 1960, Gels was engaged chiefly on its contract with the Board but it was also engaged on some other building projects. All its receipts from whatever source were deposited in its bank account with the respondent bank and all disbursements were made by cheques drawn on that account including disbursements unconnected with the contract with the Board.

At the time of commencing work on the contract Gels had arranged with the bank for a credit of $45,000. By October, 1960, the bank had decided that it was unwilling to continue to extend credit to Gels and viewed with some

alarm the state of its account. To the knowledge of the branch manager of the bank Gels was being pressed for payment by the subcontractors and mechanics' liens had been filed on July 25 and October 7. In these circumstances the branch manager decided to appropriate the next payment received by Gels from the Board in reduction of Gels' overdraft and not to extend further credit; he did not so advise Livingstone who was the general manager and virtual owner of Gels.

On ample evidence the learned trial judge has found that, at the time it appropriated the $31,999.01 in reduction of the overdraft, the bank, through its branch manager, knew that it was a sum received by Gels on account of the contract price under its contract with the Board and that a number of subcontractors had not been paid for work done and materials supplied on that contract. The contract was finally completed but the plaintiff and other subcontractors have not been paid in full.

The learned trial judge found that on the evidence it was reasonably clear that in the month of October, 1960, between the date of the requisition for payment and the receipt of the $31,999.01 Gels had paid out to its own employees and suppliers amounts totalling more than that sum.

On these findings of fact, the question to be determined was as to the effect of s. 3 of *The Mechanics' Lien Act* which reads as follows:

> 3. (1) All sums received by a builder or contractor or a subcontractor on account of the contract price are and constitute a trust fund in the hands of the builder or contractor, or of the subcontractor, as the case may be, for the benefit of the proprietor, builder or contractor, subcontractors, Workmen's Compensation Board, workmen and persons who have supplied material on account of the contract, and the builder or contractor or the subcontractor, as the case may be, is the trustee of all such sums so received by him, and until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.
>
> (2) Every builder, contractor or subcontractor who appropriates or converts any part of the contract price referred to in subsection (1) to his own use or to any use not authorized by the trust is guilty of an offence and on summary conviction is liable to a fine of not more than $5,000.00 or to imprisonment for a term of not more than two years or both, and every director or officer of a corporation who knowingly assents to or acquiesces

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE et al.

Cartwright J.

in any such offence by the corporation is guilty of such offence in addition to the corporation.

(3) Notwithstanding the other provisions of this section, where a builder, contractor or subcontractor has paid in whole or part for any materials supplied on account of the contract, or any workman or subcontractor who has performed any work or services or placed or furnished any material in respect of such contract, the retention by such builder, contractor or subcontractor of any amount so paid by him shall not be deemed an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

The reasons of the learned trial judge make it clear that, had he regarded the question as being *res integra,* he would have construed subs. (3) as modifying the effect of subs. (1) so as to constitute the contractor not only a trustee of all sums received by him on account of the contract price but also a beneficiary under the trust created by the subsection to the extent that he had paid out of his own funds for work done and materials supplied in performance of the contract. The learned judge was however of opinion that he was bound to hold otherwise by the judgment of the Court of Appeal delivered by Schroeder J.A. in *Fonthill Lumber Ltd. v. Bank of Montreal*[1] and particularly the following passage at p. 470:

It was urged that the bank manager might have believed that the contractor had paid out of his own money for the materials supplied on account of the contracts in question or for work performed thereon with the result, that in using the moneys on deposit to pay his indebtedness to the bank he was not to be deemed to be appropriating or converting these moneys by virtue of s. 3(3). Obviously, the fallacy of this argument lies in the fact that he was thereby divesting himself of the money, and s. 3(3) only prevents the retention thereof by the builder from operating as a wrongful appropriation or conversion within the meaning of that section.

The Court of Appeal regarded the passage just quoted as *obiter dictum* and disagreed with it. Roach J.A. who delivered the unanimous judgment of the Court said in part:

By virtue of s. 3(1) the sums which are the subject of the trust thereby created are any sums 'received by a builder or contractor or a subcontractor on account of the contract price'. When, as in this case, an owner makes an interim payment to a general contractor pursuant to a progress certificate it is made on account of the whole contract price. The certificate on the strength of which the Board paid the $31,999.01 states in terms that Gels 'is entitled to a payment of $31,899.01 being tenth: Payment on the contract'.

Who are the beneficiaries of that trust? It is plain from subs. (1) that they are and were thereby intended to be all those persons who contributed to the totality of the work and material up to the date of payment. Included among them, in the instant case, was Gels which had contributed to that totality through its own workmen and material men.

[1][1959] O.R. 451.

Gels was therefore both a trustee of the $31,999.01 received by it and one of the beneficiaries of that trust. Subsection (1) standing by itself prohibited Gels from appropriating or converting any part of that trust fund to its own use or to any use not authorized by the trust until, among others, all subcontractors had been paid. By reason of that prohibition a subcontractor would have a preferential right to payment out of the trust fund to compensate him not only for any moneys expended by him but also for his earned profit before Gels, as the general contractor, could have recourse to the fund to compensate itself even for moneys expended by it for labour or material that had gone into the building.

In 1952 the Legislature amended s. 3 by adding thereto subss. (2) and (3). In my opinion on the plain wording of subs. (3) Gels as the contractor was entitled to retain out of the trust fund sufficient to recoup itself for moneys that it had paid to its employees, workmen, material men or subcontractors. The word 'retention' as used in subsection (3) cannot mean retention as part of the trust fund. The 'retention' thereby authorized is a retention which, were it not for subs. (3), would amount to a prohibited appropriation or conversion by the contractor to his own use and a retention in the trust fund obviously would not amount to such an appropriation or conversion. The contractor is still not put on an equal footing with the subcontractor. The former has only the right to recoup itself out of the trust fund for moneys actually expended out of its own pocket for labour or material or in payments to subcontractors; the latter's beneficial interest in the trust fund includes not only any amount expended out of its pocket for that purpose but also its earned profit.

There is nothing in the whole of s. 3 amounting to a direction as to the manner in which the trust fund created by subs. (1) is to be apportioned among those entitled and in the absence of such a direction it has been held by Rand, J. in *Minneapolis-Honeywell Regulator Co. Limited v. Empire Brass Manufacturing Co. Limited* [1955] S.C.R. 694 at 697 that the trustee has a discretionary power and his obligation is satisfied when the trust moneys are paid out to persons entitled whatever the division. Certainly so long as the trust fund was used for a trust purpose the position of the bank would not be affected whether or not Gels unduly preferred itself in retaining out of the trust fund sufficient to recoup itself to the detriment of other beneficiaries.

This passage, in my opinion, correctly interprets s. 3. It appears to have been the view which the learned trial judge would have adopted had he felt free to do so.

After discussing the *Fonthill* case Roach J.A. concluded his reasons as follows:

When the $31,999.01 came into the hands of Gels it did constitute a trust fund but for the reasons stated Gels was entitled to retain it for its own use by way of recoupment for moneys expended out of its own pocket for labour and material that had gone into the job and for payments made to subcontractors without thereby committing a breach of the trust. This it did by putting that money within the reach of the bank which, as it was entitled to do, applied it on Gels' indebtedness. That indebtedness had been incurred in the first place when the bank advanced moneys to Gels so that Gels could thus expend it.

The appeal should be allowed with costs and the action dismissed with costs.

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE *et al.*

Cartwright J.

With respect, it appears to me that in the first sentence of this passage Roach J.A. overlooked an aspect of the matter to which the learned trial judge had called attention. After considering the argument of counsel for the bank that there had been no breach of trust on the part of Gels because it had expended out of its own funds in fulfilment of the contract during the month of October more than $31,999.01, Gale J. continued:

> Had the argument on behalf of the Bank on this point succeeded, it would not have meant necessarily that the action would be dismissed. I say that for this reason: the trust could only be discharged to the extent that all payments made by Gels out of its own funds exceeded any monies retained by it from draws. In other words, to make subsection (3) effective, it would have to be shown that the total of all monies paid out by Gels on the contract prior to October 27 was at least $31,999.01 greater than the total of draws received by it prior to that date, and the fact that Gels expended more in October that it received in that month would not automatically give it the right to keep the whole of the $31,999.01.
>
> I also venture to add that had I been obliged to consider this last point, I would have been inclined to the view, having regard to *Pleet v. Canadian Northern Quebec R.W. Co.*, 50 O.L.R.223, affirmed [1923] 4 D.L.R. 1112, that the onus of establishing that the whole or any part of the $31,999.01 was released from the trust would rest upon the Bank.

I am in agreement with the first paragraph of this passage. It will be necessary to consider the second paragraph later.

In answer to questions from the bench counsel for the appellant and for the respondent stated that it is not possible to determine from the evidence in the record whether, as of October 27, 1960, the total of all payments made by Gels out of its own funds in fulfilment of the contract exceeded the total moneys retained by it out of sums received by it on account of the contract price.

In this state of affairs it would at first appear that judgment must go against the party on whom lay the onus of proving the matters of fact referred to in the preceding paragraph. For the appellant it was contended that the onus lay upon the bank not only for the reason indicated by the learned trial judge in the second paragraph of the passage last quoted above but also because it was established that the bank had appropriated in discharge of Gels' personal liability to it moneys which it knew that Gels had received in trust. The appellant argues that the fact that under certain circumstances Gels might also turn out to be a beneficiary of the trust was not sufficient to place on the

plaintiff the onus of proving that Gels was not beneficially entitled to the trust fund.

For the respondent bank it is argued that the plaintiff having alleged a breach of trust the onus of shewing that Gels was not entitled as beneficiary lay upon the plaintiff because until that was shewn there was no proof that a breach of trust had been committed.

I have reached the conclusion that in the circumstances of this case the onus lay upon the respondent bank to shew that Gels was entitled as beneficiary to all or part of the $31,999.01, and that it has not discharged that onus.

In determining what result flows from this it is necessary to consider the course of the proceedings at the trial. Before any evidence was called an agreement as to certain facts was filed. It concludes with the following paragraph:

> 8. Should it be held that the sum of $31,999.01 is subject to a trust and there was any breach of trust with respect thereto to which the bank was a party and a reference is directed, the parties shall be free to adduce such evidence as they see fit as to the amount of the payment of $31,999.01 discharged from the trust and the amounts of the claims of the plaintiff and other subcontractors on whose behalf this action has been brought thereagainst.

It does not appear to me that the wording of this paragraph relieved either party from the necessity of leading such evidence as was necessary to prove or disprove that (i) the sum of $31,999.01 or part thereof, was subject to a trust, (ii) that there was a breach of that trust, and (iii) that the bank was a party to the breach. Unless each of these three matters were found the action would fail and there would be no occasion for a reference.

On the evidence in the record and the findings of the learned trial judge it is established that Gels received the $31,999.01 impressed with the trust created by s. 3 of *The Mechanics' Lien Act*, that the claims of several beneficiaries under that trust remained unpaid and that the bank with knowledge of these facts applied the sum in question in reduction of the personal liability of Gels to it. If the matter rested there it would appear that the appeal should be allowed and the judgment at trial restored. It does however appear from the record that Gels paid substantial sums to subcontractors out of its own funds. As already pointed out, there is no way of determining from the record as it stands whether or not the total of the sums so paid by

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE et al.

Cartwright J.

Gels for work done and materials supplied in performance of the contract exceeded the total of all payments received by it on account of the contract price. The judgment at the trial directs a reference in the following terms:

> 4. AND THIS COURT DOTH FURTHER DIRECT a reference to the Master of the Supreme Court of Ontario to ascertain which of the plaintiff and all others on whose behalf it sues under Section 3 of the *Mechanics' Lien Act*, are to participate in the said fund, and their respective degrees of participation, the parties to be free to adduce upon such reference such evidence as they see fit as to the amount of the said sum of $31,999.01, subsequently discharged from the trust and the amount of the claims of the plaintiff and all others on whose behalf it sued thereagainst.

It would not appear that on the reference so directed the bank could give evidence to shew that Gels was beneficially entitled to all or part of the sum of $31,999.01; the judgment decides the contrary. While the judgment was founded primarily on the view of the law propounded in the passage from the judgment in the *Fonthill* case, quoted above, which has now been rejected, the learned trial judge also indicated his inclination to the view that the onus of proving that Gels was beneficially entitled to all or any part of the sum in question lay upon the bank and had not been discharged. I have already expressed my agreement with this view.

In the circumstances it appears to me that the proper course is to allow the appeal and restore the judgment at the trial.

I wish, however, to rest my judgment also on another ground put forward by counsel for the appellant. Assuming, for the purposes of this branch of the matter, that in fact when Gels deposited the cheque for $31,999.01 the total of all payments made by it out of its own funds in fulfilment of the contract exceeded by that amount the total of all payments received by it on account of the contract price, the result would not be that the $31,999.01 was not subject to the statutory trust created by s. 3; it would be, as pointed out by Roach J.A., that Gels was trustee of the fund and also one of the beneficiaries of the trust. In *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Manufacturing Co. Ltd.*[1], Rand J. was speaking for the majority of the Court when he held that s. 19 of the *Mechanics' Lien Act* of British Columbia, which is indistinguishable from s. 3(1) of the Ontario Act, did not re-

[1] [1955] S.C.R. 694.

quire the statutory trustee (in that case a subcontractor) to make a *pro rata* distribution among the beneficiaries. His actual words at p.697 were:

> Section 19 does not, however, require that they be distributed on a *pro rata* basis. The subcontractor has, in this respect, a discretionary power, and his obligation is satisfied when the trust moneys are paid out to persons entitled, whatever the division. This, of course, might be affected by rights of unpaid trust creditors under other provisions of law.

This pronouncement appears to treat the trust created by the statute as an exception to the general rule that a trustee must hold an even hand between the beneficiaries and not benefit one at the expense of the others but, accepting it as stating the rule applicable to this trust, the situation is as follows. When Gels received the $31,999.01 it did so as trustee but had a discretionary power to pay it to one or more of the beneficiaries to the exclusion of the others. It had therefore, in the assumed situation, a discretion to retain it all for itself. Gels acted throughout by its general manager Livingstone and it appears to me that the only reasonable inference to be drawn from the relevant evidence is that Livingstone decided not to retain the money for Gels but to pay it out to the plaintiff and the others on whose behalf the plaintiff sues. It is elementary that a trustee cannot delegate the exercise of a discretion committed to him by the instrument creating the trust and *a fortiori* he cannot be compelled by a creditor who is a stranger to the trust to exercise his discretion in a particular manner which will benefit that stranger to the detriment of the beneficiaries.

We are not here concerned with any question which would arise if the bank without knowledge of the existence of the trust had acquired legal title to the trust fund. The findings that the branch manager was fully aware of the existence of the trust and of the intention of Gels to distribute the fund among the beneficiaries other than itself cannot be successfully challenged.

For these reasons I have reached the conclusion that even if the state of the accounts, which was not proved, was such that Gels had the right to retain the $31,999.01 this circumstance would not assist the respondent; Gels did not elect to exercise the right of retention. Gels' relationship to the bank was that of a debtor to its creditor; its

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE *et al.*

Cartwright J.

relationship to the plaintiff and those on whose behalf it sues was a dual one, that of a debtor to its creditors and that of a trustee to the beneficiaries of the trust. It chose to exercise its discretion in favour of the beneficiaries; the bank had no standing to require it to alter that choice. On this view it does not matter whether the state of the accounts in connection with the contract was such that Gels would have had the right to retain the fund in question for its own use had it seen fit to do so.

With respect, I think that Roach J.A. was in error when he said, at the conclusion of his reasons in the passage quoted above, that Gels by putting the money within the reach of the bank was evidencing an intention to retain it for its own use. The evidence is to the contrary. Livingstone's intention, which in the circumstances was the intention of Gels, was to follow an established practice of depositing the trust moneys in Gel's only bank account and paying it out forthwith to its subcontractors who were beneficiaries of the trust; that this was his intention was well known to the branch manager of the bank.

To summarize, it is my opinion that the appeal succeeds on two grounds. Firstly, it having been established that the $31,999.01 came into the possession of Gels impressed with the trust created by subs. (1) of s. 3 of *The Mechanics' Lien Act* and that there were unpaid subcontractors who were *prima facie* entitled to the trust fund, the onus of proving the facts, if they existed, which would bring the case within the exception created by subs. (3) lay upon the bank and that onus was not satisfied. Secondly, even if the state of the accounts at the date when the $31,999.01 was received by Gels was such that it was entitled under subs. (3) to retain that sum for its own use, its decision whether or not to do so involved the exercise of a discretion vested in it as trustee and the only inference that can reasonably be drawn from the evidence is that it decided to exercise that discretion in favour of the plaintiff and those on whose behalf it sues and not in its own favour.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the learned trial judge. The appellant will recover from the respondent bank its costs in the Court of Appeal and in this Court.

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE et al.

JUDSON J. (*dissenting*):—This action was brought by the Clarkson Company Limited as trustee for certain lien claimants against the Canadian Bank of Commerce and Gels General Contractors Limited for breach of trust. The contractor was alleged to have received a certain cheque for $31,999.01 as trustee under s. 3(1) of *The Mechanics' Lien Act* and to have misapplied it by enabling the bank to pay off an overdraft out of the proceeds of this cheque. The Court of Appeal held that the case fell within s. 3(3) of *The Mechanics' Lien Act* and that there was no breach of trust. In so finding they disapproved of the dictum in *Fonthill Lumber Limited v. Bank of Montreal*[1]. That dictum had said that the right given by s. 3(3) was merely a right of retention. The Court of Appeal held that it did not mean retention as part of the trust fund but enabled the contractor, where the conditions of subs. (3) were met, to use the money for the discharge of his own obligations.

I agree with this interpretation of subs. (3). It is clear that the learned trial judge would himself have placed the same interpretation on the subsection had he not considered himself bound by the decision in *Fonthill*. It has to be remembered that the *ratio* of the trial decision in this case was that there was a breach of trust because subs. (3) did not authorize more than a retention.

Now the argument is submitted to us that there was a breach of trust unless the third party, the bank that received the money, can show by going through every draw on the contract (and it should be noted that this was the tenth draw) that the job owed the construction company at least $31,999.01 more than the total of the draws. Each side on the appeal admitted that the case had not been presented in such a way as to make this possible. The appellant says that the onus was on the bank to do this. With this I do not agree. The plaintiff, in instituting this action, undertook the burden when he sued a third party of proving a trust and proving knowing participation in the breach of trust, and I think that the Court of Appeal was right in finding on a review of the facts of the case that subs. (3) applied, that there was no breach of trust, that the construction company was entitled to apply the cheque in payment of its overdraft, and that the bank was entitled to receive this payment.

[1] [1959] O.R. 451.

1966

CLARKSON CO. LTD. v. CANADIAN BANK OF COMMERCE et al.

Judson J.

The facts are set out in great detail in the reasons at trial[1] and summarized in the reasons of the Court of Appeal[2]. All that I need to say is that they show that the construction company was borrowing from the bank from month to month for the purpose of paying accounts for the job, that when the time approached for another draw it was heavily in debt to the bank, that whenever it deposited a cheque for the draw it cleared off the existing indebtedness as far as the cheque would go and then began to borrow again to pay off more debts. It was always behind because the owner never did or could pay everything owing up to the date of the cheque. For example, the cheque for $31,999.01 in question in this action was dated October 27, 1960 and was issued pursuant to a progress certificate from the architects dated October 13, 1960, which, in turn, was based upon a requisition issued by the construction company dated September 30, 1960.

I have no doubt that when the construction company deposited this cheque it expected to go on as before. It issued cheques on October 28 payable to subcontractors. These were dishonoured because the bank appropriated the whole of the cheque, which reduced the overdraft to $6,417.70, and then refused to honour further cheques. It is clear that the bank had given no undertaking that it would continue to honour cheques for which there were no funds and that the construction company when it made the deposit had not attempted to impose any conditions that further cheques would be honoured.

In these circumstances and with the rejection of the interpretation given to subs. (3) in the *Fonthill* case, I am in full agreement with the reasons of Roach J.A. in the Court of Appeal that there was no breach of trust in the deposit of this cheque into an overdrawn account and that the bank was entitled to apply it on the overdraft.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Timmins and Bristow, Toronto.

Solicitors for the defendants, respondents: Blake, Cassels & Graydon, Toronto.

[1] [1963] 2 O.R. 116, 38 D.L.R. (2d) 546.
[2] [1965] 1 O.R. 197, 47 D.L.R. (2d) 289, 6 C.B.R. (N.S.) 312.

WILLARD M. GORDON and GEORGE H. BELL (*Defendants*) ..... APPELLANTS;

1966
*Mar. 14
Apr. 26

AND

ROBERT M. GABY (*Plaintiff*) ..... RESPONDENT;

AND

FEDERAL PACKAGING AND PARTITION COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Agreements entitling shareholders to purchase shares in proportion to existing holdings—Right claimed on basis of shares held including shares purchased and paid for but not yet registered.

A group of shareholders in a private company were in dispute concerning their rights to purchase shares from each other in the company. All of the shareholders were parties to agreements which provided that before any one shareholder could sell to an outsider, he must first offer his shares to the other shareholders, who were entitled to purchase proportionately to their existing holdings. M Co., the holder of 17,500 shares out of a total of 50,000 shares, offered to sell to the other shareholders all of its shares. The plaintiff, G, who was already the holder of 1,250 shares, accepted the offer. He paid the purchase price in full for the 17,500 shares and took delivery of a certificate endorsed by M Co. However, there was an interval of one month between the purchase of the shares and the registration of G as a shareholder in connection with his new acquisition. This delay was the result of the company's by-laws which required a resolution of the directors and a ten days' notice for the calling of a meeting.

In the meantime, two other shareholders, I and N, holding respectively 4,500 and 4,125 shares in the company, made an offer to the other shareholders to sell all their shares. Their offer was accepted by all the other shareholders, who were then only five in number. G, when he accepted, claimed the right to purchase proportionately to a holding of 18,750 shares. The other shareholders disputed G's right to count the 17,500 shares not yet registered in determining the proportion of the I-N shares that he was entitled to purchase.

In an action by G for a declaration, judgment was given in favour of the defendants. The trial judge decided that in the two agreements made among the shareholders the word "shareholders" meant "registered shareholders." On appeal, the Court of Appeal allowed the appeal, holding that G was a shareholder with reference to the 17,500 shares. From this decision the defendant shareholders appealed to this Court.

Held: The appeal should be dismissed.

Throughout the agreements the words used were "shareholders" and "shareholdings." There was nothing which required the construction that "shareholders" meant "registered shareholders" or that "shareholdings' meant "registered shareholdings". The trial judge's construction, if adopted, would mean that a block of 17,500 shares out of a total

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

1966

GORDON *et al.* v. GABY *et al.*

issue of 50,000 shares would be disqualified for the count and that the advantage of pre-emption attached to these shares would be distributed among the four other shareholders. There was no logical or practical reason why such a result should follow.

The argument that G was disqualified because, in purchasing the 17,500 shares, he had a partner who had provided part of the funds on the understanding that he would be entitled to an undivided 72 per cent interest in the block and that G would be entitled to the remaining 28 per cent interest was rejected. G was bound as to the whole block by his shareholder agreements. He was trustee of the block to the extent of his associate's interest but always subject to the terms of these agreements.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Donnelly J. Appeal dismissed.

Allan Findlay, Q.C., for the defendants, appellants.

Douglas K. Laidlaw, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The dispute in this litigation is among a group of shareholders in Federal Packaging and Partition Company Limited, a private company, concerning their rights to purchase shares from each other in the company. All the shareholders were parties to agreements which provided that before any one shareholder could sell to an outsider, he must first offer his shares to the other shareholders, who were entitled to purchase proportionately to their existing holdings.

The facts are not in dispute. They are fully stated in the reasons delivered in the Court of Appeal[1]. The Court of Appeal held that a person who had purchased and paid for shares but had not yet secured registration as a shareholder on the books of the company was to be counted as a shareholder for the purpose of determining the proportionate rights to purchase when a further offer from other shareholders was made. The trial judge held to the contrary.

On May 14, 1962, Martin Paper Products Limited, the holder of 17,500 shares out of a total issue of 50,000 shares, offered to sell to the other shareholders all of its shares for $120,000, that is, at a price of $6.86 per share. The offer was to remain open for acceptance until the close of business on

[1] [1966] 1 O.R. 15, 52 D.L.R. (2d) 295.

May 23, 1962. On that date the plaintiff, Robert M. Gaby, who was already the holder of 1,250 shares, accepted the offer. No other shareholders accepted Martin's offer.

On May 25, 1962, Gaby paid the purchase price in full for the 17,500 shares and took delivery of a certificate endorsed by the Martin Company. On May 29, his solicitors sent to Federal Packaging a share certificate to have Gaby registered as the owner of the 17,500 shares. This certificate was received on May 30, 1962. The directors, pursuant to the by-laws of the company, had to call a meeting with ten days' notice for the approval of the transfer. The meeting was held on June 25, 1962. The transfer was approved and Gaby was entered on the books of the company as the holder of these 17,500 shares. There was, therefore, an interval of a month between the purchase of the shares and the registration of Gaby as a shareholder in connection with his new acquisition.

In the meantime, on May 23, 1962, two other shareholders, W. Imrie and O. G. Nash, holding respectively 4,500 and 4,125 shares in the company, made an offer to the other shareholders to sell all their shares at $3.50 per share. This price was well below the price at which the Martin Company had offered its shares. The Imrie-Nash offers were to be accepted before twelve o'clock noon on May 29, 1962. The Martin Company had already sold its shares and Imrie and Nash were engaged in selling their shares. Their offer was accepted by all the other shareholders, who were then only five in number. Gaby, when he accepted, claimed the right to purchase proportionately to a holding of 18,750 shares. This was made up of 1,250 shares which he had held for some time and which were registered in his name, and the 17,500 shares which he had just acquired from the Martin Company but had not yet been able to register and was not able to register until June 25, 1962. The other shareholders disputed Gaby's right to count the 17,500 shares not yet registered in determining the proportion of the Imrie-Nash shares that he was entitled to purchase. This is the whole dispute.

The other shareholders say that according to the agreements that they made the only shares that could be counted were those registered on the books of the company. Gaby says that he was a shareholder with reference to the

1966

GORDON *et al.* v. GABY *et al.*

Judson J.

17,500 shares because he was entitled to registration, having bought and paid for the shares, and that the delay was merely the result of the company's by-laws which required a resolution of the directors and a ten days' notice for the calling of the meeting.

The learned trial judge decided that in the two agreements made among the shareholders the word "shareholders" meant only "registered shareholders." The Court of Appeal held that Gaby was a shareholder with reference to the 17,500 shares. I agree with this construction. Throughout the agreements the words used are "shareholders" and "shareholdings." I can see nothing which requires the construction that "shareholders" means "registered shareholders" or that "shareholdings" means "registered shareholdings." If the trial judge's construction is adopted, it means that a block of 17,500 shares out of a total issue of 50,000 shares is disqualified for the count and that the advantage of pre-emption attached to these shares is distributed among the four other shareholders. There is no logical or practical reason why such a result should follow. It was the merest accident that the Imrie-Nash offer followed so closely on the Martin Company offer at a time when the Martin Company shares which had been validly sold had not been registered in the name of the new owner. Gaby was the owner in equity of these shares and as soon as it was possible he became the registered owner. It requires a very highly technical construction of the agreement to deprive him of his rights of pre-emption along with the other four remaining shareholders. The Martin Company had parted with these shares. It could not accept the Imrie-Nash offer even though it remained the registered shareholder. Imrie and Nash were out of the competition. This left only five shareholders, including Gaby. If the 17,500 shares are not to be counted in Gaby's hands, there is a big bonus to the other four shareholders.

When the parties were unable to agree upon proportionate participation in the Imrie-Nash offer, the solicitors acting for these two shareholders directed the transfer in accordance with Gaby's contention. I think that they were right in so doing and that the Court of Appeal judgment was right in affirming these directions.

In argument before us, much was made of the practical difficulties which would arise among the shareholders if the

construction of "registered shareholders" was rejected. These practical difficulties do not exist with a company of this size.

The difficulties of the company were also emphasized if the construction of "registered shareholders" was rejected. Again, I see no difficulty. The company in sending out notices and paying dividends must be governed by the share register. But matters of this kind are not in issue here.

Finally, the appellants urged that Gaby, in purchasing the 17,500 shares, had a partner who had provided part of the funds on the understanding that he would be entitled to an undivided 72 per cent interest in the block and that Gaby would be entitled to the remaining 28 per cent interest. This means no more than this, that Gaby would become the registered owner of the whole block. He would be trustee for his associate as to 72 per cent of the shares in the block. I cannot see that this disqualifies Gaby. The company, when Gaby became registered, could only recognize him as the shareholder. If Gaby wished to sell the block at any time he could only do so on the terms of first offering the shares to the other shareholders pursuant to the agreements to which he was a party. There is no question of the associate becoming a registered shareholder. Gaby is bound as to the whole block by his shareholder agreements. He is trustee of the block to the extent of his associate's interest but always subject to the terms of these agreements.

I agree with the reasons of the Court of Appeal and I would dismiss the appeal with costs payable by the appellants.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Tilley, Carson, Findlay and Wedd, Toronto.

Solicitors for the plaintiff, respondent: McCarthy and McCarthy, Toronto.

Solicitors for the defendant, respondent: Kilmer, Rumball, Gordon, Davis and Smith, Toronto.

1965
*Dec.15, 16, 17
1966
Apr. 26

HER MAJESTY THE QUEEN, in right of the Province of Ontario, represented by the Minister of Highways for the Province of Ontario (*Defendant*) .... APPELLANT;

AND

ROBERT MALCOLM JENNINGS, a mentally incompetent person so found by his Committee, WILMOT STANLEY BRIGGS (*Plaintiff*) and GARRY CRONSBERRY (*Defendant*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Highways—Duty to keep highway in repair—Failure to maintain stop sign in proper position—Plaintiff injured in collision at intersection—Liability of Department—The Highway Improvement Act, R.S.O. 1960, c. 171, s. 33.

Damages—Plaintiff rendered unconscious as result of severe brain injury—No hope of recovery—Quantum of damages—Whether income tax which plaintiff would have had to pay on future earnings to be taken into account.

As the result of a collision between an automobile owned by the plaintiff in which he and his wife were passengers and which was being driven by their son and an automobile owned and operated by the defendant C, the plaintiff was so severely injured that he never regained consciousness and his wife was killed. The collision occurred at the intersection of a through highway and a concession road. At the time of the accident the plaintiff's car was being driven northerly on the highway and the defendant C was driving his car westerly on the concession road. The highway had been marked at the intersection by a stop sign. This sign and its location conformed to the relevant regulations but four days prior to the accident some mischievous boys had turned it around so that as C's car approached it the driver would not see a stop sign but only the back of the sign which was gray in colour and bore no lettering.

Action was brought for damages suffered by the plaintiff personally and also, pursuant to *The Fatal Accidents Act*, for damages for the death of his wife. The trial judge found that both the defendant Department of Highways and the defendant C were at fault and apportioned the blame 80 per cent to the former and 20 per cent to the latter. He assessed the damages of the plaintiff personally at $145,795.43 and the damages under *The Fatal Accidents Act* at $11,300.

Each of the parties appealed to the Court of Appeal. The defendant Department sought the dismissal of the action as against it, alternatively a reduction of the percentage of blame attributed to it and a reduction in the amount of damages. The defendant C by cross-appeal asked that he be absolved from liability and alternatively that the damages be reduced. The plaintiff by cross-appeal asked that the award of damages to him personally be increased. The plaintiff's cross-appeal was allowed, his total damages being assessed at $180,000.

PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

The Department's appeal and C's cross-appeal were dismissed.

The majority in the Court of Appeal were of the opinion that the trial judge had erred in his assessment of damages in regard to the following matters: (1) The trial judge had deducted $50,000 from the total damages on the ground that had the plaintiff been well and normal for the next five years his own personal living expenses would have been $10,000 a year whereas all his estimated living expenses during that period would in fact be covered by an amount which was allowed for hospital expenses. This deduction should not have been made. At most the deduction should have been for not more than a sum sufficient to cover the plaintiff's food and lodging as distinguished from medical and nursing care in the hospital for five years. (2) There should not have been any reduction made in the damages for loss of future earnings by reason of income tax. (3) The allowance for general damages of $2,000 for loss of enjoyment of life should have been for loss of the amenities of life and was too low. (4) The allowance for loss in respect of certain stock options was too high. That there could be no certainty as to the price of the stock at the time the options would be taken up and that other circumstances might have prevented the plaintiff exercising the options were factors that should have been taken into consideration. (5) In allowing loss of salary for five years some allowance should have been made not only for the fact that the salary was being paid in advance but also some deduction should have been made for the contingency that the plaintiff might have, within that period of time, become ill or died or for other reason might have lost his position.

An appeal from the judgment of the Court of Appeal was brought to this Court. The Department asked that the action as against it be dismissed and alternatively that the assessment of the trial judge should be restored. C as cross-appellant asked that the action as against him be dismissed.

Held: The appeal and cross-appeal should be dismissed.

Per Cartwright, Martland, Ritchie and Spence JJ.: The appellant's contention that failure to maintain a stop sign as required by the relevant statute (*The Highway Improvement Act*, R.S.O. 1960, c. 171) and regulations does not amount to "default to keep the King's Highway in repair" was rejected. Its further contention that even if, contrary to its submission, the failure to maintain the stop sign constituted default in keeping the highway in repair the appellant was relieved from liability by the terms of subs. (3) of s. 33 of the Act was also rejected.

For the reasons given by McGillivray J. A. in the Court below, it was agreed that the collision was caused by the fault of both defendants and that the apportionment of the blame made by the trial judge ought not to be disturbed.

On the question of the quantum of damages, as to the deduction of $50,000, at the most the amount of this deduction should not have exceeded such portion of the estimated hospital expenses of $20,075 as represented the cost of food, and possibly the cost of lodging. As to item (3), the allowance of $2,000 for loss of amenities of life was very much too low. Damages for loss of amenities of life are not to be reduced by reason of the fact that the injured person is unconsicious and unaware of his condition. As to item (4), the allowance in respect of the loss of the right to exercise options to purchase stock, the estimate of the trial

1966

THE QUEEN v. JENNINGS et al.

judge if excessive at all was not greatly so. As to item (5), it appeared that the trial judge did allow for the fact that the salary was in effect being paid in advance, and in view of the circumstances of the case no substantial amount should have been deducted by reason of the other contingencies to which reference was made.

On a consideration of the whole record, the total amount of $180,000 fixed by the Court of Appeal was not excessive and should not be disturbed.

Per Curiam: The principle stated in *British Transport Commission v. Gourley*, [1956] A.C. 185, (the incidence of taxation on future earnings should be taken into account in assessing damages in respect of loss of such earnings) was rejected.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing the appeal of the present appellant and the cross-appeal of the respondent Cronsberry from a judgment of Ferguson J., and allowing the cross-appeal of the respondent Jennings as to the quantum of damages awarded. Appeal dismissed.

C. L. Dubin, Q.C., K. Duncan Finlayson, Q.C., and *P. J. Brunner*, for the defendant, appellant.

Ross V. Smiley, Q.C., for the defendant, respondent and cross-appellant, G. Cronsberry.

B. J. Thomson, Q.C., for the plaintiff, respondent, R. M. Jennings.

Martland, Ritchie and Spence JJ. concurred with the judgment delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing a cross-appeal by the respondent Jennings, varying a judgment of Ferguson J. by increasing the amount of the damages awarded to Jennings personally from $145,795.53 to $180,000 and dismissing the appeal of the present appellant and the cross-appeal of the respondent Cronsberry. McGillivray J. A., dissenting in part, would have affirmed the judgment of the learned trial Judge.

The action arose out of a collision between an automobile, hereinafter referred to as "the Jennings car", owned by the respondent Jennings in which he and his wife the late Mary Jennings were passengers and which was being driven by their son William E. Jennings and an automobile, hereinafter referred to as "the Cronsberry car" owned and driven by the respondent Cronsberry.

[1] [1965] 2 O.R. 285, 50 D.L.R. (2d) 385.

The collision occurred at about 5 p.m. on Sunday, November 5, 1961, at the intersection of Highway No. 12 which runs North and South, with the Second Concession road of the Township of Thorah which runs East and West.

The Jennings car was being driven northerly on Highway No. 12 at a speed of about 60 miles per hour which was a lawful speed. The Cronsberry car was being driven westerly on the Second Concession road. Highway No. 12 was a through highway and the Second Concession road was a "stop street". At this intersection Highway 12 had been marked by a stop sign placed at the northeast corner of the intersection 27 feet east of the east edge of the pavement of Highway 12 and 5 feet north of the north edge of the gravel on the Second Concession. The sign and its location conformed to the relevant statutes and regulations but on the Wednesday preceding the day of the accident some mischievous boys had turned it around so that as the Cronsberry car approached it the driver would not see a stop sign but only the back of the sign which was gray in colour and bore no lettering. Cronsberry, who suffered a concussion, had no recollection of the accident or of anything that occurred in the space of a few minutes before it happened.

The two cars collided with great violence in the intersection. Mrs. Jennings was killed, the respondent Jennings was so severely injured that he has never recovered consciousness. William Jennings was not seriously injured.

The action was brought for damages suffered by the respondent Jennings personally and also, pursuant to *The Fatal Accidents Act*, for damages for the death of the late Mary Jennings.

The learned trial judge found that both the appellant and Cronsberry were at fault and apportioned the blame 80 per cent to the former and 20 per cent to the latter. He assessed the damages of the respondent Jennings personally at $145,795.43 and the damages under *The Fatal Accidents Act* at $11,300.

Each of the parties appealed to the Court of Appeal.

The present appellant, hereinafter sometimes referred to as "the Department", sought the dismissal of the action as against it, alternatively a reduction of the percentage of

1966

THE QUEEN v. JENNINGS et al.

Cartwright J.

blame attributed to it and a reduction in the amount of damages.

The respondent Cronsberry by cross-appeal asked that he be absolved from liability and alternatively that the damages be reduced.

The respondent Jennings by cross-appeal asked that the award of damages to him personally be increased.

The result of these appeals has been stated in the opening paragraph of these reasons.

In this Court, the Department asks that the action as against it be dismissed and alternatively that the assessment of damages made by the learned trial judge should be restored, it does not ask any further reduction of the damages; the respondent Cronsberry asks that the action as against him be dismissed; the respondent Jennings asks that the appeal be dismissed, he does not ask that the assessment of damages made by the Court of Appeal be increased.

Neither the appellant nor the cross-appellant Cronsberry suggests that there was any negligence on the part of the driver of the Jennings car.

On the question of liability there are the following findings of fact all of which are supported by the evidence; (i) that the sign was turned on the Wednesday morning preceding the accident and, notwithstanding a daily patrol by employees of the Department, was allowed to remain in that position up to the happening of the accident; (ii) that this was an unreasonable length of time; (iii) that the position of the sign was an effective cause of the collision in that had it been in its proper position it was probable that Cronsberry would have seen it and stopped before entering Highway 12; (iv) that, even if Cronsberry was unaware that the highway which he was approaching was a through highway and so was entitled to assume that he had the right of way over the Jennings car, he was negligent as he had a clear view for some hundreds of feet to the south of the intersection and could see that the Jennings car was approaching the intersection at such a rate of speed that unless Cronsberry stopped a collision would occur.

On this statement of facts, for the reasons given by McGillivray J.A., I agree that the collision was caused by the fault of both defendants and that the apportionment of

the blame made by the learned trial judge ought not to be disturbed.

Counsel for the appellant submitted that even if the failure to have the stop sign in position was in fact an effective cause of the collision there was no legal liability on the part of the Department. It is common ground that if such liability existed at the time of the accident it must be found in s. 33 of *The Highway Improvement Act*, R.S.O. 1960, c. 171, the relevant subsections of which are (1)(2)(3) and (10). These read as follows:

33 (1) The King's Highway shall be maintained and kept in repair by the Department and any municipality in which any part of the King's Highway is situate is relieved from any liability therefor, but this does not apply to any sidewalk or municipal undertaking or work constructed or in course of construction by a municipality or which a municipality may lawfully do or construct upon the highway, and the municipality is liable for want of repair of the sidewalk, municipal undertaking or work, whether the want of repair is the result of nonfeasance or misfeasance, in the same manner and to the same extent as in the case of any other like work constructed by the municipality.

(2) In the case of default by the Department to keep the King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default, and the amount recoverable by a person by reason of the default may be agreed upon with the Minister before or after the commencement of an action for the recovery of damages.

(3) No action shall be brought against the Crown for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier adjacent to or in, along or upon the King's Highway or caused by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or thing adjacent to or in, along or upon the King's Highway that is not on the roadway.

(10) The liability imposed by this section does not extend to a case in which a municipality having jurisdiction and control over the highway would not have been liable for the damage sustained.

The appellant contends that failure to maintain a stop sign as required by the relevant statute and regulations does not amount to "default to keep the King's Highway in repair". In the Courts below this submission has been unanimously rejected and, in my opinion, rightly so. It has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety. The danger created by the failure to maintain the required stop signs marking a through highway is too obvious to require comment. On this branch of the matter I

1966

THE QUEEN v. JENNINGS et al.

Cartwright J.

agree with and wish to adopt the reasons of McGillivray J.A.

It was next argued by counsel for the appellant that even if, contrary to his submission, the failure to maintain the stop sign constituted default in keeping the highway in repair the appellant was relieved from liability by the terms of subs. (3) of s. 33. This point was disposed of adversely to the appellant at the hearing and counsel for Jennings and for Cronsberry were not called upon in regard to it. On this point also I am content to adopt the reasons of McGillivray J.A.

For the above reasons I conclude that the judgment finding both defendants liable to the plaintiff and as between them apportioning the blame 80 per cent to the Department and 20 per cent to Cronsberry should be upheld and it remains to consider the question of the quantum of the damages awarded to Jennings personally. The amount of the damages awarded pursuant to *The Fatal Accidents Act* is not questioned.

Jennings was born on April 16, 1909. His normal life expectancy at the date of the accident was 22.43 years. He is a graduate engineer. In 1955 he had become general manager of the Small Appliances Department of the Canadian General Electric Company at Barrie. In 1959 he had been made a vice-president of the company. The plant had progressed rapidly and satisfactorily under his management. He was paid by way of salary plus an annual "incentive bonus". His gross earnings had increased from $13,752 in 1955 to $26,294.44 in 1961. According to the evidence of Mr. Marrs, the manager of the Personnel Accounting of the company, Jennings' gross earnings in 1962 would have amounted to $30,525 and by 1967 would have increased to $34,000 a year and have continued at that rate until his retirement. If he retired at age 60 he would have received an annual retirement income of $7,025 and if he retired at 65 an annual retirement income of $11,215. Following the accident the company continued to pay his salary until the end of February 1962 when he was retired. He receives an annual retirement income of $4,842, which if he should still be living in 1974 when he reaches 65 years of age would be increased to $4,992.

The termination of Jennings' employment deprived him of the right to exercise certain options to purchase stock in

American General Electric at fixed prices. He lost the right to purchase 594 shares at $52.25, U.S. funds, and the right to purchase 117 of such shares at $68.25, U.S. funds. At the date of the trial the current market price of the shares was $82, U.S. funds, and Mr. Marrs calculated the amount of profit which would have resulted if Jennings had exercised his option and sold the shares at the market at $19,695 U.S. funds.

The evidence of Dr. Harrison as to the physical condition of Jennings is uncontradicted. He suffered so severe a brain injury in the accident that he has never regained consciousness. He has been a patient at the Queen Elizabeth Hospital since January 4, 1962. He is confined to bed. He cannot speak. He cannot make any voluntary movement. He cannot swallow and is fed through a duodenal tube that passes through his nostril down to his stomach. He has a tracheotomy tube in his windpipe because without it he cannot breathe. He is incontinent as to his bladder and his bowels and has to have bladder drainage with a permanent catheter. There is no hope of recovery or improvement. He does not suffer pain and does not realize what his condition is. He is kept alive by "very meticulous care". He is taking nourishment well and Dr. Harrison was of opinion that since his admission to the Queen Elizabeth Hospital up to the date of the trial in May 1963 his general physical condition had perhaps improved. The chief danger to his life is from a secondary infection developing either in the respiratory tract or in the bladder. The examination in chief of Dr. Harrison concluded as follows:

> Q. Are you able to give his lordship any assistance as to his probable life expectancy in this condition?
>
> A. My lord, that is a very difficult question. Barring what you might call a medical accident, in the way of one of these medical accidents taking place, his general vital functions are such that he could almost live—well, indefinitely. In my own experience out there, we had one patient that went over five years in this condition. It was the result of a motor accident. He, I may say, had many more sort of acute attacks of one sort or another during his illness than Mr. Jennings has had. I would hate to give a prognosis on whether he will live five years or ten years or even longer.

At the date of the hearing of the appeal in this Court, which concluded on December 17, 1965, Jennings was still alive.

1966

THE QUEEN v. JENNINGS et al.

Cartwright J.

In approaching the assessment of damages the learned trial judge stated that his calculations were based on Jennings living for five years from the date of the trial but no longer.

The learned trial judge stated that while it was not customary to assess damages item by item he found it desirable to do so in this case. He allowed nothing for pain and suffering owing to the fact that Jennings has remained unconscious ever since the accident. He allowed:

Out of pocket expenses to the date of trial, agreed upon,	$ 13,801.53
Loss of salary to date of trial	33,800.00
Additional expenses for upkeep of son	600.00
Expenses of appointing Committee	529.00
Estimated hospital expenses for 5 years from date of trial	20,075.00
Estimated medical expenses for 5 years from date of trial	2,600.00
Estimated loss in connection with options to purchase stock	18,590.00
The present value at the date of the trial of Jennings' loss of salary for the ensuing 5 years after deducting estimated income tax from gross earnings	104,000.00
Loss of enjoyment of life	2,000.00

These items total $195,995.53, but apparently there was some correction not appearing in his reasons as the total arrived at by the learned trial judge was $195,795.53. From this total he deducted $50,000 on the ground that had the plaintiff been well and normal for the next five years "his own personal living expenses" would have been $10,000 a year whereas all his estimated living expenses during that period would in fact be covered by the item for hospital expenses set out above. In the result judgment was given for $145,795.53.

In the Court of Appeal, MacKay J.A., with whom Kelly J.A. agreed was of opinion that the learned trial judge had erred in his assessment in regard to five matters which he summarized as follows:

> In light of the authorities and commentaries to which I have referred I am of the opinion that in the present case:—
>
> (1) The sum of $50,000 should not have been deducted. At most the deduction should be for not more than a sum sufficient to cover the plaintiff's food and lodging as distinguished from medical and nursing care in the hospital for five years.
>
> (2) There should not have been any reduction in the damages for loss of future earnings made by reason of income tax.
>
> (3) The allowance for general damages of $2,000 under the heading of loss of enjoyment of life should be under the heading of loss of the amenities of life and is too low.

(4) The allowance for loss in respect of stock options was too high. The contingency that there could be no certainty as to the price of the stock at the time the options would be taken up and that there might have been other circumstances arise that would prevent the plaintiff exercising the options, ie. sickness, loss of position.

(5) In allowing loss of salary for five years some allowance should have been made not only for the fact that the five years salary is being paid in advance but also some deduction should be made for the contingency that the Plaintiff might have, within that period of time, become ill or died or for other reason might lose his position, it being, I think, reasonable to assume that in the modern business world there is no certainty of tenure in executive positions.

MacKay J.A. concluded that $180,000 would be a fair and reasonable amount at which to assess the plaintiff's total damages.

McGillivray J.A., who dissented on this branch of the case, agreed in substance with the views of MacKay J.A. as to each of the five items set out above except item (2). As to that item he held that the learned trial judge was right to take into consideration the fact that had Jennings received his salary he would have had to pay income tax on it. As to item (3), McGillivray J.A. while agreeing that the amount allowed was too low considered that this involved "no error in principle but a difference in view point as to what the award should be". In the result he decided that while the total awarded by the learned trial judge was perhaps somewhat less than it should have been the difference was not sufficient to warrant the Court of Appeal substituting a different figure.

With regard to the question raised in item (2) I agree with the reasons and conclusion of my brother Judson. Even if I had shared the view of the learned trial Judge and of McGillivray J.A. on this point I would none the less have been of the opinion that the total amount of $180,000 at which the Court of Appeal assessed the plaintiff's damages is by no means excessive.

As to the deduction of $50,000, I agree with the view of MacKay J.A. and that of McGillivray J.A. that at the most the amount of this deduction should not have exceeded such portion of the estimated hospital expenses of $20,075 as represented the cost of food, and possibly the cost of lodging. As McGillivray J.A. points out, this would of necessity be less than $20,075; the part is less than the whole; while it cannot be fixed with precision I am of opinion that the deduction should have been very much less than

1966

THE QUEEN v. JENNINGS et al.

Cartwright J.

$20,075. If the percentage applied by Asquith L.J. in making a similar calculation in *Shearman v. Folland*[1], quoted with approval by MacKay J.A., were adopted the resulting figure would be less than $2,000.

As to item (3) I regard the allowance of $2,000 for loss of amenities of life as very much too low. MacKay J.A. in his reasons dealing with this branch of the matter has made a careful examination of the judgments in the recent cases of *Wise v. Kaye*[2] *and H. West & Son Ltd. v. Shephard*[3]. I am in full agreement with his view that these cases rightly decide that damages for loss of the amenities of life are not to be reduced by reason of the fact that the injured person is unconscious and unaware of his condition.

As to item (4), the allowance in respect of the loss of the right to exercise options to purchase stock, the evidence of Mr. Marrs shews that Jennings by reason of the termination of his employment lost the right which he would otherwise have had to purchase 594 shares in annual amounts of 217 shares up to November 18, 1965, at $52¼ and 117 shares in annual amounts of 15 shares up to June 28, 1967, at $68½. At the date of the trial the current market price of these shares was $82. It was Mr. Marr's opinion that the market price of this stock would move up gradually. It is true, as MacKay J.A. points out, that there was no certainty that Jennings would have realized a profit of the amount estimated by the learned trial judge. It is equally true that if the market price continued to move upward he could have realized a substantially larger profit. I do not attach any great importance to this item but in my view the estimate of the learned trial judge if excessive at all was not greatly so.

As to item (5), we do not know the details of the calculation by which the learned trial judge arrived at the figure of $104,000 but he expressly stated that he was taking the present value of the estimated loss of earnings and it would seem therefore that he did allow for the fact that the salary was in effect being paid in advance. In the circumstances of this case particularly in view of the evidence of Jennings' good record and high standing in the company of which he was a vice-president and of his normal life expectancy

[1] [1950] 2 K.B. 43.

[2] [1962] 1 Q.B. 638.

[3] [1964] A.C. 326.

mentioned above, I do not think that any substantial amount should have been deducted by reason of the other contingencies referred to by MacKay J.A. in connection with this item.

On a consideration of the whole record I am satisfied that, even on the assumption that the income tax which Jennings would have had to pay had he lived and continued to earn his salary should be taken into consideration in assessing his damages, the total amount of $180,000 fixed by the Court of Appeal is not excessive and should not be disturbed.

Before parting with the matter I wish to make it clear that I am not expressing agreement with the view, apparently entertained by both the learned trial judge and the Court of Appeal, that because the normal live expectancy of the plaintiff of 22.43 years had been reduced by his injuries to 5 years he should be compensated only for the earnings he would have been expected to receive during the 5 year period.

I would dismiss the appeal with costs payable to Jennings and dismiss the cross-appeal of Cronsberry with costs payable to Jennings. The appeal fails as against Cronsberry and Cronsberry's cross-appeal fails as against the appellant; as between Cronsberry and the appellant I would make no order as to costs in this Court.

Martland, Ritchie and Spence JJ. concurred with the judgment delivered by

JUDSON J.:—Before 1956, the problem involved in *British Transport Commission v. Gourley*[1] had been considered in only three reported cases in Ontario. They were decisions at trial and had followed *Billingham v. Hughes*[2]. Since 1956 the *Gourley* case has been applied in three reported cases from Alberta, Newfoundland and Ontario, and not applied in one case from Manitoba and one from Quebec. The cases are listed in [1965] 2 O.R. 297, with the exception of the recent Quebec decision in *Leroy v. Perini Ltd.*, which is now in appeal.

In the present case, the trial judge did follow *Gourley*. The majority in the Court of Appeal rejected this but for different reasons. MacKay J.A. expressed a preference for

[1] [1956] A.C. 185. [2] [1949] 1 K.B. 643.

1966

THE QUEEN v. JENNINGS et al.

Judson J.

the dissenting opinion of Lord Keith and also agreed with Kelly J.A. that a proper foundation had not been laid for the application of the principle. Kelly J.A. confined his reasons to the second ground. He said that a defendant, seeking because of the incidence of income tax to reduce damages otherwise payable, must satisfy the court that the award is in fact tax free and then adduce the necessary evidence on which the court can assess the net amount of the award. Both elements, in his opinion, were lacking. McGillivray J.A. held, in agreement with the trial judge, that the principle in *Gourley* did apply and that the award, as a whole, was satisfactory and should not be interfered with. The majority increased the award from $146,000 to $180,000, only part of the increase being attributable to their rejection of *Gourley*.

All points of appeal, of which the application of the principle in *Gourley* was only one, were argued in this Court and it is necessary that we should face the issue and express an opinion. It is important not only for future litigation but for every-day practice in a contentious field where settlements are frequent.

Gourley was decided upon an admission of counsel that the damages were a non-taxable capital receipt. This admission was taken to be an accurate reflection of the law and of the practice of the Inland Revenue.

For what it is worth, my opinion is that an award of damages for impairment of earning capacity would not be taxable under the Canadian *Income Tax Act*. To the extent that an award includes an identifiable sum for loss of earnings up to the date of judgment the result might well be different. But I know of no decisions where these issues have been dealt with and until this has been done in proceedings in which the Minister of National Revenue is a party, any expression of opinion must be insecure. Such litigation would have to go through the Board of Tax Appeals or direct to the Exchequer Court with a final appeal, in appropriate cases, to this Court. As matters stand at present this ground alone is perhaps sufficient for the rejection of the principle in *Gourley*.

I would, however, put my rejection upon broader grounds. I agree with the dissenting opinion of Lord Keith in the *Gourley* case and the minority views expressed in the 7th

Report of the Law Reform Committee on the effect of tax liability on damages, published in August of 1958. These are stated in the following paragraphs:

(a) Damages should, so far as any monetary award can do so, restore the plaintiff to the position in which he would have stood but for the defendant's wrongdoing. On this basis they should represent compensation for loss of earning capacity and not for loss of earnings. In a case of personal injuries, what the plaintiff has lost is the whole or part, as the case may be, of his natural capital equipment and to tax him on this is contrary to generally accepted principles of taxation.

(b) What the plaintiff would have done or have been required to do with his money had he not suffered the injury complained of is, so far as the defendant is concerned, irrelevant. Tax is not a charge on income before it is received and there is no more reason for taking it into account than rates, mortgage interest and any other liabilities which the plaintiff may have to meet. To do so means that the defendant is making something less than full restitution for the injury. In other words, each £1 of income lost is worth £1 *to the plaintiff*, either to spend on himself, or to discharge his liabilities, including that for income tax.

(c) The net sum representing what the plaintiff would have received after deduction of tax is not adequate compensation for loss of the ability to deal freely with the gross sum. Not only is the plaintiff deprived of his chance of dealing with his income as he thinks fit and so reducing his liability to tax, but third parties who might otherwise have benefited from such arrangements as the plaintiff might be disposed to make are unable to do so.

(d) The present law operates in some cases in a way which is contrary to public policy. Thus it is now frequently more profitable to pay damages for the breach of a contract of service than to perform the contract, because by paying damages the employer saves the amount of the tax on the employee's salary.

It has been said that if the incidence of taxation on future earnings is ignored, the plaintiff is being over-compensated. With this I do not agree. A lump sum award under this head is at best no more than rough-and-ready compensation. There must be very few plaintiffs who are compelled to take a lump sum who would not be better off with their earning capacity unimpaired or a periodic reassessment of the effect of its impairment. There is, as things are at present, no possibility of such a reassessment. But mathematical precision is impossible in assessing the lump sum, and where large amounts and serious permanent disability are involved, I think that the award is usually a guess to the detriment of the plaintiff.

To assess another uncertainty—the incidence of income tax over the balance of the working life of a plaintiff—and

1966

THE QUEEN v. JENNINGS et al.

Judson J.

then deduct the figure reached from an award is, in my opinion, an undue preference for the case of the defendant or his insurance company. The plaintiff has been deprived of his capacity to earn income. It is the value of that capital asset which has to be assessed. In making that determination it is proper and necessary to estimate the future income earning capacity of the plaintiff, that is, his ability to produce dollar income, if he had not been injured. This estimate must be made in relation to his net income, account being taken of expenditures necessary to earn the income. But income tax is not an element of cost in earning income. It is a disposition of a portion of the earned income required by law. Consequently, the fact that the plaintiff would have been subject to tax on future income, had he been able to earn it, and that he is not required to pay tax upon the award of damages for his loss of capacity to earn income does not mean that he is over-compensated if the award is not reduced by an amount equivalent to the tax. It merely reflects the fact that the state has not elected to demand payment of tax upon that kind of a receipt of money. It is not open to the defendant to complain about this consequence of tax policy and the courts should not transfer this benefit to the defendant or his insurance company.

The speculative and unsatisfactory result that may follow from a deduction for future income tax may be illustrated from the *Gourley* case itself. As pointed out in Street, Principles of the Law of Damages, p. 102, if Gourley had been able to postpone the trial for two years, he would inevitably have received several thousand pounds more by way of damages.

The practical difficulties that arise from the application of the principle are many and they have been noticed. What is to be done with the young plaintiff who had a promising career ahead of him? If he is unmarried or newly married, how does the Court deal with his potential exemptions? How does it deal with the complexities that may arise from a wife's separate income? Why should it be assumed that investment income is necessarily permanent or that it will always remain taxable in the hands of the plaintiff? What will be done with the foreign plaintiff and foreign systems of taxation?

In this country there are additional difficulties. Each of the provinces has the power to impose taxation upon income, and there is no assurance that the total impact of federal and provincial tax upon taxpayers in each of the provinces will remain the same. At the same time there is a considerable and increasing movement of people from one province to another. To deduct from an award of damages for loss of earning capacity an amount based upon the existing tax rates in the province in which he lived at the time of his injury might well create a hardship for a man who might reasonably have anticipated, in the future, a transfer of his employment to another province in which the rate of taxation is less.

In the litigation itself there are practical difficulties. There will be discovery on income tax matters with its possibilities of oppressive and endless examination. There are also problems of onus of proof. I notice that *West Suffolk County Council v. W. Rought Ltd.*[1] put the burden on the plaintiff. The Ontario Court of Appeal, in the present case, put the burden on the defendant. Finally, how does the principle fit in with lump sum awards either from a judge or jury or with jury trials at all in these cases?

I agree with Cartwright J. that the appeal should be dismissed with costs but I think that we should say now that we reject the principle stated in *Gourley*.

Appeal dismissed with costs; cross-appeal dismissed with costs.

Solicitors for the defendant, appellant: Kingsmill, Mills, Price, Barret & Finlayson, Toronto.

Solicitors for the plaintiff, respondent: Haines, Thomson, Rogers, Macaulay, Howie & Freeman, Toronto.

Solicitors for the defendant, respondent: Smiley & Allingham, Toronto.

[1] [1957] A.C. 403.

1966

*May 19
June 7

GILLES E. BÉDARD (*Plaintiff*) ..... APPELLANT;

AND

THE SASKATCHEWAN GOVERNMENT INSURANCE OFFICE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Insured trucks damaged—Claims for consequential loss based on alleged breaches of statutory provisions—The Automobile Accident Insurance Act, 1963 (Sask.), c. 38, ss. 35(1), 36(8) and (13).

The appellant was the owner of two trucks with which he engaged in the transportation business in the Province of Saskatchewan and both of which were insured in accordance with the provisions of s. 35(1) of *The Automobile Accident Insurance Act*, 1963 (Sask.), c. 38. One of the trucks was damaged in an accident, and, in a later accident, the other was seriously damaged if not totally destroyed by fire. The appellant made no claim in this action in respect of the direct damage sustained by either of his vehicles but contended that the failure of the Government Insurance Office to comply with the terms of ss. 36(8)(2) and 36(13) of the Act resulted in delays which had the effect of putting him out of business altogether and in this regard he claimed in respect of each truck special damages in the amount of $50,000 and general damages of $100,000. The appellant's claims were dismissed by the trial judge and an appeal from his judgments was dismissed by the Court of Appeal.

Held: The appeal should be dismissed.

The appellant's contention that the failure by the insurer to give the notice for which provision is made in s. 36(8)(2) constituted a breach of the statute failed. The section only requires notice to be given in a case where the insurer intends to "repair, rebuild or replace the property damaged". In the present cases the insurer had no such intention and the provision for notice was accordingly inapplicable.

The provisions of s. 36(13), which provide that the insurer "shall pay any insurance money for which it is liable within sixty days after the proof of loss has been received by it, or, where an appraisal is had under statutory condition 9, within fifteen days after the award is rendered", could have no relevance to the claim for the fire loss as no award had yet been rendered in respect of that loss.

The Insurance Office had disputed certain items in the proof of loss filed in respect of the accident claim and no money was paid within sixty days after it had been received. However, the only insurance for which provision was made in the "owner's certificate" referred to in s. 35(1) was insurance "against direct and accidental loss of or damage to the vehicle designated therein . . .". The insurer under such a certificate was not responsible for consequential loss or damage such as that claimed by the appellant. Also, under s. 36(8)(1), it was provided that the insurer's liability "...shall in no event exceed what it would cost to repair or replace the vehicle. . .".

* PRESENT: Fauteux, Martland, Judson, Ritchie and Hall JJ.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, dismissing an appeal from two judgments of Davis J. Appeal dismissed.

Gilles E. Bédard, in person, for the plaintiff, appellant.

W. Bellesberger, for the defendant, respondent.

THE COURT:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan dismissing an appeal from two judgments of Mr. Justice C. S. Davis whereby he dismissed two claims of the appellant for damages arising out of alleged breaches by the Saskatchewan Government Insurance Office of the provisions of s. 36 subss. 8 and 13 of *The Automobile Accident Insurance Act,* 1963 (Sask.), c. 38 (hereinafter referred to as "the Act").

At all times material hereto the appellant was the owner of two power unit trucks of identical make and model with which he engaged in the transportation business in the Province of Saskatchewan and both of which were insured in accordance with the provisions of s. 35(1) of the said Act. On March 14, 1964, one of these trucks was damaged in an accident and on April 4 in the same year the other was seriously damaged if not totally destroyed by fire.

The appellant filed proofs of loss with the Saskatchewan Government Insurance Office in due form and time and the respondent stands ready and willing to pay for the damage to each vehicle (less the statutory deductible sum of $150) when the amount payable is finally determined. In respect of the accident claim, the Insurance Office disputes certain items contained in the proof of loss as not constituting "direct and accidental loss" within the meaning of s. 35(1) of the Act, and the appraisal in respect of the fire loss for which provision is made under s. 36(9) has not been completed.

The appellant, however, makes no claim in this action in respect of the direct damage sustained by either of his vehicles but contends that the failure of the Insurance office to comply with the terms of ss. 36(8)(2) and 36(13) of the Act has resulted in delays which have had the effect of putting him out of business altogether and in this regard he claims in respect of each truck special damages in the amount of $50,000 and general damages of $100,000.

1966

BEDARD v. SASKATCHEWAN GOVERNMENT INSURANCE OFFICE

The provisions of s. 36(8)(2) read as follows:

> Except where an appraisal has been had, the insurer, instead of making payment, may within a reasonable time repair, rebuild or replace the property damaged or lost with other of like kind and quality, giving written notice of its intention so to do within seven days after receipt of the proofs of loss; but there can be no abandonment of the vehicle to the insurer without its consent. In the event of the insurer exercising such option, the salvage, if any, shall revert to it.

The appellant, who appeared in person before this Court, strongly argued that failure by the insurer to give the notice for which provision is made in this section constituted a breach of the statute. This contention is based on a misconstruction of the meaning of the language used in the section which only requires notice to be given in a case where the insurer intends to "repair, rebuild or replace the property damaged". In the present cases the insurer had no such intention and the provision for notice is accordingly inapplicable. It follows that in so far as the appellant's claims are based on a breach of this section they must fail.

Section 36(13) upon the breach of which the appellant's claims are also based, reads as follows:

> The insurer shall pay any insurance money for which it is liable within sixty days after the proof of loss has been received by it, or, where an appraisal is had under statutory condition 9, within fifteen days after the award is rendered.

As no award had yet been rendered in respect of the fire loss, the provisions of this section can have no relevance to that claim.

As has been indicated, the Insurance Office disputed certain items in the proof of loss filed in respect of the accident claim and no money was paid within sixty days after it had been received, but the liability of the Insurance Office is limited and controlled by the provisions of the Act and the only insurance for which provision is made in the "owner's certificate" referred to in s. 35(1) is insurance "against direct and accidental loss of or damage to the vehicle designated therein...". It is thus apparent that the insurer under such a certificate is not responsible for consequential loss or damage such as that claimed by the appellant in the present case. It is to be observed also that under the provisions of s. 36(8)(1) of the Act, it is provided

that the insurer's liability "... shall in no event exceed what it would cost to repair or replace the vehicle...".

This appeal is accordingly dismissed.

Appeal dismissed.

Solicitor for the defendant, respondent: J. Green, Regina.

PRE-CAM EXPLORATION & DEVELOPMENT LTD. and MAURICE MURTACK (*Plaintiffs*) ..... APPELLANTS;

1966
*May 9, 10
June 21

AND

DONALD McTAVISH (*Defendant*) .....RESPONDENT.

and DONALD J. SHERIDAN (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Master and servant—Information acquired during course of employment—Implied term of employment that employee could not use information for his own advantage—Constructive trust.

The defendant (McT) was employed by the plaintiff company on the inspection of certain mining claims which had been staked by one M. The latter wanted some exploratory work done on these claims and gave instructions to the plaintiff company to do this work. All that McT had to do was to take readings from a magnetometer and record them in a log book. The results, when plotted and recorded, established that a mineralized zone on the claims ran in a southwesterly or northeasterly direction and indicated that the area north and east of the claims contained an extension of the mineralized zone. This was ground that the company would have staked for M in the normal course of events. While McT did not see the final plot and record of the readings, he could tell from the showings and the magnetometer work that he did that the area north and east of the claims was on the strike of the mineralized zone. He made up his mind to stake this area for himself. After having turned over his log book containing the record of the magnetometer readings and having later severed his employment, McT staked a number of claims north and easterly of and contiguous to M's claims.

In an action brought to compel McT to transfer the claims which he had staked around the first group, the trial judge held that McT held these claims as trustee and that he must transfer them to the owner of the other claims. The Court of Appeal, with one member of the Court dissenting, allowed the appeal and held that McT was free to stake these claims for his own benefit. An appeal was then brought to this Court.

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* PRESENT: Fauteux, Abbott, Martland, Judson and Ritchie JJ.

1966

PRE-CAM EXPLORATION & DEVELOPMENT LTD. *et al.* *v.* MCTAVISH *et al.*

Held: The appeal should be allowed and the judgment at trial restored.

The information acquired by McT during the course of his employment was highly confidential and the purpose for which it was being sought was obvious—the acquisition of other connected claims which would be of advantage to the existing claims. Neither the company nor McT, its servant, could acquire these connected claims against the interest of M. It was a term of his employment, which McT on the facts of the case understood, that he could not use this information for his own advantage. A constructive trust was imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Hall C.J.Q.B. (as he then was). Appeal allowed.

L. N. Hyman and M. A. Kuziak, for the plaintiffs, appellants.

E. C. Leslie, Q.C., and *John Stein,* for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This action was brought to compel Donald McTavish, who had been employed on the inspection of certain mining claims, to transfer other mining claims which he staked around the first group after he had severed his employment. The information which led him to stake these claims was acquired in the course of his employment. The learned trial judge held that McTavish held these claims as trustee and that he must transfer them to the owner of the other claims. The Court of Appeal[1], with Hall J.A. dissenting, allowed the appeal and held that McTavish was free to stake these claims for his own benefit.

The facts are that one Maurice Murtack had staked fifteen claims near Brabant Lake in the Rottenstone Mining District of Saskatchewan. These claims were known as Peg 1 to 15. Murtack wanted some exploratory work done and on December 8, 1956, he gave Pre-Cam Exploration & Development Ltd., instructions to do this work in the following letter:

[1] (1965), 53 W.W.R. 662.

Prince Albert, Saskatchewan
December 8, 1956.

Mr. Berry Richards,
Pre-Cam Exploration Ltd.,
Prince Albert, Saskatchewan
Dear Sirs:

I have completed the staking of 15 mineral claims in the Rottenstone Mining District near Brabant Lake named Peg 1 to 15, which I am having recorded in my name for myself and associates.

It is our wish to have your firm carry on exploratory work on the showings which I have described to you, details of which we will be discussing as work proceeds. The map which I have left with you shows location, etc., of the claims. As an immediate step, I suggest that you proceed with Magnetometer work on the claims and that you follow up any anomalous conditions that may be found to extend from this block of 15 claims in any direction and that you stake the ground on which these extensions may appear for myself and my associates.

Please keep me advised of progress in this work.

Yours truly,
(sgd.) M. Murtack

At that date Donald McTavish was an employee of Pre-Cam at a salary of $275 per month. He had had some instruction from Pre-Cam in the operation of a magnetometer and on December 5 the company had him flown to Brabant Lake along with a helper.

There had been some development done on the Peg claims. The mineralized zone had been exposed in five places by blasting, making a discovery trench of 60 feet long, with four additional trenches 100 feet apart, each of which exposed mineralized rock. Material from these trenches had been assayed and found promising. There was no overburden in the area of the trenches but the surrounding areas were covered by muskeg. In preparation for the magnetometer work, the brush had been cut along a base line with nine cross lines at right angles. All that McTavish had to do was to take readings from the magnetometer and record them.

These readings were taken along the base line and cross lines at 100 foot intervals. The results were entered in a log book. When plotted and recorded these established that a mineralized zone on the Peg claims ran in a southwesterly or northeasterly direction and indicated that the area north and east of the Peg claims contained an extension of the mineralized zone. This was ground that Pre-Cam would

1966

PRE-CAM EXPLORATION & DEVELOPMENT LTD. *et al.* *v.* MCTAVISH *et al.*

Judson J.

have staked for Murtack in the normal course of events. While McTavish did not see the final plot and record of the readings, he could tell from the showings and the magnetometer work that he did that the area north and east of the Peg claims was on the strike of the mineralized zone. He made up his mind to stake this area for himself. There is evidence that he disclosed this intention to at least two men before he returned home for Christmas.

McTavish got out by plane on December 23 and turned over his log book containing the record of the magnetometer readings. He then proceeded home to Weyburn for Christmas. Here he interested two men, Thompson and Laing, in the prospects of the Brabant Lake area and pursuant to an agreement made with them, he returned on December 27 to Brabant Lake. On the way and on December 27, he called at the offices of Pre-Cam in Regina, collected his pay and resigned. He staked 20 claims north and easterly of and contiguous to the Peg claims and called them Betty 1, 2, 3 and 8 to 24 inclusive. He was back in Weyburn by January 10, 1957.

The present case was instituted by Pre-Cam asking for a declaration that McTavish held the Betty claims in trust for Pre-Cam and for an order that he transfer them. The trial came on in 1958 and was adjourned to allow Pre-Cam to amend its Prayer for Relief and to join Murtack as plaintiff. The trial was resumed in November 1958 with Murtack joined and requesting relief for Pre-Cam as trustee for himself. Donald J. Sheridan, the Chief Mining Recorder, was joined as Defendant, only that he might have notice of proceedings.

The conclusions of the learned Chief Justice at trial are summarized in the following extracts from his reasons for judgment:

> McTavish fully appreciated the significance of the readings he had made and recorded and that the area Northeasterly of the Peg claims might well contain valuable mineralized deposits along the strike of the zone exposed in the Peg claims. While still on the job on the Peg claims, he decided to stake the area Northeast of the Peg claims for himself. I accept the evidence of Slater including his testimony that on or about December 16th, McTavish showed him a rough sketch of some 14 claims Northeast of the Peg claims and contiguous thereto, which McTavish said he was going to come back and stake for himself.
>
> The really essential thing that McTavish learned while doing the magnetometer survey work on the Peg claims besides what he saw in the discovery trenches was that the strike of this promising mineralized zone

ran in a Northeasterly direction. He admitted in cross examination, that it was as a result of what he learned while working for Pre-Cam on the Peg claims that he decided to stake for himself the area that is now Betty 1, 2, 3 and 8 to 24 inclusive. He did no work on what is now the Betty group while working on the Peg claims, nor did he use any of the plaintiff's instruments outside the Peg limits.

1966

PRE-CAM EXPLORATION & DEVELOPMENT LTD. *et al.* *v.* MCTAVISH *et al.*

Judson J.

Without the information acquired during the course of his employment, McTavish would not have staked the adjoining claims. This was highly confidential information and the purpose for which it was being sought was obvious—the acquisition of other connected claims which would be of advantage to the existing claims. Neither Pre-Cam nor McTavish, its servant, could acquire these connected claims against the interest of Murtack. Contrary to the majority opinion in the Court of Appeal, I think that it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term "fraud" by the learned Chief Justice at trial was fully warranted. The severance of his employment on December 27 was an empty formality which could not improve his position. I do not mean by this that a simple-minded person with his own ideas of common honesty could do this sort of thing without having to answer. The constructive trust is imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.

I would allow the appeal with costs, both here and in the Court of Appeal, and restore the judgment at trial.

Appeal allowed with costs and judgment at trial restored.

Solicitors for the plaintiffs, appellants: Pearce, Hyman & Kuziak, Regina.

Solicitors for the defendant, respondent: MacPherson, Leslie and Tyerman, Regina.

1966
*May 24, 25
June 21

MARY LAZARENKO (*Plaintiff by counterclaim*) ....APPELLANT;

AND

RUSSELL BOROWSKY as Administrator of the Estate of Rose Borowsky, deceased, and RUSSELL BOROWSKY as Administrator with will annexed (*de bonis non*) of the Estate of Nicholas Wachniuk, deceased (*Defendants by counterclaim*) ...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Domestic relations—Cohabitation in expectation of marriage—Entitlement to property rights of a wife claimed on basis of alleged agreement—Failure to establish intention to enter into binding legal contract.

One RB, the daughter of W, brought an action for the possession of certain lands and premises which had been transferred to her by her father. She sought possession of the land from the appellant who was in occupation thereof, and who had refused to surrender the same. The appellant, by her defence, claimed the right of possession of the land, and counterclaimed against both the plaintiff and W for a declaration that she was entitled to the property rights of a wife therein by virtue of an agreement between herself and W. In the alternative she claimed compensation, on a *quantum meruit* basis, for housekeeping services performed by her for W.

Initially, the appellant had gone to live with W believing that he was a widower, and that he intended to marry her, although he told her that he was not then ready to marry. After learning that he was not a widower, but a married man, she left him for a brief period, and then returned. There was then talk of a divorce, but again W said he would divorce his wife "when I will be ready". When they first lived together and also after her departure and return, W told the appellant that the land would be hers. W made a will in the appellant's favour but this will was later revoked by a will in favour of his daughter and, prior to his death, W transferred the land to his daughter, who became registered as owner.

The trial judge found that there was an agreement between the appellant and W whereby the latter agreed to give her the land and the household contents to induce her to continue their relationship after she discovered that he was still married. He gave judgment vesting the land in the appellant. On the appeal to the Court of Appeal, the finding of the existence of an agreement was apparently not challenged. The appeal was allowed on the grounds that such an agreement was based upon an immoral consideration, *i.e.*, illicit cohabitation, and was, therefore, void, being contrary to public policy. From that decision the appellant appealed to this Court.

Held: The appeal should be dismissed.

* PRESENT: Fauteux, Martland, Judson, Ritchie and Hall JJ.

The evidence failed to establish an intention on the part of the parties to enter into a binding legal contract whereby the appellant would live and look after W in consideration of his agreement to transfer the land to her, or to pay her some unascertained sum by way of compensation for her services. On the contrary, the true situation was that the appellant was content to accept the lodging provided by W, and to live with him as his wife, in the hope that some day he would marry her and that some day he would give her the land.

APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from a judgment of Hall J. Appeal dismissed.

Sidney Green, for the appellant.

G. O. Jewers, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The proceedings in this case were commenced by Rose Borowsky, the daughter of Nicholas Wachniuk, by virtue of her being the registered owner of certain lands and premises in the City of Winnipeg, municipally known as 756 Mountain Avenue, hereinafter sometimes referred to as "the land", which had been transferred to her by her father. She sought possession of the land from the appellant who was in occupation thereof, and who had refused to surrender the same.

The appellant, by her defence, claimed the right of possession of the land, and counterclaimed against both the plaintiff and Wachniuk for a declaration that she was entitled to the property rights of a wife therein by virtue of an agreement between herself and Wachniuk. In the alternative she claimed compensation, on a *quantum meruit* basis, for housekeeping services performed by her for Wachniuk.

Both Wachniuk and Rose Borowsky died after the proceedings were commenced and prior to the trial. The respondent is the administrator of the estates of both of them.

The only evidence at trial of any importance was that of the appellant, which was accepted by the learned trial judge. She stated that she had met Wachniuk in August, 1960, at an auction sale. At that time she was a widow, and was living with her daughter and the daughter's family. She was then 65 years of age. Her only income was the widow's allowance and she paid her daughter $20 a month

1966

LAZARENKO v. BOROWSKY

Martland J.

for her room and board. Wachniuk was then over 70 years of age.

The appellant says that she told him she was a widow and that he told her he was a widower and that he wanted to get married. He said that he wanted her for his wife.

She was then asked the following questions and gave the following answers:

Q. Did he tell you what this would involve, what you would have to do?

A. That he would have a wife for his house.

Q. Did he say anything about his house?

A. He said it will be mine.

Q. What happened as a result of this meeting?

A. He said to get married he wasn't ready then.

The appellant went to live with Wachniuk on September 1, 1960. When asked whether there was any discussion of marriage, she said he kept speaking continuously about that, that he said they would get married, but "he wasn't ready yet".

About a month later, the appellant learned that Wachniuk was still a married man, his wife being still alive. She says that after she learned of this "He said I am unable to marry, but everything is yours."

At some time after the appellant learned that Wachniuk was not free to marry her, and, according to her evidence, because of this, she left Wachniuk and returned to her daughter's house for a period which she estimated, in direct evidence, as three days, and, on cross-examination, as three weeks. However, at his request, she returned to him. The evidence does not disclose that, at this time, he made any new promise regarding the land in order to induce her to return to him. He did tell her that he was going to divorce his wife "When he will be ready."

Later Wachniuk fell ill, and the appellant says that she looked after him until, on May 5, 1963, he went to hospital on his doctor's orders. On his release from hospital, on May 17, he went to live with his daughter, Rose Borowsky. He went back to hospital on August 22 and died on November 20, 1963.

On February 14, 1963, Wachniuk made a will which, after devising certain property, other than the land, to his

daughter, left the residue of his estate to the appellant. Her evidence as to this is as follows:

Q. Did you talk to Mr. Wachniuk about your rights?

A. Yes, I was speaking.

Q. What was said?

A. I told him and he said, "Don't worry about it. Where you are you will remain there."

Q. Did he do anything?

A. Yes, he did.

Q. What did he do?

A. He made a Will.

Q. How did this come about?

A. He said, "if you are not certain with me I will make you a Will."

Q. What did he do?

A. I went and he made me a Will.

This will was later revoked by a will in favour of his daughter and, prior to his death, Wachniuk had transferred the land to his daughter, who became registered as owner.

The foregoing is a summary of the appellant's evidence respecting her rights to the land. The learned trial judge found there was an agreement between the appellant and Wachniuk whereby the latter agreed to give her the land and the household contents to induce her to continue their relationship after she discovered that he was still married. He gave judgment vesting the land in the appellant.

Apparently the finding of the existence of an agreement was not challenged on the appeal to the Court of Appeal. The appeal was allowed on the grounds that such an agreement was based upon an immoral consideration, *i.e.*, illicit cohabitation, and was, therefore, void, being contrary to public policy.

From that decision the appellant appealed to this Court.

I have carefully examined the appellant's evidence. In my opinion, even if it is accepted completely, as it was by the learned trial judge, it fails to establish the making of a legal contract which would entitle the appellant either to obtain title to the land, or compensation on a *quantum meruit* basis.

The evidence is that, initially, the appellant went to live with Wachniuk believing that he was a widower, and that

1966

LAZARENKO v. BOROWSKY

Martland J.

he intended to marry her, although he told her that he was not then ready to marry. After learning that he was not a widower, but a married man, she left him for a brief period, and then returned. There was then talk of a divorce, but again Wachniuk said he would divorce his wife "when I will be ready".

The appellant was apparently content to live with Wachniuk on the basis of these rather vague assurances as to his intent, some time in the future, to marry her.

I have already referred to the appellant's evidence respecting the land. When they first lived together, and Wachniuk told her he wanted her for his wife, he said to her that "it will be mine". After her departure and return "He said I am unable to marry but everything is yours." There is some evidence of other like statements. They amount to nothing more than an expression as to future intent, and the appellant was content to live with Wachniuk without anything further.

Wachniuk did get as far as making a will in the appellant's favour, which does establish that, at the time he made it, he did intend that the appellant should have the land after his death. Later he apparently changed his mind and this will was revoked.

In my opinion all of this evidence fails to establish an intention on the part of the parties to enter into a binding legal contract whereby the appellant would live with and look after Wachniuk in consideration of his agreement to transfer the land to her, or to pay her some unascertained sum by way of compensation for her services. On the contrary, the true situation was that the appellant was content to accept the lodging provided by Wachniuk, and to live with him as his wife, in the hope that some day he would marry her and that some day he would give her the land. We do not know what Wachniuk's intent was, as his death prevented his giving evidence. But on the appellant's own evidence I do not find that any of his statements to her were anything more than expressions of intent. They were not made in contemplation of legal consequences in the form of a binding contract. In view of this conclusion it is unnecessary to consider the question as to whether a

1966

LAZARENKO v. BOROWSKY

Martland J.

contract of the kind alleged by the appellant would be void as against public policy.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Mitchell, Green and Minuk, Winnipeg.

Solicitors for the respondents: Fillmore, Riley & Co., Winnipeg.

THE UNIVERSITY HOSPITAL BOARD (*Defendant*) .....APPELLANT;

AND

GERALD LEPINE (*Plaintiff*) .....RESPONDENT.

1966

*May 17, 18

June 28

GEORGE MONCKTON (*Defendant*) .....APPELLANT;

AND

GERALD LEPINE (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Hospitals—Physicians and surgeons—Negligence—Epileptic patient leaping through window of fourth floor ward—Injuries result of impulse which could not reasonably have been foreseen—Actions against hospital and doctor dismissed.

The plaintiff who suffered from a form of epilepsy known as automatism was admitted to the defendant hospital, where he was placed in a ward on the fourth floor. This procedure was followed because he was a patient of the defendant doctor and this was the medical ward which the doctor used for his patients. While in the hospital the plaintiff suffered a number of epileptic seizures, the majority of which were automatisms. He was not given continuous supervisory care and at times would wander out of his room during a seizure. One morning, after having been found wandering on a street some distance from the hospital and after having been returned to his ward by three police officers and an orderly, the plaintiff asked if he could go to the washroom which was located inside the ward room. On emerging from the washroom, he was walking towards his bed when he suddenly jumped up on to a chair and leaped through the window and as a result received serious injuries. The defendant doctor, a nurse and the

PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

three police officers were in the ward when the plaintiff made his unfortunate leap.

Two actions claiming damages as a result of the injuries that he sustained were commenced by the plaintiff against the hospital and the doctor. The trial judge dismissed the action against the doctor and allowed the claim against the hospital. On appeal, the Appellate Division unanimously dismissed the hospital's appeal and allowed the plaintiff's appeal, one member of the Court dissenting, against the doctor and as required by *The Contributory Negligence Act* of Alberta determined that each of the defendants was at fault to the extent of 50 per cent. The defendants then appealed to this Court.

Held: The appeal should be allowed and the actions dismissed.

Whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission. *Glasgow Corporation v. Muir*, [1943] A.C. 448, referred to.

The plaintiff's sudden leap through the window was not an event which a reasonable man would have foreseen and have been required to take more precautions than were available in this case. Short of having put the plaintiff in some restraining device or of keeping him at ground level, both of which were rejected by the Appellate Division as being necessary or required, the injuries sustained by the plaintiff were the result of an impulse on his part which could not reasonably have been foreseen.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal by the appellant hospital and allowing an appeal by the respondent from the respective trial judgments in two actions heard together by Farthing J. Appeal allowed and the actions dismissed.

C. W. Clement, Q.C., for the defendant, appellant, University Hospital Board.

W. A. McGillivray, Q.C., for the defendant, appellant, Monckton.

A. G. Macdonald, Q.C., for the plaintiff, respondent, Lepine.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Appellate Division of the Supreme Court of Alberta[1] in which two appeals from two judgments of Farthing J. were heard together. Two actions were commenced by the respondent Lepine against The University Hospital Board and Dr. Monckton claiming damages as a result of injuries sustained by the

[1] (1965), 53 W.W.R. 513, 704, 54 D.L.R. (2d) 340.

respondent on July 24, 1962. These two actions were tried together, and at the conclusion of the trial Farthing J., in an oral judgment, dismissed the action against Dr. Monckton. Later he handed down a written judgment dated December 16, 1964, awarding Lepine damages in the sum of $46,689.50 and other relief against the hospital.

The main facts are not in dispute. They were set out at length in the judgment of the learned trial judge and by Cairns J.A. in his reasons for judgment on the appeal.

The respondent who was 26 years of age at the time of the trial was an Indian residing at Hay River in the Northwest Territories where he was employed as janitor of the public school there. To quote Farthing J.:

> From the age of thirteen plaintiff has been suffering from epilepsy which had been kept under control by medication so that it had interfered with his performing his duties to a negligible degree. He was a co-operative patient and conformed to the rules prescribed by his doctors so faithfully that, despite his troublesome and trying disease, he led an active and useful life. In the summer of 1961 he had come to Edmonton, on the advice of his physician in Hay River, to be examined and treated by Dr. Monckton, a neurologist. In the following summer he came to Edmonton again for the same purpose, arriving on Tuesday, 10th July. At first he stayed with relatives or friends, as a holiday, apparently.
>
> The two most important rules laid down for his guidance with which, apparently, he almost invariably complied, were to abstain completely from any alcoholic beverage and to take prescribed medication several times a day. During his first few days in Edmonton he departed from his rule of total abstinence and took a few glasses of beer sometimes. On the evidence I am satisfied that he drank nothing except beer and the quantity he took would not, for a person in normal health, be in any way excessive. But, of course, as a victim of epilepsy, he should not have taken any beer at all. However, I am satisfied that he drank none after Friday 13th July.
>
> Moreover, his supply of medicine ran out on Monday 16th July. He testified that he did not think it would do him any harm to be without it for a day, as he expected to see Dr. Monckton on the 17th.
>
> On the evidence I am satisfied that the events of 24th July were not in any way or in any degree attributable to beer or lack of his customary medication.
>
> Plaintiff suffered from a form of epilepsy known in medical parlance as automatism. The great majority of those suffering from that disease do not move about when having epileptic seizures. A minority, estimated, according to the evidence, at not more than twenty per cent, move, under seizure, from place to place sometimes at considerable danger to themselves or even others. Such patients are in no way responsible for their actions, while so moving about, of which they are quite oblivious.

The respondent had come to Edmonton in 1961 to consult Dr. Monckton to whom he had been referred by his own physician, Dr. Norman Douglas Abbey, of Hay River. Dr. Monckton was a neurologist. The treatment of epilepsy

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

was part of Dr. Monckton's specialty as a neurologist. Dr. Monckton saw the respondent in the summer of 1961. He reported to Dr. Abbey on August 4, 1961, in part:

> Physical examination showed no significant abnormality, excepting for some right facial asymmetry. I thought that an electroencephalogram ought to be done here and I am arranging for this to be carried out and I took the liberty of increasing his medication by the addition of Mysoline grams 0.25 b. i. d.
>
> As soon as the E. E. G. is back I will, of course, let you know its result.

and again on August 14 as follows:

> Dear Doctor Abbey:
>
> Re: Mr. Gerald LEPINE—Age 24 years.
>
> Further to my letter of August 4th, Mr. LePine's electroencephalogram is now to hand and does show quite a well developed right fronto-temporal, sharp wave, focal abnormality. This is seen against a background of a fair amount of slow delta activity in the same region. This clearly must indicate some structural abnormality of an epileptogenic nature which, I would think, is probably a birth injury or something of that kind. It does, I think, in the long run, warrant further investigation by air studies and perhaps angiography at some more convenient time since Mr. LePine, as you know, is just finishing his holidays and is very anxious to get back home. I have, however, increased his medication to Mysoline grams 0.25, b. i. d., together with his Dilantin and Phenobarbital. If this should be inadequate, it might be worth increasing the Mysoline a further dose to three times daily. If the attacks are still persistent, then I feel he should come down for a more prolonged stay so that we can study him in hospital. I hope this will meet with your approval.

Lepine returned to Hay River. In July 1962, he returned to Edmonton to see Dr. Monckton. He arrived in Edmonton on July 10. As stated by Farthing J., Lepine stayed with relatives or friends until he moved into the King Edward Hotel on July 16. Meanwhile, he had consumed some beer and ran out of his supply of medicine. Farthing J. found that whatever beer he had consumed did not in any degree contribute to what happened on July 24. The medical evidence supports this finding.

As stated, Lepine moved into the King Edward Hotel on July 16. Shortly after midnight Mr. W. Pitt, a security officer on the staff of the hotel, found respondent on the roof thereof where he had gone while under a seizure. He sent for the police and stayed and talked with respondent on the roof until they arrived. After talking to Lepine, the police recognized that he was an epileptic and had had a seizure and they told Pitt of his condition and that he now appeared to be all right. He was returned to his room. Pitt

kept him under observation and about 3:00 a.m., when he had another seizure, the police were sent for again. This time they took him in an ambulance to the Royal Alexandra Hospital where he was given medicine and then returned to the King Edward Hotel. Before long, he had another attack and the police were called a third time. Meanwhile they had learned that Lepine's Edmonton physician was Dr. Monckton who told them to take him to the University Hospital. He arrived there by ambulance about 4:45 a.m. on July 17. During his second seizure at the King Edward, Lepine left his room and headed towards the fire escape. Mr. Pitt put himself between Lepine and the fire escape door and persuaded Lepine to return to his room, and once in the room Mr. Pitt says Lepine tried to go to the window but he had him sit on the bed and he stayed there until the police came and took him away in the ambulance. The information as to heading for the fire escape and trying "to go for the window" was not communicated to the hospital or to Dr. Monckton.

On arrival at the hospital, he was admitted and placed in Room 402 which was on the fourth floor. This procedure was followed because he was a patient of Dr. Monckton and this was the medical ward which Dr. Monckton used for his patients. He remained a patient in the hospital from the morning of July 17 until the forenoon of July 24 when the events which gave rise to this action took place. During the period from the 17th to the 23rd, Lepine was kept in Room 402 which was a medical ward along with several other patients and he received the supervision that the other patients in the same ward were given except that on two occasions he was moved to a room near the nurses' station where more supervision could be given. The second of these occasions was on the morning of July 24 with which I will deal separately. During this period, and including the morning of the 24th, Lepine suffered about 28 epileptic seizures which were noted by the nurses and he had other seizures not noted by the nurses but mentioned by the witness Hertel who was a patient in the same room. Of these seizures about 8 or 9 were *grand mal* and some 17 automatisms. He would at times wander out of his room and once went as far as the X-ray room which was some distance from Room 402.

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

In the early morning of the 24th, Lepine became difficult and noisy. The night supervisor, on becoming aware of this, assigned Nurse Collins to supervise Lepine and she remained with him until 7:30 a.m. that morning and to facilitate the supervision Lepine was taken from Room 402 to a room adjoining the nurses' station. He had a seizure there and climbed over the side rail of his bed. He had another seizure about six o'clock in the morning and his speech was incoherent. This was reported to Dr. Shea by the charge nurse who had been advised of the situation by Nurse Collins, and this doctor prescribed sedation which was given about six in the morning. Later, around seven o'clock, Lepine was up in bed and appeared unaware of what he was doing. His speech was rapid and he was making odd movements and used the expression "That is the man". It was quite obvious that something was troubling him at this time. Nurse Collins appeared concerned with his actions, because on the chart which she made out on leaving she noted the words "psychiatric assistance?". When Nurse Collins left, no other special nurse was put on to replace her nor was an orderly detailed to attend the patient. Dr. Shea visited Lepine about 8:00 o'clock that morning. He read the entries made by the nurse prior to his visit and so was aware of what had transpired during the night, including the entry "psychiatric assistance?" made at about 7:10 a.m. Dr. Shea who, at the time in question, was associate resident in the Department of Medicine attached to the service of neurology had seen and examined Lepine several times in the period from July 17 until July 24, and dealing with the morning of the 24th he testified:

Q. And, why on the morning of the 24th was he on vital signs?

A. I placed him on vital signs being notified of this fall because of any possibility of injury having occurred to his head so that if anything were going wrong this would quickly become evident.

Q. And, what sedation did you order by telephone?

A. Mr. Lepine had been placed on oral dilantin in the regular dose for a person of his age and weight. In addition to this, in an instance such as this, however, it was felt prudent to increase the amount of dilantin he was given with one what we call a stat dose. This is a boost over and above the level that would be circulating in his system and in addition to this he was given a barbiturate which we term sodium amytal, s-o-d-i-u-m a-m-y-t-a-l. The amount was two to three grains, I would honestly have to refer to the order sheet for the actual amount. These were given in the form of an intermuscular injection.

Q. Now, when did you next see Lepine?

A. I next saw Mr. Lepine on my way to the neurology clinic and the hour that I recorded or at least that is recorded in the nurses' notes is in the vicinity of eight fifteen.

Q. And, prior to seeing Lepine did you have an opportunity to see the notes? The nurses' notes?

A. Yes, I did, sir.

Q. So, you were aware of their contents?

A. That is correct.

Q. Where was Mr. Lepine at that time?

A. Mr. Lepine was in his bed, in his usual ward.

Q. That would be 402?

A. 402.

Q. And, what was his condition?

A. A nurse was in company with me, we approached his bed, I recall asking him pertaining to the events of the previous night for which he had no recollection. His responses to me at that time seemed quite normal. He was clear, he was lucid, his replies were in context with the questions and in general he was much as the Court saw him in the stand the other day.

Q. And, at the time you saw him at eight fifteen he seemed to have no trouble from his epilepsy or any of the aftereffects?

A. None.

Q. When you saw him where was he, was he in bed or in a chair?

A. As I recall he was sitting on his bed with his legs dangling over the side.

Mr. Lepine had been brought back to Room 402 at 7:45 a.m. on the 24th and he remained there until approximately 9:05 when the nurse on duty left the room to look at his chart, and on her return about 9:15 she discovered that the patient had gone.

Lepine was found by three police officers at about 9:51 a.m., wandering at Saskatchewan Drive and 116th Street, Edmonton, dressed in a housecoat, pajamas and socks with no shoes. He told the police "The nuts in the hospital have a bomb". He did not appear to know what was going on. He was taken to the hospital by the three police officers who had found him, entering through the emergency entrance. They reported to the person in charge there and were asked to wait until an orderly was summoned to take Lepine back to his room. An orderly arrived and was about to escort Lepine and the officers to Room 402 when he ran out the main door, knocking over a little girl who was coming into the hospital at the time. The police officers and the orderly followed him and they caught up to him when he fell. The evidence is clear that he was particularly violent and mentally unbalanced at this time. He told the

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

police to go ahead and shoot him, that he had nothing left. The hospital orderly was there and saw what had occurred. Lepine was taken back into the hospital by the orderly and the three police officers and taken to Room 402. Staff Sergeant Robertson, who was one of the police officers who brought Lepine back to the hospital, testifying for Lepine, described the events immediately preceding the accident as follows:

> We went up to Room 402 and Lepine's bed was there and it was located near the window of the room that would be against the east wall.
>
> He walked over there, sat down on a chair near his bed, asked if he could put on his shoes. We had no objection, he seemed quite calm then.
>
> He then asked if he could go to the washroom which is located right inside the ward room itself; he was allowed to go there but Ostapowich and myself remained at the door while Sergeant Strate lingered near the window of the room.
>
> There were two other bed patients in the room. I believe the orderly had gone to get a nurse and the nurse in turn had gone to get a doctor to come to attend to Mr. Lepine.
>
> The nurse was a Miss Wallace if I recall correctly. Just before Mr. Lepine came out of the washroom Dr. George Monckton came in with Miss Wallace. Lepine then came out of the washroom and he sort of had a half grin on his face. The doctor asked—said words to the effect, hello Gerald how are you feeling, and to my recollection Lepine answered, just fine doctor, and started walking towards his bed.
>
> Near the—right against the windowsill was a chair. As Lepine started walking towards his bed he suddenly took two steps, leaped up on the chair and just dove right out through the window of the fourth floor.

It is for the injuries then and there sustained that the actions against the hospital and Dr. Monckton were brought. Negligence was alleged against Dr. Monckton as follows:

> (*a*) in failing to have the Plaintiff kept and treated in Station 14, an area of the said hospital especially designed for treatment of such patients with unbreakable windows and located on the lower floor of the said hospital;
>
> (*b*) in failing to cause the Plaintiff to be restrained;
>
> (*c*) in failing to advise the aforesaid police officers that in his condition the Plaintiff was dangerous to himself and others;
>
> (*d*) in failing to keep the patient on the ground floor of the said hospital until he had recovered his reason;
>
> (*e*) in failing to recognize that the Plaintiff was obsessed by the idea of escaping from the said hospital and that he might cause himself injury in attempting so to do and in failing to take any or any adequate precautions to prevent such injury;
>
> (*f*) in failing to see that both the windows and doors of the said public ward were guarded after the Plaintiff was placed in the said ward;

(*g*) in failing to administer a drug which would render the Plaintiff immobile;

(*h*) in holding himself out to provide care and treatment to members of the public and holding himself out to provide proper care and treatment for members of the public and in failing to provide the care and treatment necessary for the Plaintiff;

(*i*) in failing to issue instructions to the staff and persons in charge employed by the said hospital as to the proper requirements for the care and treatment of the Plaintiff and more especially the precautions to be taken with the Plaintiff when the Plaintiff was suffering from an epileptic seizure;

(*j*) in failing to provide the medication and care necessary for the Plaintiff in the circumstances and more especially in failing to warn the hospital staff that would be dealing with the Plaintiff on his return to the hospital after the Plaintiff had left the hospital herein set forth;

Allegations (*a*) to (*g*) above were made against the hospital with four additional allegations as follows:

(*h*) in operating a hospital to which Plaintiff and other members of the public were invited for care and treatment and in failing to provide the care and treatment necessary for the Plaintiff;

(*i*) in failing to issue or to enforce regulations or give proper instructions to the hospital staff of the Defendant for the care and treatment of patients in the Plaintiff's condition and in failing to take such steps as were necessary for the protection of patients such as the Plaintiff who required care beyond that offered ordinary patients in that they could injure themselves, or alternatively, if such instruction was given and regulations were promulgated they were not followed or were neglected in the case of the Plaintiff;

(*j*) in taking or directing the Plaintiff to be taken to a ward on the fourth floor of the hospital;

(*k*) generally in failing to appreciate the probable consequences of Plaintiff's conduct and illness and to take proper or any steps for his safety when they ought to have done so.

In dismissing the action against Dr. Monckton, the learned trial judge, Farthing J., said:

My own view is that as far as Dr. Monckton is concerned—and I am expressing no opinion about the Hospital Board as yet so don't please anticipate what I might say—so far as Dr. Monckton is concerned the plaintiff has singularly failed to establish a cause of action. I can't see any possible basis of claim against Dr. Monckton. I don't think that he has been guilty of anything except possibly, at the very most an error of judgment and that in itself is no cause of action and I doubt very much even if that were the test that the plaintiff would have succeeded in establishing a case against him. The doctor obviously, a physician and surgeon and especially a man of eminence in his own branch of the profession, can't devote his whole time to any one patient and it seems to me that there is no evidence of any negligence on the part of Dr. Monckton throughout this whole matter. He certainly was not responsible for anything that occurred on the morning of the 24th of July, though he did happen to be in the room when, apparently when the unfortunate jump took place.

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

In the action against the hospital, Farthing J. said:

> In the instant case the present plaintiff was in the hospital precisely because he was suffering from epilepsy with post-epileptic automatism and his tendency to irresponsible moving about was well known to all concerned.

Counsel for defendant stressed very strongly the statement of the Judicial Committee in *Vancouver General Hospital vs. McDaniel* [1], expressed tritely in the judgment: "A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice."

There is evidence as to the present customary treatment of ordinary epileptics. There is little or no definite or specific evidence concerning the modern treatment of those epileptics—not more than one in five of them—afflicted with automatism. This repeated reference through the evidence presented on behalf of the defendant to "epilepsy" and "epileptics" *per se* only, in my view, served to emphasize the fundamental basis of this action, *i.e.* that defendant treated plaintiff as it would have treated any other epileptic, quite overlooking the totally different and much more dangerous implications of his automatism.

Moreover, for patients to jump out of hospital windows while extremely rare is not unknown, as the foregoing instances, show. Whatever may be the established practice in Canada and the United States regarding certain contagious diseases, it certainly does not seem to be true that the established practice in the United States is to refuse damages to every person who, because of mental upset, temporary or permanent, has jumped through a hospital window; and with genuine respect to a very strong court in Saskatchewan [2] I venture the opinion that there have not yet been sufficient Canadian decisions to establish such practice in Canada.

Like so many other people I am personally under a great debt of gratitude to the medical profession and to some hospitals, which I will never forget. But if those in charge of hospitals—who are not solely physicians and surgeons—can escape liability for negligence simply on the plea that they have complied with the established practice, they can, in effect, in the course of time create enough customs to provide a good defence against almost any claim for damages for personal injuries.

It is now thirty years since the Privy Council delivered its judgment in *Vancouver General Hospital vs. McDaniel, supra.* From the quotations, *supra*, from Lord Denning M.R. and Lord Nathan, it would seem that in much more recent years it has been reiterated in definite terms that in England common law based on custom will continue to be declared by the courts.

In my humble but convinced opinion, after many hours of considering with my utmost care the evidence in this somewhat lengthy trial, the misfortune which befell the plaintiff resulted from the fact that, though the defendant from the start had definite knowledge of his tendency to dangerous post-epileptic automatism, it placed him in the category of an ordinary epileptic. The only persons in the hospital who seemed to realize

[1] [1934] 4 D.L.R. 593. [2] [1954] 2 D.L.R. 328.

the risks attendant upon his particular form of epilepsy were some of the nurses who, on two occasions before the disaster of 24th July, tried to give him the protection his safety required. It is not my responsibility to say just what officials or employees were at fault. The defendant undertook the care of plaintiff who, through no fault of his own, suffered shattering injuries while in such care.

All changes are not necessarily improvements to the benefit of all affected by them. Had the armorplated glass not been removed from Station 14 on the ground floor of the hospital and had plaintiff been placed therein, this accident would never have occurred. It is noteworthy that in Dr. Snell's explanation as to why this change was made as given above, he referred to "psychiatric patients", not even specifically to epileptics, much less to those afflicted with post-epileptic automatism. This change may have been beneficial to those suffering from ordinary epilepsy. But, with all respect, it would appear obvious to any intelligent high-school student that it was dangerous to automatists. The opinion of Dr. Easton, who knew as much and probably more than any other medical witness about epileptic hospitalization, that, without these safeguards, the only proper course was to keep plaintiff under the care of a competent orderly or nurse at all times, would also seem, to an high-school student to follow in logical sequence.

In the light of the evidence and for the above reasons it seems clear to me that plaintiff is entitled to judgment.

The hospital appealed the finding of liability so made against it and Lepine appealed the dismissal of the action against Dr. Monckton.

The Appellate Division unanimously dismissed the hospital's appeal and allowed the appeal, Cairns J.A. dissenting against Dr. Monckton and as required by *The Contributory Negligence Act* of Alberta determined that each of the defendants was at fault to the extent of 50 per cent.

Cairns J.A. in his reasons for judgment upheld liability against the hospital, holding that it was the negligence of the hospital on July 24 that caused the damage. He said:

After a careful consideration of all of the evidence in this case, some of which I have quoted, I have come to the conclusion that not only had the condition of Lepine worsened, but he became, as I have already indicated, psychotic on the morning of the 24th of July. This condition was known by Nurse Collins and was known to Dr. Shea, or should have been appreciated because he read the chart that morning before seeing Lepine at about 8 a.m. The evidence of the doctors which I have quoted indicated this change in the patient's condition. It was recognized by the hospital authorities and Nurse Collins was put on duty as a special the morning of the 24th, and did, in fact, supervise him. In my view it was negligent conduct not to continue this or other supervision by orderlies, after she went off duty at 7.30 that morning, because of the condition of the patient. The negligence

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

which caused the plaintiff's damage was continuous from that time, and is not confined to the incident when he jumped out the window. It should have been foreseen or anticipated that a patient in his changed condition might well do damage to himself. The doctors' evidence is clear that a psychotic patient requires constant supervision, and this was not supplied. I think Dr. Easton's opinion and the other evidence can only lead one to the conclusion that if there had been supervision by a trained person, Lepine would not have been allowed to escape from the hospital and run away to Saskatchewan Drive. The traumatic experience of his recapture by the police and his becoming violent, and his fight with the police, made his condition much more acute and I have no doubt had some influence on his later mental state and behavior when he jumped out of the window shortly after being returned to his room. As I have said, I do not think that it is necessary to decide whether there was negligence before the 24th, because even if there was, it was not actionable. There certainly was negligence and it was continuous, commencing on the 24th. I think also that the hospital authorities were negligent in not having supervision when Lepine was returned to his room, in view of what was known to have occurred that morning and the knowledge of the orderly who saw the fight, and the fact that this could have been reported to the person in charge before he was taken back to his room, or the orderly should have stayed with him in the room. I base my conclusion, as I have stated, on the continuous negligence commencing prior to his being taken to the room.

Johnson J.A., with whom the Chief Justice of Alberta concurred, found negligence against both Dr. Monckton and the hospital as follows:

It is, I think, obvious that the learned trial judge considered the lack of provision for special care for Lepine throughout his stay in the hospital up to the time of the accident to be the principal negligence of the hospital, for he says later in his judgment:

> "The liability of the present defendant hospital is not to be determined solely by what occurred at the time of the jump but is based throughout upon its persistent refusal to recognize any difference between the care of a patient suffering from severe attacks of automatism and of the vast majority of epileptics who never have such attacks."

In the argument before us, many suggestions were made as to how the accident could have been prevented. Looking at all the evidence in the light of what happened, certain evidence that no one considered particularly significant at the time, assumed much greater importance after the accident had happened—one fact which comes to mind is Lepine's movement towards the window when he was in the King Edward Hotel on the early morning of July 17th. An approach to the determination of the liability of both the doctor and the hospital which looks at events in the light of what subsequently happened, is not a sound one. Liability must be determined upon the knowledge of the dangers inherent in the condition of Lepine when and after he entered the hospital. What form the accident took is only important when it is necessary to determine if the accident is

one which was caused by the failure to take the kind of care which was required, based upon the knowledge which the doctor and the hospital possessed or should have possessed.

The learned trial judge's finding that the hospital should have provided special accommodation for epileptics who also suffered from automatism, coupled with the suggestion that such accommodation be on the ground floor and provided with "armor-plated glass" is not a finding that is supported by the evidence. The hospital had several psychopathic wards—one ward, number 14, was on the ground floor but it had for some time before the accident only ordinary glass in the windows. Epileptics were, on occasion, admitted to this ward, but it was made quite clear by Dr. Easton, whose evidence the learned trial judge accepted, that the responsibility for placing an epileptic in such wards was entirely that of the doctor in charge who alone had the requisite information on which such a decision could be made.

* * *

Having admitted Lepine to a medical ward, the learned trial judge found that special precautions in the form of round the clock supervision should have been provided. This was to prevent the patient from injuring himself while in a state of automatism and to prevent him leaving the hospital and going where he might have been injured. At the close of the argument I was in some doubt how a breach of duty to have constant supervision could be said to have caused the accident because when he dove through the window there was present in the room the doctor, a nurse and three policemen, all of whom had been alerted to the danger that this man might attempt to leave the room unless he were restrained. There was at the time of the accident more protection than a single orderly or nurse would have afforded. Of course, an orderly might have prevented him from leaving the hospital earlier in the morning and if he had been run over by a car while away from the hospital, the absence of supervision which an orderly would have given would have had a causal connection with Lepine being run down and injured. Unless it could be shown that the leaving of the hospital caused or contributed to the accident, there would be no nexus between the negligence and the injury. Lack of supervision could only be a cause of the accident if there were evidence to show that during the escape from the hospital something happened to him which either caused or contributed to the mental unbalance that caused him to leap from the window—by either aggravating an existing condition or creating a new one.

and he cites evidence not relied on by the learned trial judge which, in his opinion, provided the nexus between the failure to provide round the clock supervision and the injury. That evidence was given by Dr. Easton and was as follows:

Q. Well, now, you say that the fact that the man was brought back by the police had something to do with causing him to jump out the window?

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

A. This is at least implied. What I think is this, that a man who suffers from epilepsy, is a known epileptic, and is subject to the traumatic experience of being returned to hospital by these police is more likely to have serious effects than if he hadn't had that experience. The experience in itself is a traumatic thing for this patient with his chronic epilepsy. In other words, these people are much more likely to do something. Now, you can't say what, but they are volatile, irritable, highly sensitive, and he is brought back by the policemen. This in itself might have been a precipitating factor. It certainly was against his best interests.

Later, he said:

A. Well, I can't accept the fact that this episode did not have an upsetting effect on the patient. I think it did.

and an answer by Dr. Monckton:

Q. Yes, Doctor, is it not also true that in a post-epileptic state of automatism that the patient may become violent if the environment changes, that is if he finds himself in strange surroundings, that this is not a good thing to keep his epilepsy under control?

A. Yes, I believe it was Dr. Easton who raised the question of a foreign media for the patient and suggested that this might act adversely, and under some circumstances in certain patients this may be so.

and continues:

This evidence of the traumatic effect of Lepine's escape from the hospital and his return in police custody, expressed though it be as a possibility, is sufficiently strong to warrant a finding that it caused or contributed to the mental state which brought on the accident and thus supplied the link between the lack of proper supervision and the accident and its consequent injuries.

Then, in relation to Dr. Monckton, having referred to Farthing J.'s remarks in dismissing the action against Dr. Monckton previously quoted, Johnson J.A. said:

Against this finding the respondent Lepine appeals. It becomes necessary to determine which was responsible—the hospital or the doctor—for not supplying "round the clock" supervision. I have quoted from the evidence of Dr. Easton that it was for the doctor in charge who had full knowledge of his patient to decide the type of care that he should receive. It is true that he was discussing the choice of institutional care, care in a psychiatric ward and medical ward care, but as the doctor was the only one with the training and experience to determine where he should be treated, it was also he who would know what kind of supervision was necessary for his safety. Dr. Shea, an employee of the hospital, was also in close touch with Lepine but he was not a qualified neurologist and was at all times working under Dr. Monckton. Dr. Monckton admitted that he had been given all the information that Dr. Shea and the hospital nurses had. He also stated that he issued no instructions that Lepine should not be allowed to leave the hospital. He was aware of the staff on duty in Ward 14. He was

the one most fully aware of the danger. He requested that Lepine be treated in that ward. The responsibility for seeing that extra care be provided was, at its very least, a shared responsibility. If therefore, the breach of the duty to see that extra round the clock help was provided for Lepine is the basis of liability in this case, both Dr. Monckton and the hospital should be held liable.

And in dealing further with the question of negligence, Johnson J.A. continued:

As I have mentioned, the learned trial judge made another finding of negligence against the hospital. A further possible ground of negligence was urged upon us during the hearing. Having found evidence to support one finding of negligence, it would not ordinarily be necessary to discuss these other heads of negligence. Because of the involvement of Dr. Monckton it is necessary to consider them.

The acts complained of can be stated thus:

(i) There was a change in the condition of Lepine during the twenty-four hours which preceded the accident and these changes, known to the hospital staff, should have alerted the hospital to a new danger that had arisen and have caused them immediately to take added precautions, either by having him removed to the psychiatric ward or by putting on an additional nurse or orderly to look after him.

(ii) (As found by the learned trial judge), on his return to the hospital Lepine should have been met by a doctor instead of an orderly and he should have been given immediate treatment.

The first of these grounds was not mentioned by the learned trial judge so we do not have the benefit of any finding of fact by him. My brother Cairns has fully discussed the events of that morning. From the nurses' notes it appears that Nurse Collins raised the question whether psychiatric assistance might be required. Dr. Shea saw the notes and the memorandum of his examination appears among these notes:

> "8:15 A.M. Dr. Shea visited. At this time patient was cheerful, laughed and joked at humorous comments and incident. Talking to patient in next bed. Patient refused to lie in bed while it was being made (said he'd rather sit in chair) but returned to bed after it was made and side rails which had been let down while bed was being made were put up again. Asked for his other pillow (had one under his head when bed was brought into room) so this was given to him. Foot of bed was elevated."

Having found the patient in the same state mentally as he had been during the previous week and having satisfied himself that a transfer to a psychiatric ward was not necessary, I cannot see that it was negligence not to have him placed in that ward.

As to the suggestion that the hospital should have been alerted and put on extra help, I do not think that this point requires to be determined. The learned trial judge has held that there should have been extra help in the

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

form of either an extra nurse or an extra orderly to look after Lepine for all of the period that he was in the hospital, which would include the period up to the time he escaped. This evidence, if it establishes anything, confirms that the need for such a nurse or orderly had at that time become more apparent. Instead of being negligence, it merely increased the degree of negligence that the hospital was guilty of from that time onwards.

The learned trial judge's final finding of fact was made by apparently adopting an argument of Lepine's counsel that Lepine, instead of being taken back to his old ward, should have been met by a physician and given treatment presumably treatment that would have immobilized him and prevented further escape. With respect, I am unable to find any evidence suggesting that such a procedure was usual or warranted. If it is an inference from the facts, the facts, I suggest, do not warrant such an inference. It is not enough to say that if this had been done no accident would have happened. In order to support such a finding surely there should be evidence that these procedures are a common and accepted practice in such cases. As I have said, no such evidence was given.

In summary, Farthing J. and Cairns J.A. found no negligence on the part of Dr. Monckton. Farthing J. held the hospital negligent because it placed Lepine in the category of an ordinary epileptic and that had the armor-plated glass not been removed from Station 14 on the ground floor of the hospital and had the plaintiff been placed therein, this accident would not have occurred and that, having regard to Lepine's post-epileptic automatism, the only proper course was to keep him under the care of a competent orderly or nurse at all times. Cairns J. A. did not adopt Farthing J.'s approach, saying:

As I have said, I do not think that it is necessary to decide whether there was negligence before the 24th, because even if there was, it was not actionable. There certainly was negligence and it was continuous, commencing on the 24th. I think also that the hospital authorities were negligent in not having supervision when Lepine was returned to his room, in view of what was known to have occurred that morning and the knowledge of the orderly who saw the fight, and the fact that this could have been reported to the person in charge before he was taken back to his room, or the orderly should have stayed with him in the room. I base my conclusion, as I have stated, on the continuous negligence commencing prior to his being taken to the room.

Johnson J. A., referring to Farthing J.'s findings against the hospital, said:

The learned trial judge's finding that the hospital should have provided special accommodation for epileptics who also suffered from automatism, coupled with the suggestion that such accommodation be on the ground floor and provided with "armor-plated glass" is not a finding that is

supported by the evidence. The hospital had several psychopathic wards —one ward, number 14, was on the ground floor but it had for some time before the accident only ordinary glass in the windows. Epileptics were, on occasion, admitted to this ward, but it was made quite clear by Dr. Easton, whose evidence the learned trial judge accepted, that the responsibility for placing an epileptic in such wards was entirely that of the doctor in charge who alone had the requisite information on which such a decision could be made.

and:

At the close of the argument I was in some doubt how a breach of duty to have constant supervision could be said to have caused the accident because when he dove through the window there was present in the room the doctor, a nurse and three policemen, all of whom had been alerted to the danger that this man might attempt to leave the room unless he were restrained. There was at the time of the accident more protection than a single orderly or nurse would have afforded. Of course, an orderly might have prevented him from leaving the hospital earlier in the morning and if he had been run over by a car while away from the hospital, the absence of supervision which an orderly would have given would have had a causal connection with Lepine being run down and injured. Unless it could be shown that the leaving of the hospital caused or contributed to the accident, there would be no nexus between the negligence and the injury. Lack of supervision could only be a cause of the accident if there were evidence to show that during the escape from the hospital something happened to him which either caused or contributed to the mental unbalance that caused him to leap from the window—by either aggravating an existing condition or creating a new one.

and, having taken that position, went on to find a nexus between the alleged failure to provide round the clock supervision and the leap from the window relying on an hypothesis expressed only as a possibility that the traumatic effect of Lepine's escape from the hospital and his return in police custody caused or contributed to the mental state which brought on the accident. Then, dealing with the appeal against Dr. Monckton, Johnson J.A. said:

It becomes necessary to determine which was responsible—the hospital or the doctor—for not supplying "round the clock" supervision.

and:

Dr. Monckton admitted that he had been given all the information that Dr. Shea and the hospital nurses had. He also stated that he issued no instructions that Lepine should not be allowed to leave the hospital. He was aware of the staff on duty in Ward 14. He was the one most fully aware of the danger. He requested that Lepine be treated in that ward. The responsibility for seeing that extra care be provided was, at its very least, a shared responsibility. If therefore, the breach of the duty to see that extra

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

round the clock help was provided for Lepine is the basis of liability in this case, both Dr. Monckton and the hospital should be held liable.

Johnson J.A. also held it was not negligence not to have placed Lepine in the psychiatric ward at 8:15 a.m. on July 24, and dealing with the allegation that Lepine, instead of being taken back to his old ward when returned to the hospital by the police, should have been met by a physician and given treatment that would have immobilized him, Johnson J.A. said:

> ...I am unable to find any evidence suggesting that such a procedure was usual or warranted. If it is an inference from the facts, the facts, I suggest, do not warrant such an inference. It is not enough to say that if this had been done no accident would have happened. In order to support such a finding surely there should be evidence that these procedures are a common and accepted practice in such cases. As I have said, no such evidence was given.

Smith C.J.A., agreeing with Johnson J.A., stressed that Lepine required "continuous supervisory care" from July 17 forward and the hospital was negligent in not providing that care and that that negligence was the effective cause of Lepine's injuries. This was contrary to the view taken by Cairns J.A. as previously quoted.

I have gone into the reasons for judgment somewhat extensively in order to discover the points upon which the judges of the Appellate Division were in agreement in respect of the negligence found against the two defendants, and, apart from the somewhat general finding that Lepine should have had but was not given continuous supervision on a round the clock basis from July 17 onwards, there does not appear to be a consensus on the part of the judges below other than if such supervision had been provided Lepine would not have been permitted to leave the hospital as he did between 9:05 a.m. and 9:15 a.m. on July 24, and that if he had not left the hospital and been returned to Room 402 he would not have jumped from the window.

No one suggests that after being returned to Room 402 and pending Dr. Monckton's arrival that Lepine was without adequate supervision or that the presence of an additional orderly or nurse would have prevented Lepine's totally unexpected leap on to the chair and through the

window which was higher than usual from the floor and closed at the time.

I am left with the distinct impression that the fact that Lepine jumped through the window greatly influenced the testimony of Dr. Easton, relied on so strongly by all judges below, who seemed unable to visualize the situation as it developed towards its climax without being able to test the steps in the tragic occurrence except in the light of the final act of jumping. It is to be noted that Dr. Easton, in referring to the final act of jumping, said:

> A. I do not think from the evidence given, and this was given in the evidence, that anyone could have prevented him going through the window at that time.

The case for Lepine was argued with great persuasion and sincerity. He is a most unfortunate young man and one who evokes sympathy. Farthing J. said:

> Despite his severe and permanent disabilities plaintiff impressed me as being sincerely honest and quietly courageous in his outlook on life without any tendency to self-pity.

This is one of those "hard cases" which could easily make bad law unless one adheres to established principles of responsibility in the face of the actual situation as it developed and moved to a rapid and unexpected climax when Lepine emerged from the bathroom, having given no prior sign of wanting to destroy himself.

The question of whether there was or was not negligence in a given situation has been dealt with in many judgments and by writers at great length. One principle emerges upon which there is universal agreement, namely, that whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission. As was said by Lord Thankerton in *Glasgow Corporation v. Muir*[1],

> The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect,

[1] [1943] A.C. 448 at 454-5.

1966

UNIVERSITY HOSPITAL BOARD v. LEPINE

Hall J.

and not to give undue weight to the fact that a distressing accident has happened. . . . .

Applying this principle and recognizing the duty which a doctor and a specialist such as Dr. Monckton owes to his patient and the duty which a hospital owes to a given patient as an individual, I am impelled to the conclusion that Lepine's sudden leap through the window was not an event which a reasonable man would have foreseen and have been required to take more precautions than were available in this case. Short of having put Lepine in some restraining device or of keeping him at ground level, both of which were rejected by the Appellate Division as being necessary or required, the injuries sustained by Lepine were the result of an impulse on his part which could not reasonably have been foreseen. To hold otherwise would, in my judgment, make doctors and hospitals insurers against all such hazards which they are not.

The appeal should, therefore, be allowed and the actions dismissed with costs throughout.

Appeal allowed and the actions dismissed with costs.

Solicitors for the appellant Hospital Board: Clement, Parlee, Irving, Mustard & Rodney, Edmonton.

Solicitors for the appellant Monckton: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitors for the respondent Lepine: Macdonald, Spitz & Lavallee, Edmonton.

THE CITY OF SAINT JOHN .....APPELLANT;

AND

IRVING OIL COMPANY LIMITED .....RESPONDENT.

1966

*May 30, 31
June 28

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Arbitration—Expropriation—Application to set aside or remit back arbitrators' award—Governing principle—Whether Appeal Division justified in examining proceedings before arbitrators or interfering with award—Whether opinion evidence of qualified appraiser inadmissible on ground it was hearsay—Arbitration Act, R.S.N.B. 1952, c. 9.

The appellant City, acting under the powers conferred upon it by the *City of Saint John Urban Renewal Expropriation Act,* 1960-61 (N.B.), c. 129, expropriated a property on which a service station belonging to the respondent company was located offering $20,500 "as compensation for the fair value of the land". This offer was refused by the company and the parties being unable to "reach agreement as to the amount of compensation", arbitrators were appointed pursuant to s. 9(1) of the Act. The company claimed $36,516, and after a prolonged hearing the arbitrators made an award of $22,816. The company proceeded by way of notice of motion before the Appeal Division of the Supreme Court of New Brunswick for an order that this award be set aside or, in the alternative, remitted to the arbitrators with a direction to award the amount indicated by the evidence in accordance with correct legal principles. By the judgment of the Appeal Division the award was ordered "to be remitted to the arbitrators for reconsideration on admissible evidence and in accordance with correct legal principles".

Held: The appeal should be allowed and the award of the arbitrators restored.

The hearing of the application to set aside or remit back the award was *not* an appeal. The principle governing such applications was that a Court will not look at anything to induce it to review the decision of an arbitrator on any matter submitted to him for his decision, except it be something appearing on the face of the award, or, on a document forming part of the award. *(Holgate v. Killick* (1861), 31 L.J. Ex 7.)

The mere allegation that the arbitrators apparently had acted upon evidence which was not admissible did not justify the Appeal Division in examining the evidence in order to consider whether some of it was admissible or not. Nor was the failure of the arbitrators to explain the reasons for their award a circumstance which entitled the Appeal Division to examine the record.

There was no allegation that the award was improperly procured or that it was ambiguous or uncertain and as there did not appear to be any error in law on its face, no legal grounds had been disclosed to justify the Appeal Division in examining the proceedings before the arbitrators or interfering with their award.

* PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

1966

CITY OF SAINT JOHN v. IRVING OIL CO. LTD.

The contention that the opinion of the expert appraiser called by the City to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with persons who had been parties to sales of land in the area was rejected.

City of Vancouver v. Brandram-Henderson of B.C. Ltd., [1960] S.C.R. 539; *Ramage v. City of Vancouver* (1957), 6 D.L.R. (2d) 236, distinguished; *Kelantan Government v. Duff Development Co.*, [1923] A.C. 395; *Walford, Baker & Co. v. Macfie & Sons* (1915), 84 L.J.K.B. 2221; *Doyle v. City of Saint John* (1964), 44 D.L.R. (2d) 378; *Scotia Construction Co. Ltd. v. City of Halifax*, [1935] S.C.R. 124; *Re Confederation Coal and Coke Ltd. and Bermingham et al.*, [1939] O.R. 157; *Chamsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.* (1923), 92 L.J.P.C. 163, referred to.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, whereby an arbitration award was ordered to be remitted to the arbitrators for reconsideration. Appeal allowed and award of arbitrators restored.

John P. Palmer, Q.C. and *John W. Turnbull*, for the appellant.

A. B. Gilbert, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick whereby an award made by arbitrators appointed pursuant to the provisions of the *City of Saint John Urban Renewal Expropriation Act*, c. 129 of the Acts of Assembly of the Province of New Brunswick 1960-61 (hereinafter referred to as "the Act") was ordered "to be remitted to the arbitrators for reconsideration on admissible evidence and in accordance with correct legal principles".

The circumstances giving rise to the appeal are that the City of Saint John, acting under the powers conferred upon it by the Act, expropriated a property on which a service station belonging to Irving Oil Company Limited was located offering $20,500 "as compensation for the fair value of the land". This offer was refused by the Company and the parties being unable to "reach agreement as to the amount of compensation", arbitrators were appointed pursuant to s. 9(1) of the Act which provides that the Common Council of the City of Saint John and the owner of the

property shall each appoint one arbitrator and that the two thus appointed shall select a third. The task required of such arbitrators and the manner in which it is to be conducted are governed by the provisions of ss. 12 and 13 of the Act which read as follows:

12. The reference shall then be conducted under the provisions of the Arbitration Act.

13. The arbitrators shall determine the fair value of each parcel of the land as of the date of the recording of the Council order; and the owner or owners thereof shall be entitled to be paid the sum awarded by the arbitrators, together with interest at the rate of five per centum per annum from the time when the land was acquired, taken or injuriously affected to the date of payment of compensation; the decision of the arbitrators shall be final and not subject to appeal except on a matter of law.

The claim of the respondent Company, as included in the Statement of Claim which was filed before the arbitrators, was made up as follows:

Land and building	$23,000.00
Loss of business due to expropriation	10,000.00
	33,000.00
Add 10% for forcible taking	3,300.00
Add moving costs	216.00
	$36,516.00

After a prolonged hearing at which eleven witnesses testified on behalf of the Company and eight on behalf of the City, the arbitrators made the following *unanimous* award:

The undersigned arbitrators in the above expropriation, having met together and having perused the evidence and having considered the arguments made by Counsel for the expropriating authority and the owners, have unanimously agreed the losses suffered to the owners are as follows:

(*a*) Land and buildings	$19,600.00
(*b*) Moving expenses	216.00
(*c*) Depreciation of equipment	500.00
(*d*) Business disruption and loss	2,500.00
	$22,816.00

We therefore conclude that the fair value of the lands taken and injuries arising therefrom is in the amount of $22,816.00.

This amount, plus the usual 5% from the date of taking falls under the Provisions of the Act, and since the award exceeds the offer made by the City under Section 7 of the Act, the owners shall be entitled to costs to be taxed.

1966

CITY OF SAINT JOHN v. IRVING OIL CO. LTD.

Ritchie J.

The respondent proceeded by way of notice of motion before the Appeal Division of the Supreme Court of New Brunswick for an order that this award be set aside or, in the alternative, remitted to the arbitrators with a direction to award the amount indicated by the evidence in accordance with correct legal principles.

The following provisions of the *Arbitration Act*, R.S.N.B. 1952, c. 9, are relevant in considering the circumstances under which the Supreme Court of New Brunswick is empowered to review an arbitrator's award:

5.(i) The award made by the arbitrators or a majority of them or the umpire shall be final and binding on the parties and the persons claiming under them respectively; . . .

16.(1) In all cases of reference to arbitration, the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the order so remitting otherwise directs, make their award within three months after the date of the order.

17.(1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

25. Any . . . arbitrators . . . may, at any stage of the proceedings under a reference, and shall, if so directed by the Court, state in the form of a special case for the opinion of the Supreme Court, Appeal Division, any question of law arising in the course of the reference.

In the case of *Doyle v. City of Saint John*[1], Chief Justice McNair, speaking on behalf of the Appeal Division of the Supreme Court of New Brunswick, after referring to ss. 16 and 17 of the Act, went on to say:

The authority to remove an arbitrator, or set aside or remit back an award, vested by the *Arbitration Act* in the Supreme Court is an original jurisdiction which can be exercised by this Division, sitting as a Court of first instance. Any appellate jurisdiction, however, which we possess in relation to such matters is, in our view, exercisable only on an appeal to us from an order made by a Judge of the Supreme Court in the exercise of his co-ordinate original jurisdiction under the Act.

In making its application to the Appeal Division the respondent invoked the provisions of Order 64, Rule 14 of the Rules of the Supreme Court of New Brunswick which read as follows:

An application to set aside an award may be made at any time before the last day of the sitting of the Court of Appeal next after such award

[1] (1964), 44 D.L.R. (2d) 378 at 381.

has been made and published to the parties. Provided that the Court or a Judge may by order extend the time either before or after the same is elapsed.

The making of such an application under this rule is the procedure which was expressly approved in the *Doyle* case, *supra*, and this interpretation of its own rule by the highest Court in New Brunswick is, of course, binding on the Courts of that Province but nothing herein contained should be taken as endorsing it.

It is, however, clear that the hearing of such an application is *not* an appeal. Chief Justice McNair was careful to point this out and in so doing referred to the reasons for judgment of Locke J. in *City of Vancouver v. Brandram-Henderson of B.C. Ltd.*[1] (hereinafter referred to as the "*Brandram-Henderson* case") where he said:

> This is not an appeal from the award and the proceedings upon a motion such as this are not in the nature of a rehearing, as was the case in *Cedar Rapids v. Lacoste* . . . This fact is noted in that portion of the judgment of the Judicial Committee in the second appeal in that matter, to which we were referred on the argument. We cannot in the present proceedings weigh the evidence or interfere with the award on any such ground as that it is against the weight of the evidence.

The respondent's notice of motion is based on the following five grounds:

> 1. That the said Arbitrators misdirected and misconducted themselves by admitting and apparently acting upon evidence which by law was not admissible.
>
> 2. That the said award is bad on the face of it in that it does not show that the item of $19,600.00 for land and buildings was the value to the owner and such amount is not supported by the evidence and established principles of law.
>
> 3. That the award is bad on the face of it in that the item awarded for 'business disruption and loss of $2,500.00' is not supported by the evidence and the established principles of law.
>
> 4. That the said award is bad on the face of it as the findings of fact therein are not supported by the evidence and the established principles of law.
>
> 5. That the said Arbitrators misconducted and misdirected themselves by failing to allow the claimant, Irving Oil Company, Limited, proper compensation for loss of business and compulsory taking in accordance with established principles of law.

The elaborate reasons for judgment delivered by Ritchie J.A. on behalf of the Appeal Division, containing as they do a detailed review of much of the evidence taken before the arbitrators, make it apparent that in his opinion the mere reference in the award to the arbitrators "having

[1] [1960] S.C.R. 539 at 555.

1966

CITY OF SAINT JOHN v. IRVING OIL CO. LTD.

Ritchie J.

perused the evidence..." had the effect of incorporating the whole of the proceedings in the award itself so that the Appeal Division was entitled to re-examine and reassess all the evidence and to treat any error which it found in the conduct of the proceedings as an error appearing "on the face of the award". In expounding this opinion the learned judge said:

> To grant the application we must find the award is bad on its face, as involving an apparent error either in fact or in law. In the circumstances with which we are dealing, the face of the award includes the transcript of the proceedings. *City of Vancouver v. Brandram-Henderson of B.C. Limited*, [*1960*] S.C.R. 538 at 544 and 550.
>
> In the absence of any contrary declaration, it is an implied term in every reference to arbitration that the arbitrators will make their decision in accordance with the ordinary rules of law and with regard to the admissible evidence presented to them. When, as is the case here, it is submitted the award is not supported by admissible evidence and contravenes established principles of law, we may examine the transcript of the proceedings for the purpose of determining whether or not there is admissible evidence to support the findings of the arbitrators. *City of Vancouver v. Brandram-Henderson of B.C. Limited (supra); Ramage v. City of Vancouver* (1957) 6 D.L.R. (2d) (B.C.C.A.) at 241. If there is no admissible evidence on which the award could properly have been arrived at, it must be set aside. *Lacoste v. Cedar Rapids Manufacturing & Power Company* [1928] 2 D.L.R. 1 at 11, cited with approval in *City of Vancouver v. Brandram-Henderson of B.C. Limited (supra)*.

As has been indicated, this is not an appeal from the arbitrators. The limited jurisdiction of a court in considering an application to set aside or remit back an award under such circumstances was considered in this Court by Sir Lyman Duff in *Scotia Construction Co. Ltd. v. City of Halifax*[1], where he said:

> An award can be set aside, (1) when it has been improperly procured, and (2) on the ground of misconduct of the arbitrator. 'Misconduct' is in this relation a term of very comprehensive denotation, and includes ambiguity and uncertainty in the award, as well as manifest error of law on the face of the award. The appellants have not established the existence of any of these grounds.

The principle governing such applications which has long been established at common law, was referred to by Masten J. A. speaking on behalf of the Court of Appeal of Ontario in *Re Confederation Coal and Coke Ltd. and Bermingham et al.*[2], where he said:

> I find nothing in any of the cases at variance with the statements of Wilde B., in *Holgate v. Killick* (1861), 31 L. J. Ex. 7, where he says:
>
> "The principle to be collected from the later cases is very plain, and it is, that the *Court will not look at anything to induce it to*

[1] [1935] S.C.R. 124 at 129. [2] [1939] O.R. 157 at 169.

review the decision of an arbitrator on any matter submitted to him for his decision, except it be something appearing on the face of the award, or, on a document forming part of the award."

The italics are my own.

The meaning to be given to the phrase "error in law on the face of the award" in such cases is described by Lord Dunedin in *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.*[1], where he said:

> An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated therein, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and you can then say that it is erroneous . . . Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made.

This test was expressly adopted by Locke J. in the *Brandram-Henderson of B.C. Limited* case, *supra*, at p. 549.

The *Brandram-Henderson* case and the case of *Ramage v. The City of Vancouver*[2], (hereinafter referred to as the "*Ramage* case") are the two cases chiefly relied upon as authority for the proposition that the Appeal Division was entitled to examine the record of the proceedings before the arbitrators when considering the application made by the respondent in its notice of motion.

In both these cases the City of Vancouver was seeking to set aside certain portions of the arbitrators' award on the ground that the property owner had not proved any damage whatever in respect of the items complained of and accordingly that nothing should have been awarded for these items. This amounted to a clear challenge of matters appearing on the face of the award on the legal ground that there was "no evidence" and the question so raised could only be resolved by the Court examining the proceedings to see if there was in fact any evidence. It was on this ground that the Court found itself entitled to look at the evidence.

In the present case it is not the City but the property owner which seeks to have the award set aside and it appears to me to be quite unrealistic to suggest that the grounds set forth in the notice of motion are to be read as meaning that the claimant, which called evidence in support of the various heads of compensation, was seeking to

[1] (1923), 92 L.J.P.C. 163 at 166.
[2] (1957), 20 W.W.R. 157, 6 D.L.R. (2d) 236.

1966

CITY OF SAINT JOHN v. IRVING OIL CO. LTD.

Ritchie J.

have the award set aside on the ground that there was no evidence whatever to support one or more of the items found by the arbitrators.

The suggestion that the respondent's notice of motion raised the legal question of "no evidence" which formed the basis of the decision in the *Brandram-Henderson* and *Ramage* cases is also clearly inconsistent with its alternative request that the award be remitted to the arbitrators with a direction to *award the amount indicated by the evidence.* The last four grounds set forth in the notice of motion must, I think, be taken as questioning the amounts awarded by the arbitrators rather than their right to make any award at all on the evidence before them, and such a complaint does not raise any question of law.

I am therefore of opinion that the *Brandram-Henderson* and *Ramage* cases are distinguishable from the present case and afford no authority to justify the Appeal Division in examining the proceedings before the arbitrators on the reference here in question.

The first ground in the notice of motion alleges that the arbitrators admitted and apparently acted upon evidence which by law was not admissible but this is a very different thing from saying that there was no admissible evidence at all. In the course of his reasons for judgment, however, Ritchie J.A. said that:

> If arbitrators proceed illegally as for instance by deciding on evidence which was not admissible or generally speaking on principles of construction which the law does not countenance there is on the face of the award an error in law which may be ground for setting it aside. *Kelantan Government v. Duff Development Co.* [1923] A.C. 395 (H. of L.), *McCain v. City of Saint John.*

If the learned judge is suggesting an error in law on the part of the arbitrators which can only become apparent after an examination of the evidence is to be treated as an error in law on the face of the award, then with all respect I disagree with him. What was said by Viscount Cave in the *Kelantan Government* case was that where the reference was a reference as to construction:

> ...it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it;

and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. *If it appears by the award* that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award.

The italics are my own.

In the same connection Ritchie J.A. also refers to the case of *Walford, Baker & Co. v. Macfie & Sons*[1] and he cites that portion of the judgment of Lush J. where he said that:

...when it appears that an umpire allows to be given, and acts upon, evidence which is absolutely inadmissible, and which goes to the very root of the question before him, this Court has ample jurisdiction to set the award aside on the ground of legal misconduct on the part of the umpire.

I think it desirable to point out that that was a case which was referred to arbitration under the terms of a contract of sale dated May 14, 1914 which was incorporated by reference on the face of the arbitrators' award and where the arbitrators found that the sellers were "entitled to suspend delivery under this contract". The very short judgment of Lush J. is predicated upon the following statement:

When one observes that the contract of May 14, 1914 which was the only matter before the umpire, contains no clause providing for the suspension of deliveries by the sellers, it is manifest that the umpire, in making his award, looked to some other document.

It was accordingly manifest on the face of the award in that case that an error had been made.

If it is alleged to be apparent on the face of an award that any part of it is wholly based upon evidence which was not properly admitted before the arbitrators, then, as has been indicated, there may be cases where it is permissible to examine the evidence, but the general rule, and the one which in my opinion applies in the present case is that stated in Russell on Arbitration, 17th ed. at p. 179, where it is said:

In deciding as to admissibility of evidence tendered, the arbitrator must act honestly and judicially, and if while so acting he decides erroneously that evidence is or is not admissible, that is not in itself misconduct, and (as with other mistakes) his award will not be set aside on that ground, unless the error appears on its face.

[1] (1915), 84 L.J.K.B. 2221.

1966

CITY OF SAINT JOHN v. IRVING OIL CO. LTD.

Ritchie J.

It should be noticed also that the terms of s. 25 of the *Arbitration Act, supra,* provide for a reference at any stage of the proceedings in the form of a special case for the opinion of the Supreme Court, Appeal Division, on any question of law arising in the course of the arbitration and if one of the parties seeks to have evidence excluded on the ground of its inadmissibility, application can be made to the arbitrator to state a case for the Appeal Division under this section and if the application is refused the proceedings can be adjourned so as to allow for an application to the court for an order directing a case to be stated. Procedure is thus afforded under the Act for settling the question of whether certain evidence is to be admitted or not before the arbitrators make their award.

With all respect for the conclusion reached by the Appeal Division, I do not think that the mere allegation that the arbitrators apparently had acted upon evidence which was not admissible justified that Court in examining the evidence in order to consider whether some of it was admissible or not.

Ritchie J.A., however, in the course of his reasons for judgment, found that there was another ground upon which the Appeal Division was entitled to examine the record and in so doing he said:

> As the board chose not to explain the reasons for their award, we have, with one exception, no precise knowledge of just what considerations did determine the amount of the individual items comprising the compensation they considered the company should receive. In such circumstances the record also may be examined for indications of the attitudes with which the members of the Board approached the problem entrusted to them.

It is clear that one of the grounds upon which the Appeal Division granted the present application was that the arbitrators had failed to be more explicit in the terms of their award.

After having stated that the effect of certain of the respondent's evidence was not challenged "by any admissible contrary evidence" Ritchie J.A. went on to say:

> If the board saw fit to reject the testimony of those four witnesses they should have done so explicitly and should not have left open to conjecture the principle on which they determined the amount of compensation for the land and building and how such compensation was computed.

I am, with respect, unable to agree with the reasoning of the learned trial judge in this regard and I would on the contrary adopt the following passage from Russell on Arbitration, *supra*, at p. 322 as applicable to the circumstances here in question:

> There is no reason why an arbitrator who has not been asked to state an award in the form of a special case should on the face of his award give any reasons for any part thereof, whether the substantive part or the costs part.

Accordingly, I do not think that the failure of the arbitrators to explain the reasons for their award was a circumstance which entitled the Appeal Division to examine the record.

In the present case there is no allegation that the award was improperly procured or that it is ambiguous or uncertain and as there does not appear to me to be any error in law on its face, I have reached the opinion that no grounds have been disclosed to justify the Appeal Division in examining the proceedings before the arbitrators or interfering with their award and I would allow the appeal on this ground.

It would be unnecessary to say more than this were it not for the fact that it was strenuously contended in the course of the argument before us that the opinion of the expert appraiser called by the City to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with forty-seven persons who had been parties to sales of land in the area. In this regard, Ritchie J.A. made the following finding:

> Based on the study he had made of market conditions in the area as represented by forty-six unidentified and one identified transactions, Mr. de Stecher applied a unit value of $40 per front foot...Opinion evidence as to the value of land based on such a foundation was inadmissible. It was admitted by the Board despite strong objections of counsel for the Company. The validity of an opinion such as expressed is only as good as the validity of the information on which it is based. The precise information obtained in respect of all forty-seven transactions, including price and the dimensions and physical characteristics of each property should have been submitted to the Board.

This opinion was in accordance with a decision rendered by the same judge on behalf of the same bench of judges in

1966

CITY OF SAINT JOHN v. IRVING OIL CO. LTD.

Ritchie J.

respect of evidence of the same witness in *McCain v. City of Saint John*[1], where he said:

> Much of his (Mr. de Stecher's) opinion evidence was founded on hearsay information obtained from sources not always disclosed.
>
> In the course of making his appraisal, Mr. de Stecher compiled a market survey covering sales of as many properties in the area during the preceding four years as he could obtain information on. ...The report indicates the market survey rests on a foundation of hearsay and is restricted mainly to sales by trustees of estates to public bodies. When an appraiser elects to rest his valuation of real estate on sales of comparable properties, he should testify he has examined each of them.
>
> The greater part of the de Stecher evidence, including the appraisal report, was inadmissible.

Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called. To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.

The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision.

I have not found it necessary to deal with all the questions raised in the very exhaustive judgment of the Court of Appeal, but I think it desirable to say that I do not think it to be apparent from the face of the award or otherwise that the arbitrators considered anything other than "value to the owner" in reaching their award.

[1] (1965), 50 M.P.R. 363.

In view of all the above, I would allow this appeal and restore the award made by the arbitrators. The appellant will have his costs in this Court and in the Court of Appeal.

Appeal allowed and award of arbitrators restored.

Solicitors for the appellant: Palmer, O'Connell, Leger & Turnbull, Saint John.

Solicitors for the respondent: Gilbert, McGloan & Gillis, Saint John.

RODI & WIENENBERGER AKTIENGESELLSCHAFT .....APPELLANT;

AND

METALLIFLEX, LTD. .....RESPONDENT.

1966
*Feb. 24, 25
Apr. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Failure to work invention on a commercial scale—Whether abuse of exclusive rights—Whether satisfactory reasons advanced by patentee—Patent Act, R.S.C. 1952, c. 203, ss. 2(j), 46, 67, 68.

In 1954, the appellant was granted a patent relating to extensible watch bracelets. In 1961, the respondent applied for a compulsory licence under s. 67(1) of the *Patent Act*, R.S.C. 1952, c. 203, on the ground that there had been abuse of the exclusive rights under the patent. The Commissioner of Patents ordered the grant of a licence and fixed the royalty to be paid thereunder. On appeal, the Exchequer Court affirmed the granting of the licence but referred the matter back to the Commissioner to reconsider the question of royalty. The appeal to this Court was on the granting of the licence only.

Held: The appeal should be dismissed.

Per Curiam: Where an applicant for a compulsory licence under ss. 67 and 68 of the *Patent Act* has established that the patented invention is capable of being worked in Canada and that it has not been worked in Canada on a commercial scale by the end of the 3-year period allowed in s. 67(1), the onus of justifying the use he has made of his monopoly falls on the patentee. On the facts of this case, the appellant has failed to satisfy the onus thus placed on it, and, therefore, the compulsory licence was rightly granted.

Per Spence J.: The trial judge rightly rejected the main contention of the appellant that the infringement of its patent by many competitors, and particularly the respondent, provided a "satisfactory reason"

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* PRESENT: Taschereau C.J. and Judson, Ritchie, Hall and Spence JJ.

1966

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX, LTD.

within s. 67(2)(*a*) of the *Patent Act*. The evidence in this case was a clear demonstration of the appellant's intent not to work the invention in Canada on a commercial scale.

Brevets—Licence obligatoire—Défaut d'exploiter l'invention sur une échelle commerciale—Abus des droits exclusifs—Justification du défaut d'exploitation—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(j), 46, 67, 68.

En 1954, un brevet se rapportant à des bracelets de montre extensibles fut émis à l'appelante. En 1961, l'intimée présenta une requête pour obtenir une licence obligatoire en vertu de l'art. 67(1) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, pour le motif qu'il y avait eu abus des droits exclusifs conférés par le brevet. Le Commissaire des Brevets a ordonné l'émission d'une licence et a fixé les droits à être payés. Sur appel, la Cour de l'Échiquier a confirmé l'émission de la licence mais a renvoyé l'affaire devant le Commissaire sur la question des droits. L'appel devant cette Cour ne concernait que la licence seulement.

Arrêt: L'appel doit être rejeté.

La Cour: Lorsque le requérant d'une licence obligatoire en vertu des arts. 67 et 68 de la *Loi sur les Brevets* a établi que l'invention brevetée est susceptible d'être exploitée au Canada et qu'elle n'a pas été exploitée sur une échelle commerciale au Canada à l'expiration de la période de trois ans requise par l'art. 67(1), le breveté a le fardeau de justifier l'usage qu'il a fait de son monopole. Les faits dans cette cause démontrent que l'appelante n'a pas réussi à satisfaire ce fardeau, et, en conséquence, l'émission de la licence était justifiée.

Le Juge Spence: Le juge au procès était justifié de rejeter la prétention principale de l'appelante à l'effet que la violation de son brevet par plusieurs concurrents, et particulièrement par l'intimée, était une justification en vertu de l'art. 67(2)(*a*) de la *Loi sur les Brevets*. La preuve dans cette cause démontrait clairement l'intention de l'appelante de ne pas exploiter l'invention sur une échelle commerciale au Canada.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], confirmant une décision du Commissaire des Brevets. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming a decision of the Commissioner of Patents. Appeal dismissed.

Christopher Robinson, Q.C., and *Samuel Godinsky, Q.C.*, for the appellant.

[1] [1963] Ex. C.R. 232, 23 Fox Pat. C. 45, 40 C.P.R. 52.

Gordon F. Henderson, Q.C., and *R. G. McClenahan,* for the respondent.

The judgment of Taschereau C.J. and Judson, Ritchie and Hall JJ. was delivered by

HALL J.:—The appellant was granted Canadian Patent No. 505676 on September 7, 1954. It was for an expandable wrist watch bracelet consisting of a number of metal sleeves, leaf springs and U-bows with the addition of two end pieces for coupling the bracelet to the watch. Apart from the manufacture of suitable materials and tools with which to make the parts, the production of these bracelets consists of the relatively commonplace operation of stamping out the required parts by means of presses, the assembling of the parts into bracelets and the cleaning, polishing and mounting or packaging for sale of the end product. The assembly portion of the operation is one which can be carried out by men or women after a comparatively short period of training and practice.

On January 3, 1961, the respondent applied to the Commissioner of Patents for a compulsory licence under s. 67(1) of the *Patent Act,* R.S.C. 1952, c. 203, which reads:

> 67.(1) The Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

The Commissioner ordered the grant of a licence on April 26, 1962, in the following terms:

> My conclusion is that a compulsory licence is to be granted. The licence is to be effective as of the date of this decision. The licence is non-exclusive and is valid in favour of the licensee, Metalliflex Ltd. for the manufacture in Canada of bracelets incorporating any of the features of the patent and according to my concept of manufacture as set out in this decision.
>
> I have given a great deal of thought to the basis of and the amount of royalty. In this particular case I have decided that a royalty based on manufacturing cost or sales price with all the appendages of discounts and returns would unnecessarily complicate accounting and reports. A straight royalty on pieces sold by the manufacturer and accepted by the purchaser would be much easier to compile and account for. I therefore set the royalty at ten cents per piece manufactured, and sold by the manufacturer.
>
> The parties will have sixty days within which to agree on the terms of the licence and present a draft to me for acceptation. If the parties fail to do so within the time set, I shall draft the licence upon my own terms.

1966

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX, LTD.

Hall J.

The parties were not able to agree on the terms of the licence and the Commissioner on July 31, 1962, settled the form of the licence in part as follows:

1. The said Metalliflex shall have the right to manufacture and sell in Canada extensible watch bracelets embodying the features of the invention claimed in Canadian Patent No. 505,676 from and after the 26th day of April 1962, the date of my decision, up to the expiration of the term for which the said patent has been granted.

2. Metalliflex shall pay to Rodi a royalty of ten cents (.10c) for each such bracelet manufactured and sold by it; this royalty to be paid on all sales made subsequent to the 26th day of April 1962, the date of my decision.

The licence contained provisions for the keeping of accurate records and furnishing by the respondent to the appellant of all information necessary for the computation and payment of the royalty, including the right of the respondent to inspect and take copies of all records pertaining to the manufacture of watch bracelets under the patent in question.

The appellant appealed to the Exchequer Court of Canada[1] from the decision of the Commissioner. The appeal was heard by Thurlow J. who gave judgment on November 16, 1962, dismissing the appeal as to the granting of the licence but directing that:

. . . the royalty to be paid by the Respondent on bracelets made pursuant to the said licence other than the Respondent's "Bandmaster" bracelets be and the same is hereby referred back to the Commissioner of Patents for consideration.

The appellant now appeals from the order granting the licence. The matter of the royalty payable was not an issue in this Court.

The parts of s. 67 of the *Patent Act* relevant to this appeal read:

67.(1) The Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

(2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:

(*a*) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working, but if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time that has elapsed since the grant of the patent has by

[1] [1963] Ex. C.R. 232, 23 Fox Pat. C. 45, 40 C.P.R. 52.

reason of the nature of the invention or for any other cause been insufficient to enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;

(*b*) if the working of the invention within Canada on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by the patentee or persons claiming under him, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement;

* * *

(*d*) if, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted;

(3) It is declared with relation to every paragraph of subsection (2) that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

Work on a commercial scale is defined in s. 2(*j*) as follows:

(*j*) "work on a commercial scale" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent, in or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.

Section 68 reads in part:

68. On being satisfied that a case of abuse of the exclusive rights under a patent has been established, the Commissioner may exercise any of the following powers as he may deem expedient in the circumstances:

(*a*) he may order the grant to the applicant of a licence on such terms as the Commissioner may think expedient, including a term precluding the licensee from importing into Canada any goods the importation of which, if made by persons other than the patentee or persons claiming under him would be an infringement of the patent, and in such case the patentee and all licensees for the time being shall be deemed to have mutually covenanted against such importation; a licensee under this paragraph is entitled to call upon the patentee to take proceedings to prevent infringement of the patent, and if the patentee refuses, or neglects to do so within two months after being so called upon, the licensee may institute proceedings for infringement in his own name as though he were the patentee, making the patentee a defendant; a patentee so added as defendant is not liable for any costs unless he enters an appearance and takes part in the proceedings; service on the patentee may be effected by leaving the writ at his address or at the address of his representative for service as appearing in

1966

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX, LTD.

Hall J.

the records of the Patent Office; in settling the terms of a licence under this paragraph the Commissioner shall be guided as far as may be by the following considerations:

(i) he shall, on the one hand, endeavour to secure the widest possible user of the invention in Canada consistent with the patentee deriving a reasonable advantage from his patent rights,

(ii) he shall, on the other hand, endeavour to secure to the patentee the maximum advantage consistent with the invention being worked by the licensee at a reasonable profit in Canada, and

The appellant's patent was at all times by s. 46 of the *Act* "subject to the conditions in this Act prescribed;".

It will be seen that the decision of the Commissioner and upheld by Thurlow J. was essentially one of fact and the question to be determined was whether there had been an abuse of the exclusive rights within the meaning of s. 67(2) above.

Once an applicant for a compulsory licence under ss. 67 and 68 has established that the patented invention is capable of being worked in Canada and that it was not being worked in Canada on a commercial scale by the end of the three-year period allowed in s. 67(1) the onus of justifying the use he has made of his monopoly; the onus of proving, in order to resist the granting of a compulsory licence, that his patented process is carried on, or his patented article manufactured to an adequate extent in Canada or of giving a satisfactory reason why it is not so carried on or manufactured is imposed on the patentee. Parker J. in the *Hatschek's Patents*[1] and Luxmore J. in *McKechnie's* case[2].

In the present case it was established beyond question that at the time of the filing of the respondent's application, namely January 3, 1961, manufacture of the invention in Canada was virtually non-existent. Thurlow J. said in his judgment at p. 238:

The facts with respect to the working of the invention in Canada are first that there was no working at all in the first three years following the grant of the patent except that in 1956 the respondent made some 2,200 bracelets and parts for several thousand more according to a patent which it held, but was prevented from going into full production and putting them on the market by an interlocutory injunction granted in an action brought by the appellant for infringement of the patent here in question. In November of the following year shortly after the filing by Watchstraps Inc. of an application to the Commissioner alleging abuse of the patent and asking for a compulsory licence to manufacture under it in Canada

[1] [1909] 26 R.P.C. 228 at 239, [1909] 2 Ch. 68.

[2] (1934), 51 R.P.C. 461 at 467.

the appellant organized a Canadian subsidiary company known as Rowi Limited which at some point thereafter in 1957 or in 1958 began assembling bracelets of the patented type from parts made by the appellant in Germany. The evidence does not clearly show what facilities Rowi Limited had at the time other than an office or how many employees it had engaged in assembling bracelets. Nor is there satisfactory evidence as to the extent to which the bracelets were assembled from parts as opposed to the mere attaching of end pieces made in Germany to bracelets made and otherwise assembled in Germany. It is conceded that the mere attaching in Canada of end pieces to bracelets otherwise assembled in Germany could not be regarded as manufacture of the bracelets in Canada. In 1958 Henry Amsell, who carried on business in Montreal under the firm name of Amsell Brothers, also began assembling bracelets of the patented type for Rowi Limited and installed in the cellar of his premises several machines which had been sent by the appellant to Rowi Limited. These were presses which could be used to make the parts for the bracelets but they were not put in use. There is evidence which I think is corroborated by the course of events which followed and which I would regard as credible that the machines were in fact brought to Canada and installed in the premises of Amsell Brothers not for the purpose of producing parts but as a camouflage in the hope of making it appear whenever necessary that the patented bracelets were being manufactured in Canada.

and at p. 240:

In fact what was happening in the years 1958, 1959 and 1960 was that the appellant and Rowi Limited were both selling to Canadian customers. In 1958 and part of 1959 while the appellant's prices were somewhat lower than those of Rowi and in addition the appellant allowed a 5 per cent quantity discount which Rowi could not offer the differences were apparently not of enough significance to greatly outweigh the advantage which Rowi possessed of being able to deliver more promptly and sales by Rowi increased to the point where in 1959 they were somewhat higher than those made in Canada by the appellant. In September 1959, however, the prices of bracelets sold by Rowi Limited were raised by 20 per cent while those of the appellant remained the same and this gave the bracelets supplied by the appellant a marked advantage. Thereafter sales by Rowi Limited declined sharply while those of the appellant increased. This price policy remained in effect until March of 1961, when following the presentation of the respondents petition, and the change in the management personnel of Rowi Limited and its sales representation and that of the appellant in Canada, arrangements were made to divert to Rowi Limited all Canadian orders for patented bracelets of the kinds which the appellant and Rowi Limited had theretofore sold on the Canadian market, all of which carried the trade mark "Fixoflex", and the prices therefore were reduced to the point where they were lower than any previous Rowi prices and only slightly above those at which the same articles had been supplied by the appellant from Germany. About the middle of March 1961 Rowi Limited acquired from another bracelet manufacturer a plant in Montreal which included several machines and shortly afterwards the machinery formerly installed in the premises of Amsell Brothers was moved to the new location and installed there. An automatic feeding device for one of these machines was then obtained, in Montreal, and commencing in July it and the machines acquired from the other bracelet manufacturer were used to make parts for the production of the patented bracelets. In the period from the change-over to the end of November

1966

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX, LTD.

Hall J.

1961, Rowi Limited sold 76,904 of the patented bracelets. In the same period, together with about three weeks of December, 1961, it produced a total of 38,954 bracelets some from parts which it had made and some from German made parts and it imported from Germany some 25,992 bracelets complete except for the attachment of end pieces which were attached in Montreal. During the same period, but commencing in June, 1961, the appellant also sold in Canada under the trade mark "Supra Fixoflex" some 13,986 bracelets of a new and more attractive type. None of this type of bracelet had been made or assembled in Canada up to the time of the hearing and there was no evidence of so much as plans to manufacture it in Canada.

and at p. 242:

Leaving aside the question whether the assembly of bracelets in Canada from parts made in Germany should be regarded as manufacture of the patented invention in Canada within the meaning of the definition of s. 2(*j*) it is to my mind apparent that up to the time of the filing of the respondent's petition for a compulsory licence there never had been anything in the way of working the invention in Canada that could be characterized as proportionate to or as bearing any reasonably close relationship to the demand for the patented article in this country and that while the situation changed somewhat after mid-February 1961, and particularly in the latter half of that year, even then the production of the patented bracelets in Canada whether assembled from parts made in Canada or from parts made in Germany was only 38,354 against a total market enjoyed for the period of 90,890 and that even in the months of September, October and November when production was at something of a peak, it still amounted in each month to less than half of the total quantities of patented bracelets sold on the Canadian market and also to considerably less than the quantities of Fixoflex bracelets sold in Canada.

It was submitted that by some time in November production of bracelets by Rowi Limited had reached 2,150 per week which multiplied by 52 would yield a number sufficient to meet the yearly Canadian market then available to the appellant and that accordingly at the time of the hearing the scale of manufacture by Rowi was adequate within the meaning of the definition. As to this it may first be observed that the production figures show that if the scale actually reached 2,150 in a week in November it was not maintained for the whole month, though it may have been maintained for the first three weeks of December. I do not think however that the problem is to be resolved by directing attention to a scale of production over so short a period if working for a short period were sufficient it would be just as logical to say that the scale was adequate because on the day or in the last hour or minute before the hearing so many articles were produced, which to my mind would be absurd. Capacity to manufacture on an adequate scale is one thing. Actual manufacture is quite a different thing. The evidence that in the last three or four weeks before the hearing Rowi had produced on a scale of 2,150 per week may well indicate that at the time of hearing it had the capacity to produce on a scale sufficient to supply the available Canadian market for a year. But though Rowi had been in existence for upwards of four years it had never operated for a year on anything approaching such a scale and it is only if the expectations of the production manager of Rowi Limited, who was not a policy maker, are taken as fact (an assumption which on the evidence I would not regard as justified) that one could be led to think that Rowi's production was in fact on a scale approximately

equal to the available Canadian market. The cold facts are that in no year and in no month or season for which figures were given in the whole four-year history of Rowi had its scale of production equalled or even approached the market for that year or that month or that season.

In view of these facts and having regard also to the nature of the invention, the comparatively short time required to establish a plant for the manufacture of it in Canada, and to the time which had elapsed since the grant of the patent as well as to the size of the Canadian market which is shown to have been available to the appellant during that period, I am of the opinion that it has been established that the invention was not being worked on a scale that was adequate in the circumstances within the meaning of s. 2(*j*) either before or at the time of the presentation of the respondent's application or at the time of the hearing.

The appellant sought to satisfy the onus which was thus placed on it by leading evidence to the effect that from the time the patent was obtained it was harassed by illegal importations and by infringers (including the respondent) and it was involved in litigation with the respondent challenging the validity of the patent which was not brought to a successful conclusion until the appeal in *Metalliflex Limited v. Rodi & Wienenberger Aktiengesellschaft*[1] was decided in this Court on December 19, 1960, and by evidence of the quantities of the bracelet it had assembled or manufactured in Canada either by itself or by its subsidiary Rowi Limited.

Thurlow J., after referring to a prior application for a compulsory licence in October 1957 by Watchstraps Inc., dealt with these submissions as follows at p. 244:

There is on the evidence no reason to doubt that not long after the grant of the patent imported bracelets which infringed the patent made their appearance on the Canadian market and though the situation improved to some extent after a number of infringement actions had been brought by the appellant, in three of which interlocutory injunctions effective in the Province of Quebec were obtained, in general it continued throughout the period to the end of 1960 and reached a high point in 1958 and 1959. None of the actions had, however, come to trial when in October 1957 Watchstraps Inc., one of the parties against whom an injunction had been obtained, filed an application alleging abuses of the patent under clauses (*a*), (*b*) and (*d*) of s. 67(2) and asking for a compulsory licence. In April 1958 the action against Watchstraps Inc. as well as that brought against the respondent came to trial but judgment was reserved and had not been delivered when in July 1958 the appellant filed its counterstatement opposing the application for a compulsory licence.

He then discusses the contents of the counterstatement opposing Watchstraps Inc.'s application for a compulsory licence and continues at p. 245:

The statement went on to say that the appellant had asserted its patent against the sale by the applicant of watchstraps alleged to embody the

[1] [1961] S.C.R. 117, 21 Fox Pat. C. 95, 35 C.P.R. 49.

1966

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX, LTD.

Hall J.

invention of a patent of which the applicant claimed to be the owner, and that the appellant was awaiting the judgment of the Superior Court of the Province of Quebec in the action which had been tried at Montreal in April 1958, but nowhere in the statement is there any suggestion whatever that either infringing imports or challenges to the validity of the appellant's patent had anything to do with the failure to work the invention in Canada on a commercial scale within the meaning of the statutory definition. Nor was any explanation offered as to why there had been nothing in the way of working the invention in Canada or of preparation for such working in the three-year period from the grant of the patent in September 1954 to November 7, 1957.

* * *

In September 1958 judgments were given in the actions tried in April 1958 and by these it was held that claims 1 and 2 of the appellant's patent were invalid and that while claim 3 was valid, it had not been infringed except by certain of the bracelets sold by Watchstraps Inc. The appellant thereupon appealed to the Court of Queen's Bench in both cases and the interlocutory injunctions were continued in effect but apparently following the trial judgment competition from infringing imports increased. In June of the following year the judgment in the case of the respondent was reversed and claims 1 and 2 were held to be valid and infringed by a bracelet made according to a patent held by the respondent. Shortly after this success, in September 1958, the price difference which had already been referred to was established. The customers were advised that the increase in the price of bracelets assembled in Canada was due to "augmentation of costs for wages, manufacturing improvements (installation of modern automatic machinery), general overhead, advertising, etc., which price increase was long since due to appear." That these were in fact the reasons for the increase was not established. On the contrary the evidence shows that they were not the reasons. At that time the policy being followed was to divert the orders as far as possible to the appellant and the establishment of the price difference was one of the ways adopted to carry the policy into effect.

* * *

On the evidence the failure to work appears to me to have been entirely a matter of choice on the part of the appellant for as I view it there was never any real difficulty in obtaining a substantial market or in organizing manufacture in Canada and the fact that the appellant when spurred by an application for a compulsory licence sent machinery to Canada and in its counter-statement opposing the application referred to plans to manufacture on a scale sufficient to meet the whole Canadian market appears to me to indicate that it recognized at the time that it had no satisfactory reason for not working the invention on a scale to supply the market available to it. Moreover, while the judgment of the Quebec Superior Court in September 1958 holding claims 1 and 2 of the patent invalid may have afforded some reason for not immediately pursuing the plans which had been set out in the counter-statement, if indeed such plans ever existed, on the evidence there was no justification following the reversal of that judgment in June 1959 either for failure to proceed with the plans or for the appellant's conduct in so raising the price of Rowi produced bracelets as to make it impossible for them to compete on the Canadian market with those made by the appellant in Germany.

* * *

On the facts disclosed and having regard to s. 67(3) I am of the opinion that no satisfactory reason for failure to work the invention in

Canada on a commercial scale has been established and that the case is one in which abuse within the meaning of s. 67(2)(*a*) is shown to have existed both before and at the time of the presentation of the respondent's application and to have persisted, though alleviated to some extent in the meantime, up to the time of the hearing.

All of these findings and conclusions are amply supported by the evidence which the Commissioner and Thurlow J. had before them.

The appeal should accordingly be dismissed with costs payable by the appellant.

SPENCE J.:—I have had the privilege of reading the reasons of my brother Hall and I agree with those reasons and with his conclusions. I desire, however, to add a few words in reference to the main contention of the appellant in this Court which was that the infringement of its patent by many competitors including, particularly, the respondent provided to the appellant a "satisfactory reason" within s. 67(2)(*a*) of the *Patent Act* excusing it from failure to work the invention in Canada on a commercial scale.

I am of the opinion that there may well be cases where such infringement might provide such "satisfactory reason", and particularly where it would appear that the patent which the patentee held might be found to be invalid in Canada. Thurlow J. in his reasons has rejected the alleged excuse as a "satisfactory reason" and my brother Hall has agreed with that rejection. I am of the opinion that such rejection is proper in view of the evidence in this case and particularly in view of two facts which were there established.

Firstly, in the three-year period which followed the grant of the patent there was, to all intents and purposes, no working of the patent by the patentee in Canada. As both Thurlow J. and my brother Hall have pointed out, it was quite feasible that the patent should be worked in Canada and, in fact, outside of the assembly of proper tools and materials, the process of manufacture was quite simple and a staff could be trained and in operation in a very short time indeed.

Secondly, when the appellant's patent had been declared valid by the judgment of the Court of Queen's Bench (Appeal Side) in the Province of Quebec, one would have expected the appellant, freed of the worry of those infringe-

1966

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX, LTD.

Spence J.

ments, to have proceeded apace at working its invention in Canada. Instead, the appellant took the exact opposite course and by increasing the price at which its solely owned subsidiary, Rodi Ltd., sold in Canada, and at the same time holding fast its own sale price in Canada, it contrived to turn all purchases to its own foreign-manufactured articles. It continued that course until March of 1961, following the presentation of this respondent's application for compulsory licence.

In my view, that evidence is a clear demonstration of the appellant's intent not to work the invention in Canada on a commercial scale, an intention which was only abandoned when it became apparent that such a course would result inevitably in the compulsory licence being granted.

For these reasons, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Smart & Biggar, Ottawa.

Solicitors for the respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1966

*Feb. 22, 23, 24 Apr. 26

FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING. ..... APPELLANT;

AND

THE COMMISSIONER OF PATENTS ... RESPONDENT;

AND

JULES R. GILBERT LIMITED ..... INTERVENANT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Application for re-issue—Whether mistaken view of law a mistake within s. 50 of the Patent Act, R.S.C. 1952, c. 203.

Appeals—Application for re-issue of patent refused—Whether appeal lies to Exchequer Court—Patent Act, R.S.C. 1952, c. 203, ss. 2(a), 42, 44, 50.

The appellant surrendered a patent issued to it in 1959 in respect of a drug used to lower blood sugar levels, and petitioned the Commissioner of Patents, under s. 50 of the *Patent Act*, R.S.C. 1952, c. 203, for the

* PRESENT: Taschereau C.J. and Fauteux, Martland, Ritchie and Hall JJ.

re-issue of the patent. In its petition, it sought to add five new claims to the patent, as previously issued, but did not seek to make any change in the original disclosure, nor to abandon any of the claims contained in the original patent. The petition for re-issue was refused by the Commissioner. On appeal to the Exchequer Court, the Commissioner contended that the Court was without jurisdiction to hear an appeal from a decision made under s. 50 of the Act. The Exchequer Court found it unnecessary to determine this point and ruled against the appellant on the merits of the appeal. The appellant appealed to this Court.

Held: The appeal should be dismissed.

The wording of s. 44 of the *Patent Act* permits an appeal to the Exchequer Court in cases coming within s. 50 of the Act.

The appellant claimed that its patent was defective or inoperative by reason of its not having claimed that which it had a right to claim and that such error arose from mistake. The appellant believed that to comply with s. 41(1) of the *Patent Act* all that was necessary was that a product claim be dependent on a claim for a process by means of which the substance could be prepared and it was not realized that a claim for a specific product should be dependent upon a process claim specifically defining the production of that substance. The question to be determined was therefore whether that alleged mistake was a mistake within the meaning of s. 50 of the Act. That section deals only with a patent which is defective or inoperative. It contemplates the existence of a valid patent which requires re-issue in order to become fully effective and operative. In this case, the patent for which re-issue is sought has been held by this Court to be invalid (ante p. 189). Furthermore, assuming, without deciding, that a mistake of law could constitute that kind of mistake which is contemplated by s. 50, the section can only operate if the patentee can satisfy the Commissioner that, because of his mistake, the patent fails to represent that which the inventor truly intended to have been covered and secured by it. The appellant has not met that test. The mistake which is alleged is a failure, in the light of existing understanding of the law, to appreciate that a process claim of the kind here in question would not be sufficient to support the claim to the product under the requirements of s. 41(1) of the Act. A mistake of that kind does not fall within s. 50 of the Act.

Brevets—Requête pour redélivrance—Une erreur concernant la loi est-elle une erreur dans le sens de l'art. 50 de la Loi sur les Brevets, S.R.C. 1952, c. 203.

Appels—Requête pour la redélivrance d'un brevet, refusée—Y a-t-il appel devant la Cour de l'Échiquier—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(a), 42, 44, 50.

Ayant abandonné un brevet qui lui avait été émis en 1959 relativement à un produit pharmaceutique utilisé pour diminuer le contenu du sucre dans le sang, l'appelante a présenté une requête au Commissaire des Brevets, sous le régime de l'art. 50 de la *Loi sur les Brevets,* S.R.C. 1952, c. 203, pour obtenir la redélivrance du brevet. Dans sa requête, l'appelante a cherché à ajouter cinq nouvelles revendications au brevet, tel qu'émis préalablement, mais n'a pas cherché à faire de changements dans la divulgation originale et n'a pas cherché non plus à abandonner

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

aucune des revendications contenues dans le brevet original. La requête pour redélivrance fut refusée par le Commissaire. Sur appel à la Cour de l'Échiquier, le Commissaire a soutenu que la Cour était sans juridiction pour entendre un appel d'une décision rendue sous le régime de l'art. 50 du statut. La Cour de l'Échiquier n'a pas jugé nécessaire de déterminer ce point et a donné raison au Commissaire sur les mérites de l'appel. D'où le pourvoi de l'appelante devant cette Cour.

Arrêt: L'appel doit être rejeté.

La phraséologie de l'art. 44 de la *Loi sur les Brevets* permet un appel à la Cour de l'Échiquier dans les causes tombant sous le régime de l'art. 50 du statut.

L'appelante prétend que son brevet était défectueux ou inopérant en raison du fait qu'elle n'avait pas revendiqué ce qu'elle avait le droit de revendiquer et que cette erreur a été commise par méprise. L'appelante croyait que pour se conformer à l'art. 41(1) de la *Loi sur les Brevets* tout ce qui était nécessaire était que la revendication du produit dépende de la revendication du procédé au moyen duquel la substance pouvait être préparée, et il ne fut pas réalisé qu'une revendication pour un produit spécifique devait dépendre d'une revendication du procédé délimitant spécifiquement la production de cette substance. La question à être déterminée était donc de savoir si l'erreur alléguée était une erreur dans le sens de l'art. 50 du statut. Cet article traite seulement d'un brevet qui est défectueux ou inopérant. Il envisage l'existence d'un brevet valide qui requiert redélivrance pour devenir complètement effectif et opérant. Dans le cas présent, le brevet dont on recherche la redélivrance a été jugé être invalide par cette Cour (voir p. 189). Bien plus, en assumant, sans le décider, qu'une erreur de droit peut constituer une erreur de la sorte qui est envisagée par l'art. 50, l'article ne peut entrer en jeu que si le breveté peut satisfaire le Commissaire que, à cause de son erreur, le brevet ne représente pas ce que l'inventeur avait vraiment l'intention de couvrir et d'obtenir. L'appelante n'a pas rencontré cette exigence. L'erreur que l'on allègue est le défaut, à la lumière de la loi telle qu'elle était alors comprise, d'apprécier qu'une revendication de procédé de la sorte dont il est question ne serait pas suffisante pour supporter la revendication du produit selon les exigences de l'art. 41(1) du statut. Une telle erreur ne tombe pas sous l'art. 50 du statut.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], confirmant une décision du Commissaire des Brevets. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming a decision of the Commissioner of Patents. Appeal dismissed.

Christopher Robinson, Q.C., and *James D. Kokonis*, for the appellant.

[1] [1966] Ex. C.R. 91, 31 Fox Pat. C. 64.

G. W. Ainslie, for the respondent.

I. Goldsmith, for the intervenant.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the judgment of Thurlow J. in the Exchequer Court[1], which dismissed an appeal by the appellant from the refusal by the respondent to reissue Canadian Patent No. 582,623 which had been granted to the appellant on September 1, 1959.

On July 15, 1960, the appellant and Hoechst Pharmaceuticals of Canada Limited brought an action against Gilbert & Company, Gilbert Surgical Supply Co. Limited and Jules R. Gilbert Limited claiming infringement of this and several other patents. The last named company is an intervenant in the present appeal. The action was dismissed in the Exchequer Court by Thurlow J., and an appeal to this Court[2] from that judgment was dismissed on December 14, 1965.

The reasons for judgment in this Court, delivered by my brother Hall describe the nature of the invention in respect of which Patent No. 582,623 and the other patents involved in the case were granted, and the legal issue involved, as follows:

> All the patents relate to defined new sulfonyl ureas, each patent claiming a different process of producing them. Each of the processes produces the new substances by known methods from known materials, with the result that the patentability of the process depends on the possession of unexpected utility by the new substances produced. The unexpected utility stated in the patents is the capacity of lowering blood sugar levels, this being referred to as hypoglycemic activity. The process in each patent is claimed in claim 1 in relation to the production of all the new sulfonyl ureas. Each patent contains a claim (claim 10 in all but the last patent and claim 13 in the last patent) to a specific new sulfonyl urea, tolbutamide, whenever obtained by the process claimed in claim 1 of the patent. It is upon this claim to tolbutamide in each patent that the appellant founded its action for infringement.
>
> It is conceded that tolbutamide, standing by itself, could have been the subject matter of a valid patent if claimed as such when prepared or produced by the methods or processes of manufacture particularly described and claimed in the patent or by their obvious chemical equivalent. It possessed the previously undiscovered useful quality as defined in *Re May & Baker Ltd. and Ciba Limited,* 65 R.P.C. 255 and adopted by this Court in *Commissioner of Patents v. Ciba,* (1959) S.C.R. 378. However, the

[1] [1966] Ex. C.R. 91, 31 Fox Pat. C. 64.

[2] [1966] S.C.R. 189.

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

Martland J.

respondents say that the process claims in each of the patents in question are invalid as being too broad in their terms, and, in consequence, the claim to the substance tolbutamide cannot stand for that reason.

His conclusion is stated as follows:

In challenging the validity of the patents in question, counsel for the respondents put his case upon the footing that no one could obtain a valid patent for an unproved and untested hypothesis in an uncharted field. This is what the appellant has tried to do in claim 1 of each of the patents. It has sought to cover, in the words of Thurlow J., "every mathematically conceivable sulphonyl urea of the class" and has consequently overclaimed, and, in so doing, invalidated claim 1 in each patent.

He then went on to hold, applying the decisions of this Court in *C. H. Boehringer Sohn v. Bell-Craig Limited*[1] and *Commissioner of Patents v. Winthrop Chemical Company Incorporated*[2], that the claims to the product tolbutamide (claim 10 in the patent now in question) fell because they could not stand except upon the foundation of a valid process claim, which did not exist.

Prior to the delivery of the judgment of Thurlow J. in its infringement action, the appellant, in August 1963, had petitioned for the issue of a new patent, and had surrendered Patent No. 582,623. The petition was based upon s. 50 of the *Patent Act*, R.S.C. 1952, c. 203, which provides as follows:

50. (1) Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention for the then unexpired term for which the original patent was granted.

(2) Such surrender takes effect only upon the issue of the new patent, and such new patent and the amended description and specification have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if such amended description and specification had been originally filed in their corrected form before the issue of the original patent, but in so far as the claims of the original and reissued patents are identical such surrender does not affect any action pending at the time of reissue nor abate any cause of action then existing, and the reissued patent to the extent that its claims are identical with the original patent constitutes a continuation thereof and has effect continuously from the date of the original patent.

[1] [1963] S.C.R. 410, 25 Fox Pat. C. 36, 41 C.P.R. 1, 41 D.L.R. (2d) 611.
[2] [1948] S.C.R. 46, 7 Fox Pat. C. 183, 7 C.P.R. 58, 2 D.L.R. 561.

(3) The Commissioner may entertain separate applications and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a reissue for each of such reissued patents.

The relevant portions of the petition are as follows:

1. THAT Your Petitioner is the patentee of Patent No. 582,623 granted on September 1st 1959, for an invention entitled MANUFACTURE OF NEW SULPHONYL-UREAS.

2. THAT the said Patent is deemed defective or inoperative by reason of the patentee having claimed more or less than he had a right to claim as new.

3. THAT the respects in which the patent is deemed defective or inoperative are as follows:

Claims 1, 3 and 4 of the patent cover the production of new compounds of a general formula in which certain substituents are not exhaustively defined.

The patent contained claims directed to the production of the new compounds when prepared by the process of claim 1 and to certain specific products when prepared by the process of claim 1 but did not contain claims to specific products when prepared by specific processes.

4. THAT the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention in the following manner: Applicant on the advice of his attorneys believed at the time the application was pending that for compliance with Section 41(1) all that was required was that a product claim be dependent on a process claim by means of which the specific claimed substance could be prepared, whereas on March 21, 1962, it was pronounced in a judgment of the Exchequer Court of Canada that for compliance with Section 41(1) a claim covering a specific product should be dependent on a process claim which defines specifically the production of that substance.

THAT at the time the application was pending, applicant also believed that for the production of a medical substance, broad terms of theoretically unlimited scope would not result in any defect in the claims, whereas following a judgment in the Exchequer Court of Canada on March 21, 1962, it became apparent that the validity of such claims was in doubt.

5. THAT knowledge of the new facts in the light of which the new claims have been framed was obtained by Your Petitioner on or about April 1962 when the fact and effect of the said judgments of the Exchequer Cour was communicated to Your Petitioner by its Canadian patent agents, whereupon the specification of the Patent was reviewed carefully for the presence of these and other defects.

In the petition, the appellant sought to add five new claims to the patent, as previously issued. Three of these purported to restrict the substituent group of the general formula. The other two contained a specific claim for the substance tolbutamide and for a specific process for its preparation. The appellant did not seek to make any change in the original disclosure, nor to abandon any of the claims contained in the patent as originally issued. In fact,

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

Martland J.

as has already been noted, the appellant persisted in its infringement action, notwithstanding the filing of the petition.

The petition was refused by the respondent. The material portions of his decision are as follows:

> Careful consideration has been given to the admissibility of this reissue application for prosecution in the Office.
>
> Whether an application for reissue is acceptable for prosecution before the Office depends on the reasons given in the petition for wanting to correct what is said to be the defect or inoperativeness of the patent.
>
> Section 50 of the Patent Act is the governing section. The reasons for reissue are insufficiency of description or specification or claiming more or less than what the patentee had the right to claim. I do not believe that the patentee in this case can rightly invoke any of these reasons.
>
> In addition to the reasons the section is conditional on certain circumstances which occurred or were present at the time of issue. The error must have arisen from inadvertence, accident or mistake at that time.
>
> Here there was no inadvertence, accident or mistake at the time of issuing the patent. The applicant was satisfied to obtain his patent with claims submitted and was satisfied on the advice of his agent that the provisions of section 41 subsection 1 has been complied with. There was no defect that the applicant had in mind and failed through inadvertence to correct, (1936 S.C.R. 649 at page 661 Northern Electric Company Limited v. Photo Sound Corporation). It is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification. It must appear from the face of the instrument that what is covered by the reissue was intended to have been covered and secured by the original, (In re Sawyer 624 O.G. 960, 81 USPQ 374, Decisions of the Commissioner 1949 at page 343).
>
> I do not believe that a change in the legislation or a different interpretation of the legislation was ever contemplated to be a reason for reissue. In this case the courts interpreted the sufficiency of the claims in a patent in a manner different from the generally accepted views of the patent agents and patentees, thereby creating a situation which did not exist at the time of issue of the original patent.
>
> My ruling is that the present application for reissue cannot be entertained.

From this refusal, the appellant appealed to the Exchequer Court[1]. The respondent contested the right of the appellant to appeal the respondent's decision under s. 50, contending that the Court was without jurisdiction to hear it. Thurlow J., in view of his decision on the merits of the appeal, found it unnecessary finally to determine this point, though stating that he was inclined to the view that a right of appeal did exist.

[1] [1966] Ex. C.R. 91, 31 Fox Pat. C. 64.

The relevant section of the *Patent Act* is s. 44, which provides as follows:

> 44. Every person who has failed to obtain a patent by reason of a refusal or objection of the Commissioner to grant it may, at any time within six months after notice as provided for in sections 42 and 43 has been mailed, appeal from the decision of the Commissioner to the Exchequer Court and that Court has exclusive jurisdiction to hear and determine such appeal.

Section 43 is not relevant in relation to this issue. Section 42 reads as follows:

> 42. Whenever the Commissioner is satisfied that the applicant is not by law entitled to be granted a patent he shall refuse the application and, by registered letter addressed to the applicant or his registered agent, notify such applicant of such refusal and of the ground or reason therefor.

It was the contention of the respondent that, when these sections are read together, it cannot be contemplated that s. 44 provided for a right of appeal in respect of the refusal by the Commissioner of Patents to issue a new patent under s. 50. It was submitted that an application under s. 50 was not the kind of application contemplated by s. 42. Reliance was placed on the definition of an "applicant" in s. 2(*a*) of the *Act*, i.e.:

> 2.(*a*) "applicant" includes an inventor and the legal representatives of an applicant or inventor;

as indicating that a patentee, surrendering his patent and seeking the granting of a new patent, was not an applicant within the meaning of s. 42.

It should be observed, however, that the definition of "applicant" in s. 2(*a*) is not an exclusive one, and that the word "application", as defined in s. 2(*c*) of the *Patent Rules*, means, "except in sections 96 to 116, an application for a patent or an application for a reissue of a patent".

Section 12(2) of the *Act* provides that any rule or regulation made by the Governor in Council is of the same force and effect as if it had been enacted in the *Act*.

In the light of these circumstances, in my opinion the wording of s. 44 of the *Act* permits an appeal in cases coming within s. 50.

This being so, it is necessary to consider the refusal by the respondent of the appellant's petition upon the merits.

I interpret the reasons for that refusal as being twofold:

1. That the appellant could not rightly invoke any of the reasons justifying the reissue of a patent

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

Martland J.

under s. 50, i.e., insufficiency of description or specification or the claiming of more or less than the appellant had the right to claim.

2. In any event there had been no inadvertence, accident or mistake causing the alleged error.

On the appeal from the decision of the respondent, pleadings were ordered and the parties agreed upon a statement of facts. Paragraph 4 of the statement reads as follows:

> 4. The parties hereto agree that if this Honourable Court should find:
>
> (*a*) that an appeal lies from the ruling by the Respondent, and
>
> (*b*) that the error in relation to Patent No. 582,623 arose from inadvertence, accident or mistake without any fraudulent or deceptive intention,
>
> then the application for reissue should be referred back to the Respondent for further consideration and, *inter alia,* for consideration as to whether the amended specification attached to the petition for reissue is for the same invention as the said Patent No. 582,623.

Having reached the conclusion that an appeal did lie to the Exchequer Court, I propose to consider the issue raised in subpara. (*b*) of para. 4 above.

It is clear from the fact that in the petition for reissue no change was made in the disclosure, and no claims previously made were abandoned, that the appellant did not allege error, within s. 50, by reason of insufficiency of description or specification or by reason of its having claimed more than it had a right to claim. It is also clear from the petition that the appellant did not allege that the error arose from inadvertence or accident.

What the appellant claims, therefore, is that its patent was defective or inoperative by reason of its not having claimed that which it had a right to claim and that such error arose from mistake.

The mistake which is relied upon is that the appellant, on the advice of its attorneys, believed that to comply with s. 41(1) of the *Patent Act* all that was necessary was that a product claim be dependent on a claim for a process by means of which the substance could be prepared and it was not realized that a claim for a specific product should be dependent upon a process claim specifically defining the production of that substance. This, it is claimed, was not

discovered until the reasons for judgment of the Exchequer Court in *Boehringer v. Bell-Craig*[1] were issued.

It is also claimed that, prior to that time, the appellant believed that, for the production of a medical substance, broad terms of theoretically unlimited scope would not result in any defect in the claims.

In essence what the appellant is saying is that the appellant's attorneys made a mistake of law in respect of the product tolbutamide in having failed to make a process claim specifically defining the production of that substance. The question to be determined is, therefore, whether that alleged mistake is a mistake within the meaning of s. 50.

Counsel for the appellant pointed out that the reissue provision of the *Patent Act* is drawn from legislation in the United States. The American provision is similar to that in Canada, subject, however, to some material differences. The word "deemed" does not appear in the American statute. Instead of the words "defective or inoperative" it uses the words "inoperative or *invalid*". It does not refer to a patentee claiming less than he had a right to claim. Furthermore, where the required conditions exist, it provides that the Commissioner "shall" cause a patent to be reissued, whereas our Act uses the word "may".

In the result, the American statute requires the Commissioner to reissue a patent, in the events defined, even in cases where the initial patent is invalid. The Canadian Act creates a discretion, and only in cases where the initial patent is "deemed defective or inoperative".

The first Canadian *Patent Act*, that of the Province of Canada, 12 Vict., c. 24, did use the words "inoperative or invalid". The forerunner of the present s. 50, which uses the words "defective or inoperative", is found in s. 19 of the Statutes of Canada, 1869.

The view of the Supreme Court of the United States regarding the purpose of the American provision as to reissue was stated as being "to provide that kind of relief which courts of equity have always given in cases of clear accident and mistake in the drawing up of written instruments". *Mahn v. Harwood*[2]. This statement was cited, with

[1] [1962] Ex. C.R. 201, 22 Fox Pat. C. 190. [2] (1884), 112 U.S. 354 at 363.

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

Martland J.

approval, in *Sontag Chain Stores Co. v. National Nut Company of California*[1].

Used in this sense, the word "mistake" means that a written instrument does not accord with the true intention of the party who prepared it. A person relying upon a mistake under s. 50 would have to establish that the patent which was issued did not accurately express the inventor's intention with respect to the description or specification of the invention or with respect to the scope of the claims which he made. This view appears to me to coincide with that expressed by Chief Justice Duff, in relation to the word "inadvertence" in *Northern Electric Company Ltd. v. Photo Sound Corporation*[2], cited by the respondent in his reasons for the refusal of the appellant's petition.

In *General Radio Co. v. Allen B. DuMont Laboratories, Inc.*[3], the Circuit Court of Appeals, Third Circuit, held that the failure of the patent applicants to foresee that the application was based upon an error of judgment by the patentee's solicitors in the drafting of the claims.

The appellant relied upon the reasoning of the Court of Appeals, Ninth Circuit, in the case of *Moist Cold Refrigerator Co. v. Lou Johnson Co.*[4]. In that case the Court held that the failure of the patent applicants to foresee that the original patent would be declared invalid as functional was an error through "inadvertence or mistake" where the applicant drafted claims in good faith, without intent to cover any means of producing the result, and where the functional nature of the claims was a very close question.

The Court pointed out that in s. 251 of the *Patent Act* of 1952, governing the reissue of patents, the words "inadvertence, accident or mistake" had been deleted, but held that the test as to the type of error required remained the same as before.

Two points should be noted in respect of this decision. The first is that in this case a reissue had been granted in respect of a patent which had been held to be invalid. As has been pointed out earlier, the American statute in terms permits the reissue of an invalid patent in certain specified circumstances. The Canadian Act, however, does not so

[1] (1940), 310 U.S. 281 at 290.
[2] [1936] S.C.R. 649 at 661, 4 D.L.R. 657.
[3] (1942), 129 F. 2d 608.
[4] (1954), 217 F. 2d 39.

provide. Section 50 deals only with a patent which is defective or inoperative. In my opinion it contemplates the existence of a valid patent which requires reissue in order to become fully effective and operative. In the present case, in so far as the substance tolbutamide is concerned, the patent for which reissue is sought has been held by this Court to be invalid.

The second point is that, while the Court considered an error on a question of law could be one which could be corrected by reissue if it arose through inadvertence or mistake, the test applied does not actually depart significantly from that defined by the Supreme Court of the United States in the cases previously cited. The Court did find on the evidence that the patentee's intent was to take proper steps only to protect its invention and not to cover any and all means of producing the result. Its failure to accomplish that intent resulted from a mistake in framing its claims so as not to render them functional in character within the legal requirements and the earlier decision that they had not done so was a close question.

The learned trial judge, in the present case, left open the question as to whether inadvertence, accident or mistake in relation to a question of law could come within s. 50. He was inclined to the view that such cases might arise.

It is not necessary to express a final view with respect to that question in the present case. Assuming, without deciding, that a mistake of law could constitute that kind of mistake which is contemplated by s. 50, in my opinion the section can only operate if the patentee can satisfy the Commissioner that, because of his mistake, the patent fails to represent that which the inventor truly intended to have been covered and secured by it. I do not think that the appellant has met that test.

The parties to this appeal agreed to the following stated facts:

(*a*) Process claims 1 and 2 in Patent No. 582,623, to which claims 3 to 19 inclusive refer, are claims to processes for the manufacture of a large class of substances, and the number of mathematically conceivable substances embraced in the class defined in claims 1 and 2 is infinite.

(*b*) Claims 1 and 2 do not state specifically the starting materials from which tolbutamide and the other specific substances defined in claims 10 to 19 inclusive may be made.

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

Martland J.

(c) The disclosure in Patent No. 582,623 does not purport to be one of an invention of tolbutamide alone, or of any of the other specific substances defined in claims 10 to 19 and a process or processes for their preparation, but on the contrary, relates to a class of sulphonyl ureas of which tolbutamide and the other specific substances defined in claims 10 to 19 are members; and the disclosure proceeds to outline in general terms the methods by which ureas of the class may be produced, and asserts utility for the substances of the class. Tolbutamide and the other specific substances defined in certain of the claims are mentioned from time to time in the disclosure as examples, but not until one reaches claims 10 to 19 is there any indication that the invention is concerned with anything but a whole class of substances and general methods of producing them.

(d) The method used in process claims 1 and 2 was not new, nor were the starting materials which were used new.

(e) The great bulk of conceivable substances embraced within the class defined in claims 1 and 2 have not, in fact, been produced or tested and nothing is, in fact, known of what their pharmacological effects or usefulness may be; pharmacological effects of new and untried substances are not generally predictable or, if predictable at all, are not predictable to any great extent.

(f) It is highly improbable that all, or substantially all, of the infinitely large class of substances produced by processes within the scope of claims 1 and 2 have either the blood sugar lowering activity to a useful extent or the freedom from toxicity or harmful side effects necessary to render them useful; and it cannot be predicted that all or substantially all of the substances produced by the process claimed in claim 1 have advantages for lowering and controlling the blood sugar level of patients suffering from diseases such as diabetes, over the known methods of (1) dieting, and (2) the administration of insulin.

There is the further fact that the petition for reissue made no change in the disclosure and abandoned none of the claims contained in the patent originally issued.

In the light of these facts, it would appear to me that the conclusion of the learned trial judge with respect to claims 1, 3 and 4, referred to in the appellant's petition for reissue, is fully warranted.

I should say a word, however, with respect to what was put forward as an explanation of the alleged error in claims 1, 3 and 4. The Commissioner plainly did not accept it. The explanation was that the alleged error arose through inadvertence, accident or mistake in that at the time the application was pending the applicant believed that for the production of a medical substance broad terms of theoretically unlimited scope would not result in any defect in the claims whereas after a judgment of this Court it became apparent that the validity of such claims was in doubt. Assuming this to be true (which is a matter of some difficulty in view of the fact that the *May & Baker* case had already been decided and had been considered

and in some respects adopted in this country in *Commissioner of Patents v. Ciba*, (1959) S.C.R. 378) I do not see how the Commissioner could have been expected to accept it as showing that the alleged failure to define certain substituents exhaustively arose from inadvertence, accident or mistake for it shows on its face that the applicants knew their alleged invention was limited to substituents that required to be more exhaustively defined but refrained from so defining them not by inadvertence, accident or mistake but deliberately so as to claim and thus get a monopoly under the statute on something which on the admitted facts they had not invented and must have known they had not invented and which was not in fact an invention at all. This is not a case of the applicants having claimed more than they were entitled to claim as new through inadvertence, accident or mistake but one of their having deliberately set out to monopolize what was for the most part an unexplored field of organic chemistry so as to prevent others during the life of the patent from exercising their right to search in that field for, and if successful to put on the market, new substances which might turn out to be as useful or more useful than the several specific substances in that field which the applicants had found to be useful.

The claim to the substance, tolbutamide, claim 10, is one which falls within the requirements of s. 41(1) of the *Patent Act*, which provides:

> 41.(1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

The process claim relied upon for compliance with this subsection was claim 1. There is no suggestion in the petition that the appellant had intended to include in its original patent a claim of the kind defined in the new claim 23 specifically defining the production of tolbutamide. It is clear that judgment was exercised and a decision reached to rely upon the process claim which is claim 1, which, as already noted, was a claim described by Thurlow J. in the infringement action and adopted by this Court as seeking to cover "every mathematically conceivable sulphonyl urea of the class".

There was, therefore, no mistake in the sense that the original patent failed to represent the true intent of the appellant. The mistake which is alleged is a failure, in the light of existing understanding of the law, to appreciate that a process claim of this kind would not be sufficient to support the claim to the product tolbutamide under the requirements of s. 41(1).

1966

FARBWERKE HOECHST AKTIEN-GESELL-SCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMIS-SIONER OF PATENTS

Martland J.

I do not think that a mistake of that kind falls within s. 50. Even if the *Moist Cold Refrigerator Co.* case were to be accepted as an accurate statement of the law in Canada in so far as a mistake of law is concerned, which I do not necessarily accept, the present case would not fall within it since here the appellant deliberately elected to make a process claim in the widest possible terms and had no intention of restricting its invention solely to the production of tolbutamide.

Nor do I agree that the decision of Thurlow J. in *C. H. Boehringer Sohn v. Bell-Craig Limited, supra,* could be regarded as being an unexpected change of view as to the state of the law. This Court in *Commissioner of Patents v. Winthrop Chemical Co. Inc., supra,* had held that a claim for a substance alone could not be entertained if it was of the kind defined in s. 41(1) and that the applicant must describe in his specification the method or process by which the substance is prepared or produced and claim such process.

The English decision of *May v. Baker*[1], which had been approved by Thorson P., [1956-1960] Ex. C.R. 142, and by this Court, [1959] S.C.R. 378, in relation to one aspect in *Commissioner of Patents v. Ciba,* had dealt with a broad process claim of the kind made in claim 1 and had held, to quote from the headnote:

> That although the two named thiazoles were of considerable therapeutic value, there was no evidence that this was true of any other derivatives covered by the claims, and
>
> That accordingly the patent was bad for want of subject matter since the claims covered substances which were not useful.

At the very least, this decision constituted a warning that there might be doubt as to the validity of claim 1 upon which, under s. 41(1), the appellant elected to rely in claiming the substance tolbutamide.

In the *Boehringer* case this Court held that an invalid process claim could not support a claim to a substance under s. 41(1), and this was repeated in the decision in the infringement action in relation to claim 10 of the patent under consideration here. Such a conclusion merely stated what I think was implicit in the *Winthrop* case.

[1] (1948), 65 R.P.C. 255.

In the light of the foregoing, I think there was ample justification for the exercise by the Commissioner under s. 50 of his discretion in the manner which he did. He was sustained in his decision by the judgment in the Court below, and in my opinion his decision should not be disturbed by this Court. It is my view that this appeal should be dismissed with costs to be paid by the appellant to the respondent.

Appeal dismissed with costs.

Solicitors for the appellant: Smart & Biggar, Ottawa.

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

Solicitors for the intervenant: Duncan, Goldsmith & Caswell, Toronto.

JAMES EATON O'CONNOR .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1966
*Feb. 21, 22
Apr. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Driving while ability impaired—Prisoner refused permission to contact lawyer after arrest—"Full answer and defence"—Criminal Code, 1953-54 (Can.), c. 51, s. 709(1)—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(e).

Evidence—Admissibility—Breathalizer tests obtained after arrest—Accused not informed beforehand of arrest—Subsequently allowed to place a telephone call for legal assistance—Refused further calls when first proved abortive—Whether violation of s. 2(c)(ii) of Canadian Bill of Rights, 1960 (Can.), c. 44—Whether evidence of breathalizer admissible.

The accused, who was represented by counsel at trial, was convicted of impaired driving. The evidence included evidence of breathalizer tests. The accused was not told that he was under arrest until after the tests had been taken. When he was so informed, he was allowed to place a telephone call to his solicitor. When this call proved abortive, he was refused permission to make a second call to obtain legal assistance. His appeal by way of a stated case was allowed on the ground that the breathalizer evidence should not have been admitted. On appeal by the Crown to the Court of Appeal, the conviction was restored. The accused was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

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* PRESENT: Taschereau C.J. and Fauteux, Ritchie, Hall and Spence JJ.

1966

O'CONNOR v. THE QUEEN

Per Taschereau C.J., and Fauteux, Ritchie and Hall JJ.: The refusal by the police to allow the accused to make a second telephone call was not a denial of his right to make "his full answer and defence" within the meaning of s. 709 of the Criminal Code. That section relates solely to the procedure at trial.

The accused cannot derive any assistance from s. 2(*c*)(ii) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44, which provides that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay. The contention that the mere denial to the accused of his right to retain and instruct counsel without delay of itself automatically nullifies the subsequent proceedings was rejected. *Regina v. Steeves*, [1964] 1 C.C.C. 266 at 268, adopted.

The alternative contention that the evidence of the breathalizer should be ignored, could not be entertained either. The facts submitted for the stated case in no way suggested that the presence of counsel after the tests had been completed could have resulted in his ascertaining any factors which would have affected the admissibility of this evidence. The Magistrate did not see fit to draw the inference that had the accused been informed of the charge against him he would have then and there decided to obtain and instruct counsel, and therefore no question of law based upon that inference arose out of the stated case. Furthermore, the decision that the evidence of the breathalizer tests should be ignored was a decision on a question of law which did not arise out of the stated case and which did not form one of the grounds upon which leave to appeal to this Court was granted.

In any event, the evidence of the breathalizer tests was clearly admissible, even if it had been shown that the absence of counsel deprived the accused of being advised of his right to refuse to take the tests.

Per Spence J.: Under the particular circumstances of this case and on the basis upon which the case was stated and the questions put therein, the accused's appeal should be dismissed. A Court, upon an appeal by way of stated case upon the questions as put in this case, could not consider the inference that the accused, had he been informed as he ought to have been that he was under arrest, would there and then have determined upon obtaining and instructing counsel.

Droit criminel—Conduite d'automobile alors que la capacité de le faire est affaiblie—Permission refusée de communiquer avec un avocat après mise en arrestation—«Réponse et défense complète»—Code criminel, 1953-54 (Can.), c. 51, art. 709(1)—Déclaration canadienne des droits, 1960 (Can.), c. 44, s. 2(e).

Preuve—Admissibilité—Épreuve d'haleine obtenue après arrestation—Accusé non informé préalablement de son arrestation—Permission subséquente de téléphoner à son avocat—Permission refusée de placer d'autres appels lorsque le premier a été sans succès—Est-ce qu'il y a eu contravention de l'art. 2(c)(ii) de la Déclaration canadienne des droits, 1960 (Can.), c. 44—La preuve d'haleine était-elle admissible—Code criminel, 1953-54 (Can.), c. 51, art. 224.

L'appelant, qui était représenté à son procès par un avocat, a été trouvé coupable d'avoir conduit une automobile pendant que sa capacité de le faire était affaiblie. La preuve comprenait une preuve d'un examen d'haleine. L'appelant a été averti qu'il était en état d'arrestation seulement après que les épreuves d'haleine eurent été prises. C'est alors qu'on lui a permis de placer un appel téléphonique à son avocat. Lorsque cet appel s'avéra sans résultat, permission de placer un second appel pour obtenir de l'aide légale lui fut refusée. Son appel en vertu d'un dossier soumis fut maintenu pour le motif que la preuve de l'examen d'haleine n'aurait pas dû être admise. Sur appel par la Couronne à la Cour d'appel, le verdict de culpabilité fut rétabli. L'appelant a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le Juge en chef Taschereau et les Juges Fauteux, Ritchie et Hall: Le refus par la police de permettre à l'appelant de placer un second appel téléphonique n'était pas un déni de son droit de présenter «une réponse et défense complète» dans le sens de l'art. 709 du *Code criminel*. Cet article traite seulement de la procédure lors du procès.

L'appelant ne peut obtenir aucun bénéfice de l'art. 2(*c*)(ii) de la *Déclaration canadienne des droits*, 1960 (Can.), c. 44, qui prévoit que nulle loi du Canada ne doit s'interpréter ni s'appliquer comme privant une personne arrêtée ou détenue du droit de retenir et de constituer un avocat sans délai. La prétention que le seul déni du droit de retenir et de donner des instructions à un avocat sans délai *per se* annule automatiquement les procédures subséquentes doit être rejetée. *Regina v. Steeves*, [1964] 1 C.C.C. 266 à la page 268, adoptée.

La prétention alternative que la preuve de l'examen d'haleine devrait être ignorée ne peut pas être entretenue non plus. Les fait relatés au dossier soumis ne suggèrent d'aucune façon que la présence d'un avocat après que les épreuves eurent été complétées aurait eu pour résultat de faire constater des faits qui auraient affecté l'admissibilité de cette preuve. Le magistrat n'a pas jugé à propos de tirer la conclusion que, si l'accusé avait été notifié de l'accusation portée contre lui, il aurait décidé dès ce moment d'obtenir et de donner des instructions à un avocat, et en conséquence aucune question de droit basée sur cette déduction n'était soulevée par le dossier soumis. Bien plus, la décision que la preuve de l'examen d'haleine devrait être ignorée était une décision sur une question de droit qui ne se soulevait pas dans le dossier soumis et qui ne formait pas un des motifs pour lesquels permission d'appeler devant cette Cour avait été accordée.

A tout événement, la preuve de l'examen d'haleine était clairement admissible, même si on avait pu démontrer que l'absence d'un avocat avait privé l'appelant d'être avisé de son droit de refuser de se soumettre à cette épreuve.

Le Juge Spence: Dans les circonstances particulières de cette cause et vu la base sur laquelle le dossier a été soumis et les questions ont été posées, l'appel doit être rejeté. Une Cour, sur appel sur des questions telles que posées dans cette cause en vertu d'un dossier soumis, ne peut considérer

1966

O'CONNOR v. THE QUEEN

l'inférence que l'accusé, s'il avait été notifié qu'il était en état d'arrestation, tel qu'il aurait dû l'être, aurait dès ce moment décidé d'obtenir un avocat et de lui donner des instructions.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], rétablissant un verdict de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], restoring a conviction. Appeal dismissed.

E. Patrick Hartt, Q.C., for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of Taschereau C. J. and Fauteux, Ritchie and Hall J.J. was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal for Ontario[1] setting aside a judgment of Mr. Justice Haines and ordering that an affirmative answer should be given to the three questions submitted by Magistrate F. W. Bartram, Q.C., in the case stated by him at the request of the appellant's counsel following the appellant's conviction of an offence contrary to s. 223 of the *Criminal Code*.

As we are limited on this appeal to the facts stated by the learned Magistrate, I think it desirable to set out the whole of the case stated by him:

1. On the 5th day of February, 1964, an information was laid under oath before a Justice of the Peace for the County of York by the above named Peter Campbell for that the said James Eaton O'Connor on the 5th day of February, 1964, in the Municipality of Metropolitan Toronto, in the County of York, unlawfully did while his ability to drive a motor vehicle was impaired by alcohol or a drug, drive a motor vehicle contrary to the Criminal Code.

2. On the 20th day of February, 1964, the said charge was duly heard before me in the presence of the accused and after hearing the evidence adduced and the submissions made by Counsel on behalf of the Crown and the accused, I found the said James Eaton O'Connor guilty of the said offence and convicted him thereof, but at the request of Counsel for the said James Eaton O'Connor, I state the following case for the consideration of this Honourable Court:

James Eaton O'Connor was driving a Dodge motor vehicle south on Weston Road at about 1:20 a.m. on February 5th, 1964, when he was stopped by Constable Graham of the Metropolitan Toronto Police

[1] [1965] 2 O.R. 773, 47 C.R. 287, [1966] 2 C.C.C. 28, 52 D.L.R. (2d) 106.

Department. James O'Connor got out of his car and as a result of his observations of Mr. O'Connor, Constable Graham formed the opinion that Mr. O'Connor's ability to drive a motor vehicle was impaired by alcohol. Constable Graham placed Mr. O'Connor under arrest on a charge of driving while his ability to drive a motor vehicle was impaired by alcohol but did not tell Mr. O'Connor this.

James O'Connor was interviewed by Constable Thomas McBrian on February 5th, 1964, at about 1:45 a.m. at the Police Station. As a result of his observations of Mr. O'Connor and the results of tests attempted by Mr. O'Connor for Constable McBrian, Constable McBrian formed the opinion that the accused's ability to drive a motor vehicle was obviously impaired by alcohol. A breathalyzer test reading of 2.0 parts per thousand blood alcohol was recorded at 2:00 a.m. and at 2:15 a.m. a second breathalyzer test reading of 1.9 parts per thousand blood alcohol was recorded. I found as a fact that Mr. O'Connor was not told that he was going to be charged and did not know that he was under arrest until after the breath tests were taken and he was being placed in a cell for the night. At that time, he requested permission to contact his solicitor. He was allowed to make one telephone call but when he was informed that the solicitor was away, he was refused permission to make a further telephone call to obtain legal assistance. The refusal to telephone was made after the tests were taken.

Counsel for James Eaton O'Connor desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the questions submitted for the judgment of this Honourable Court being:

(1) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial to the accused to make his full answer and defence?

(2) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial of natural justice?

(3) Was I right in convicting the accused under the circumstances when I found as a fact, that he, while under arrest, had been denied the right to contact a lawyer?

It is to be noted that no further questions have been submitted by the appellant's counsel at any stage of these proceedings and that the questions of law upon which the application for leave to appeal to this Court was based were confined to challenging the answers given by the Court of Appeal to these three questions, as indeed the grounds upon which such leave to appeal was granted were also confined.

I take it from reading the reasons for judgment of Mr. Justice Haines that the negative answer which he gave to the first question posed by the learned Magistrate was based on his having equated the refusal by the police to allow the appellant to make a second telephone call, for the purpose of contacting a lawyer while he was in the cells at

1966

O'CONNOR v. THE QUEEN

Ritchie J.

the Police Station at 2:15 a.m. with a denial of his right to make "his full answer and defence" within the meaning of s. 709 of the *Criminal Code* which reads as follows:

709(1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.

(2) The prosecutor or defendant as the case may be may examine and cross-examine witnesses personally or by counsel or agent.

(3) Every witness at a trial in proceedings in which this Part applies shall be examined under oath.

I think it desirable to dispose of this phase of the matter at the outset and to say that I am in full agreement with Mr. Justice Roach that this section "relates solely to the procedure at trial" and that I accept the statement which he made in the course of the reasons for judgment which he delivered on behalf of the Court of Appeal when he said:

At the trial the accused was represented by able, experienced counsel and in the case stated there is no suggestion that any right given to the accused by that section (i.e. s. 709) was withheld from him.

In my opinion the questions submitted by the learned Magistrate are to be answered in accordance with the interpretation to be placed on the relevant provisions of the *Canadian Bill of Rights* which read as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .

(*b*) the right of the individual to equality before the law *and the protection of the law*; . . .

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . .

(*c*) *deprive* a person who has been arrested or *detained*

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

...

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; . . .

The italics are my own.

In submitting that this appeal should be allowed and the three questions answered in the negative, counsel for the

appellant asked that a verdict of acquittal be entered and, in so far as this request is based on the contention that the mere denial to the appellant of his "right to retain and instruct counsel without delay" of itself automatically nullifies the subsequent proceedings, I reject it. In this regard I adopt the view expressed by Ilsley C.J. in *Regina v. Steeves*[1], where he said:

> Nor, in my opinion, is there any general rule that if a person who has been arrested has been deprived by the police of the right to instruct counsel without delay, the charge against that person must be dismissed if he is brought to trial and the accused go forever free.
>
> Reflection on the consequences of such a rule, if it were to exist in, for example, the case of capital murder, will indicate, I think, that the relevant provision of the *Canadian Bill of Rights* cannot mean that.

Counsel for the appellant, however, asked in the alternative that the conviction be quashed and "the matter remitted back to the learned Magistrate to dispose of the case on the other evidence only, ignoring the evidence of the breathalizer", in accordance with the order made by Haines J.

On the facts as stated by the learned Magistrate it is not suggested that the appellant had been deprived of his rights under s. 2(*c*)(ii) until after he had voluntarily submitted to the two breathalizer tests being administered to him and it is a little difficult to understand the grounds upon which Mr. Justice Haines decided that this evidence should be excluded.

In the early stages of his reasons for judgment, the learned judge of first instance observed:

> It was only after the taking of two breathalizer tests that the accused sought permission to contact his solicitor, and, indeed, it can hardly be gainsaid that the police were under no duty to advise him of his rights in that respect. One might therefore be prompted to conclude that all proceedings taken by the police up to and including the taking of the breath tests were regular and proper, and that the complaints of the accused, if any, must necessarily be confined to subsequent events.
>
> However, on the basis of the facts placed before me it is manifest that from the very first two seemingly obvious rights inherent in an accused person were violated. Mr. O'Connor was not informed of or made aware of the fact that he was under arrest, and further, and more importantly, he was not informed of the charge upon which he was arrested. It was only upon the completion of the breath tests and their analysis that these things were made known to him, and it was upon the acquisition of this knowledge that Mr. O'Connor sought permission to contact counsel. I have

[1] [1964] 1 C.C.C. 266 at 268, 42 C.R. 234, 49 M.P.R. 227, 42 D.L.R. (2d) 335.

1966

O'CONNOR v. THE QUEEN

Ritchie J.

no doubt but that had the police fulfilled their very obvious duty in making known to the accused the charge against him at the time of apprehension that he would there and then have determined upon the obtaining and instructing of counsel as was his right under sec. 2(*c*)(ii) of the *Canadian Bill of Rights* . . .

In my opinion, therefore, nothing in this case turns on the question of when the attempt to retain and instruct counsel was exercised, . . .

It would appear from this part of his decision that the learned judge was expressing the view that the failure of the police to tell the appellant at the time of his apprehension that he was under arrest or that he was charged with driving his motor vehicle while his ability to do so was impaired resulted in his being subjected to the breathalizer tests before he had any reason to believe that he was in any need of legal assistance and thus deprived him of his right to retain and instruct counsel before the tests were administered. This interpretation of the judgment, however, appears to me to be inconsistent with what the learned judge later said. After he had expressed the view that there had been a complete violation of the appellant's rights he then continued:

And here I am not speaking of the initial failure of the police to inform the accused of the offence with which he was charged or of the fact of his arrest. These things of course are as unacceptable as their apparent notion that persons in custody are permitted only one phone call completed or otherwise.

My reference for the purposes of deciding this case is directed solely to the conduct of the police in denying to the accused the right to retain and instruct counsel without delay. Inherent in that denial was a denial of the right in the accused to confrontation in fact development at a crucial stage to demonstrate his lack of guilt according to law. Had counsel been present to gather evidence he might possibly have ascertained factors which would have determined the innocence of the accused. For example, and only by way of example, he might have unearthed some physical disability under which the accused laboured which would have pointed to some other explanation than impairment by alcohol. Alternatively, he might have discovered some defect in the breathalizer apparatus and sought the taking of a blood test which would negate the presence of alcohol. As applied to this case, having regard to the materials before me, these things are of course speculation, . . .

If these speculative considerations formed any part of the judge's reasoning in reaching his conclusions that the breathalizer tests were to be ignored, then I think he was in error in considering them because, in my opinion, the facts submitted in the stated case in no way suggest that the

presence of counsel in the Police Station after the tests had been completed at 2:15 a.m. could have resulted in his ascertaining any factors which would have affected the admissibility of this evidence.

If, on the other hand, the breathalizer test evidence was excluded on the ground that the appellant was deprived of counsel before the tests were taken by reason of the fact that he was not told of the charge against him when he was apprehended, then any such ruling must be based on the assumption that if he had been given this information "he would there and then have determined upon the obtaining and instructing of counsel". This is an inference which the learned Magistrate did not see fit to draw from the evidence and in my opinion no question of law based upon it arises out of the stated case.

A judge to whom a stated case is transmitted under s. 734 of the *Criminal Code* is confined to the questions of law stated by the Magistrate and to any other question of law necessarily arising out of the facts stated, in the sense that no evidence could alter it. This is made plain by McRuer C.J.H.C. in the course of his reasons for judgment in *Regina v. C.P.R.*[1], where he said:

> On the argument I had some doubt as to whether I could deal with points of law not stated in the stated case. I have, however, come to the conclusion that since the matter before me is in the nature of an appeal and so stated to be, by s. 734 of the *Criminal Code,* the respondent is entitled to support the conviction on any matter of law arising out of the stated case *as long as no evidence could alter it:*...

The italics are my own.

As I have indicated, I am of opinion that when Mr. Justice Haines decided that the evidence of the breathalizer tests should be ignored, he was deciding a question of law which did not arise out of the stated case and which does not form one of the grounds upon which leave to appeal to this Court was granted.

In view, however, of the fact that the question of the admissibility of the evidence of the breathalizer tests was dealt with in both the Courts below, I think it desirable to say that this evidence in my opinion was clearly admissible and even if it had been shown that the absence of the

[1] (1962), 36 C.R. 355 at 365, 366, [1962] O.R. 108, 31 D.L.R. (2d) 209.

1966

O'CONNOR v. THE QUEEN

Ritchie J.

appellant's lawyer deprived him of being advised of his right to refuse to take the tests, my opinion would be the same having regard to the provisions of s. 224(3) of the *Criminal Code* which read as follows:

> 224(3) In any proceedings under section 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, *notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.*

The italics are my own.

This subsection was considered by this Court in *Re the Validity of s. 92(4) Of the Vehicle Act 1957 (Sask.)*[1] and the general law establishing the admissibility of such evidence was fully reviewed by Mr. Justice Fauteux in the course of his reasons for judgment in the case of *Attorney General for Quebec v. Begin*[2].

The evidence in the present case does not, in my opinion, disclose that the circumstances under which the police refused "to allow the accused while under arrest to contact a lawyer" were such as to in any way deprive him "of the right to a fair hearing in accordance with the principles of fundamental justice" and I am accordingly of opinion that no question arises as to the effect which the *Canadian Bill of Rights* might have upon such circumstances if they did exist.

In view of all the above I would answer each of the questions submitted by the learned Magistrate in the affirmative and thereby confirm the conviction.

I would therefore dismiss this appeal.

SPENCE J.:—I have had the privilege of reading the reasons for judgment of my brother Ritchie. I agree that under the particular circumstances in this appeal the appeal must be dismissed.

I feel, however, that I must limit my concurrence strictly to the basis upon which the case was stated by the learned

[1] [1958] S.C.R. 608, 121 C.C.C. 321, 15 D.L.R. (2d) 225.

[2] [1955] S.C.R. 593 et 600 *et seq.*, 21 C.R. 217, 112 C.C.C. 209, 5 D.L.R. 594.

magistrate and the questions put by him which were as follows:

(1) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial to the accused to make his full answer and defence?

(2) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial of natural justice?

(3) Was I right in convicting the accused under the circumstances when I found as a fact, that he, while under arrest, had been denied the right to contact a lawyer?

I agree, with respect, that Haines J. had no basis upon which he could conclude that the accused "would there and then have determined upon obtaining and instructing counsel" had he been informed as he ought to have been that he was under arrest on a charge of impaired driving. In my view, such an inference could not be considered by the court upon an appeal by way of stated case upon the questions as put therein. It certainly was not one which could not be altered by evidence. See McRuer C.J.H.C. in *Regina v. C.P.R.*[1].

There may well be cases where the same failure to warn the accused that he is under arrest and to state the charge against him results in the obtaining of evidence which it could not otherwise have been obtained. It is not my view that we are in any way bound in the consideration of such cases by the result in the present appeal.

Appeal dismissed.

Solicitor for the appellant: E. P. Hartt, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario.

[1] (1962), 36 C.R. 355 at 365, 366, [1962] O.R. 108, 31 D.L.R. (2d) 209.

1966

*May 10, 11, 12, 13, 16, 17 June 28

CANADIAN WESTERN NATURAL GAS COMPANY LIMITED (*Defendant*) ..... APPELLANT;

and

INTERNATIONAL UTILITIES CORPORATION, HORATIO RAY MILNER and JOHN MAYBIN (*Defendants*);

AND

CENTRAL GAS UTILITIES LTD. and CENTRAL GAS UTILITIES (VULCAN) LIMITED (*Plaintiffs*) ..... RESPONDENTS;

and

LAURENCE B. GIBSON, E. O. PARRY, ERIC AVERY and HARRY EDELSON (*Third Parties*).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Purchase by one company of another company's gas distribution system—Claim that purchasing company was trustee of franchise for distribution of natural gas—Conspiracy claim—Claims dismissed—Fiduciary relationship not established.

Central Gas Utilities Ltd. and Central Gas Utilities (Vulcan) Ltd. sued the defendants for a declaration that Canadian Western Natural Gas Co. Ltd. was a trustee for the plaintiffs of a franchise for the distribution of natural gas in the Town of Vulcan, and for damages for conspiracy to acquire for Canadian Western the gas utility plant of the Vulcan Company. The trial judge dismissed the action. On appeal it was held that Canadian Western must hold the franchise as trustee for the Vulcan Company but the dismissal of the conspiracy claim was affirmed. Canadian Western appealed to this Court from the declaration that it was a trustee and the respondents cross appealed from the dismissal of the conspiracy claim.

Central Gas Utilities (Vulcan) Ltd., which later became a wholly owned subsidiary of Central Gas Utilities Ltd., was incorporated for the purpose of distributing propane gas in the Town of Vulcan. (The two companies are hereinafter referred to as the Vulcan Company.) In July of 1953 the Vulcan Company entered into an agreement with

* PRESENT: Taschereau C.J. and Abbott, Judson, Ritchie and Hall JJ.

International Utilities Corporation as the only possible means of keeping going. Under this agreement International took over two options held by the Vulcan Company and also provided it with financial assistance. International also became a substantial minority shareholder of the Vulcan Company and during the subsequent years continued to feed in money to keep the company going. It had one nominee on the company's board of directors and it provided routine management and day-to-day administration.

Following representations made to the provincial government on the part of the Town of Vulcan for service of natural gas, Canadian Western, a subsidiary of International, built a feeder line to the town in 1959. This company also got the franchise for the distribution of natural gas in Vulcan and in three neighbouring municipalities and after lengthy negotiations they bought the propane gas distribution system from the Vulcan Company.

After all this had been done and the arrangements ratified by the town and the Board of Public Utility Commissioners of Alberta, the Vulcan company repudiated the arrangements, their complaint being that Canadian Western should have actively promoted the acquisition of the franchise in the Town of Vulcan for them, and that because of their position they must hold the franchise for the Vulcan Company.

Held: The appeal should be allowed and the judgment at trial restored.

An examination of the prior negotiations showed that the purchase of the distribution system and the granting of the franchise were the result of hard bargaining at arm's length participated in not only by the two companies involved but by the town and with the knowledge of the Board of Public Utility Commissioners, which eventually approved both the sale and the grant of the franchise. There was no question here of the imposition of the will of the purchaser on a captive company.

The relationship between the two companies was not one that prevented Canadian Western from accepting the franchise and buying the distribution system. Canadian Western was not in a fiduciary position in relation to the Vulcan Company. There was no evidence that the former, as a corporate entity, ever undertook the obligations and duties of management of the latter. The control and direction of management of the Vulcan Company remained with its board of directors at all times.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing in part an appeal from a judgment of Milvain J. Appeal allowed; cross-appeal dismissed.

Geo. H. Steer, Q.C., and *G. A. C. Steer, Q.C.*, for the defendant, appellant.

W. A. McGillivray, Q.C., and *R. A. Scott*, for the plaintiffs, respondents.

[1] (1965), 53 W.W.R. 705.

1966

CANADIAN WESTERN NATURAL GAS CO. LTD. v. CENTRAL GAS UTILITIES LTD. et al.

The judgment of the Court was delivered by

JUDSON J.:—Central Gas Utilities Limited and Central Gas Utilities (Vulcan) Limited sued Canadian Western Natural Gas Company Limited, International Utilities Corporation, H. R. Milner and John Maybin for a declaration that Canadian Western was a trustee for the plaintiffs of a franchise for the distribution of natural gas in the Town of Vulcan, and for damages for conspiracy to acquire for Canadian Western the gas utility plant of the Vulcan Company. The trial judge dismissed the action. On appeal[1] it was held that Canadian Western must hold the franchise as trustee for the Vulcan Company but the dismissal of the conspiracy claim was affirmed.

Central Gas Utilities (Vulcan) Limited is a wholly owned subsidiary of Central Gas Utilities Limited. It was incorporated for the purpose of distributing propane gas in the Town of Vulcan. The only other property owned by Central Gas Utilities Limited was a similar distribution system in the Town of Melville, Saskatchewan. It also held an option to buy another small distribution system in British Columbia. Lack of money soon compelled it to give up this option. I will refer from now on to these two companies as the Vulcan Company.

The Vulcan Company in July of 1953 entered into an agreement with International Utilities Corporation as the only possible means of keeping going. This agreement is set out in full in the reasons for judgment of Mr. Justice Milvain at trial[2]. I will here attempt only a summary of the agreement and a statement of the reasons why it was made.

Under this agreement International Utilities took over two options held by the Vulcan Company and reimbursed that company for its deposits. These options were about to expire and would have required payment of $135,000 and $402,300 within a short time. The Vulcan Company because of lack of money could not possibly have taken them up.

The other main purpose of the agreement was to provide financial assistance to the Vulcan Company. International guaranteed an existing bank loan of $21,500. It made an

[1] (1965), 53 W.W.R. 705. [2] (1964), 49 W.W.R. 515.

immediate loan of $50,000 to be applied on current liabilities and it promised that from time to time it would, in its discretion, make further loans as they were needed.

International also bought from one L. B. Gibson, who was a party to the agreement and a promoter of the company, 159,470 common shares of the Vulcan Company, which gave International approximately one-third of the voting power.

At the time when this agreement was made the Vulcan Company was insolvent. Its assets were the two distribution systems in the Towns of Vulcan and Melville. The consolidated financial statement for the year ending September 30, 1952, showed current assets of $4,123.35 and current liabilities of $163,519.84. In October 1952, the company borrowed $75,000 on the security of a 120-day debenture. In January 1953, it borrowed $200,000 on the security of another debenture. After a capital reorganization, the company made a public issue of 750,000 of its common shares but sold only 300,000 and realized the sum of $300,000. What it realized was applied to pay off the secured indebtedness. A financial statement dated May 31, 1953 shows current assets of $19,769.72 and current liabilities of $55,045.70.

The evidence is that it was impossible for the company to raise money on any public capital markets. Such efforts had been made and had failed. If the financing agreement between the company and International had not been made in July of 1953, the company would not have long survived.

The agreement also provided that Gibson would resign as a director and officer of the Vulcan Company in favour of a nominee of International. This was also done and one Austin Brownie became a director and president of the Vulcan Company from 1953 until his death in January of 1956. He was succeeded in this office by the defendant H. R. Milner, who remained in that position until 1959. This agreement, pursuant to its terms, had to be submitted to the shareholders. This was done and the shareholders ratified the agreement.

Canadian Western is a public utility in the business of producing, purchasing and distributing natural gas in the City of Calgary and a large number of other communities in Southern Alberta. It is a subsidiary of the defendant

1966

CANADIAN WESTERN NATURAL GAS CO. LTD. v. CENTRAL GAS UTILITIES LTD. et al.

Judson J.

International Utilities Corporation, which controls a number of other public utilities operating in the Province of Alberta.

Until the year 1958 nothing much happened in the Vulcan Company. The operation was routine. Until October 1956 the old manager, Edgar Robinson, remained in office. When he resigned he was replaced by one John Maybin, who was a member of what is called the Administrative Services Division of a number of subsidiaries of International in the Province of Alberta. The sales of propane gas did not expand as had been expected. Compared with other fuels, it was too expensive. The company lost money every year. It never had any working capital and International had to feed in money every year to keep it going. By October 1957 these loans amounted to $190,000. There was, in addition, the bank loan of $21,500 guaranteed by International.

The following is a table of the company's current assets, current liabilities and losses, year by year, from 1952 to 1958:

	Current Assets	Current Liabilities	Loss
1952	$ 4,123.35	$163,519.84	$14,095.33
1953	26,475.95	85,468.40	82,745.85
1954	29,658.87	145,889.68	56,297.98
1955	38,141.45	191,510.58	40,909.80
1956	33,039.44	202,331.27	19,542.64
1957	26,246.00	211,807.00	14,319.00
1958	22,662.00	216,241.00	10,534.00

Counsel for the Vulcan Company made much of the tight control exercised over the company during this period. The head office was transferred to the head office of Canadian Western. Robinson, until his resignation in 1956 and after that date Maybin, carried on their duties from their desks in the common office. This was an economy measure. The company was in arrears with its rent. Routine administration, such as billing and collecting, was also done in this office at no charge to the Vulcan Company until Robinson left. When Maybin took over the administration a charge of $400 per month was made for these services and accommodation. There is no suggestion anywhere that this charge was excessive. I have no doubt also that Maybin exercised control over the banking arrangements. This was only to be

expected when the company was being kept going on steady and increasing loans from International. I can see nothing in this period which puts International or Canadian Western in a fiduciary relation with the Vulcan Company. International was a substantial creditor and shareholder. It had one nominee on the Board of Directors and it provided routine management and day-to-day administration.

The year 1958 was a significant year in the relations between the companies. In October of that year an Alberta Gas Trunk Line from Pincher Creek to Princess was completed. The Town of Vulcan was forty miles north of this line. If the town was to be served with natural gas, it would be necessary to construct a feeder line from Shaughnessy going through the small municipalities of Barons, Carmangay, Champion, with Vulcan at the end. Canadian Western at first did not think that the three municipalities of Barons, Carmangay and Champion alone would justify the building of the extension. They estimated that they would get approximately 400 customers from these places. Vulcan had 400 potential customers. However, they did conclude late in 1958 that the three municipalities alone would be sufficient to justify the building as far as Champion. There was another fourteen miles to go from Champion to Vulcan and this part of the line would cost approximately $190,000.

In 1958, knowing of the construction of the gas trunk line, the Town of Vulcan began to agitate for service of natural gas. They made representations to the provincial government. The Vulcan extension line was built by Canadian Western in 1959 at its own expense. This company also got the franchise for the distribution of natural gas in Vulcan and the other three municipalities and after lengthy negotiations they bought the propane gas distribution system from the Vulcan Company.

After all this had been done and the arrangements ratified by the town and the Board of Public Utility Commissioners of Alberta, the Vulcan Company repudiated the arrangements, their complaint being that Canadian Western should have actively promoted the acquisition of the franchise in the Town of Vulcan for them, and that because of their position they must hold the franchise in

1966

CANADIAN WESTERN NATURAL GAS CO. LTD. v. CENTRAL GAS UTILITIES LTD et al.

Judson J.

trust for the Vulcan Company. In an action against them for specific performance of the agreement for the sale of the Vulcan distribution system, they pleaded this as a defence. They also started an action for a declaration to this effect and also for damages for conspiracy. It is the judgment of the Court of Appeal in this action that is now under appeal. This makes it necessary to examine in some detail the purchase of the distribution system by Canadian Western and the acquisition of the franchise.

The position towards the end of 1958 was this. The Vulcan Company had a non-exclusive licence in the town for the distribution of propane gas but not natural gas. When the town granted this licence in 1951 it stated that it was not granting a licence for the distribution of natural gas although when the Vulcan Company installed its propane system, it did so in such a way that it was suitable for the distribution of natural gas.

The problem facing everybody was twofold. Who was going to build and finance the construction of a forty-mile extension line costing approximately $900,000 to the Town of Vulcan, and who was going to distribute natural gas in the town? It is obvious that the insolvent company could not finance the extension line and the town was urging its claims to an immediate service.

As far as the franchise was concerned there was the same difficulty. An insolvent company unable to build the extension line could have no chance of getting a franchise from any municipal council which was alert to the interests of its citizens. Nevertheless, the claim of the Vulcan Company against Canadian Western is that this company, having brought natural gas to the town limits, could not acquire the franchise and could not purchase the distribution system without holding both in trust for the Vulcan Company. This, in fact, is the effect of the judgment of the Court of Appeal.

The problem was never as simple as its statement by the Vulcan Company. There were not merely two competing companies involved. There was a municipality with a mind and interests of its own, and a provincial public utility commission which had to approve all arrangements made for construction, franchises and rates and which had given

the town assurance in 1951 that by granting the non-exclusive licence for the distribution of propane gas, its hands would not be tied if, at a later date, it wished to obtain a supply of natural gas from another company. The legal position cannot be in doubt. No one had any claim of right to this franchise. It was wide open to competition, including competition from Canadian Western, unless that Company's relations with the Vulcan Company raised a disability.

I come now to the offers made by Canadian Western to purchase the distribution system in the Town of Vulcan. The first offer was dated April 10, 1958 and was for $75,000. I am dealing here with the assets in the Town of Vulcan only. The Board of Directors rejected this offer on two grounds. They thought the price was too low, and they also suggested that they might purchase natural gas from Canadian Western and distribute it themselves until such time as the plant in Melville had been disposed of when they might be in a better position to appreciate the true worth of the Vulcan property. The next offer was dated May 7, 1958. It was for $70,000 plus whatever salvage might be realized from the sale of assets not needed for the distribution of natural gas. Again, the Vulcan Company suggested that it should distribute the gas and purchase wholesale from Canadian Western.

On April 7, 1958, the town had given first reading to a by-law granting a franchise to Canadian Western. This became known to the Board of Directors when they considered the second offer and they made representations to the Board of Public Utility Commissioners that they were being ignored. The Chairman of the Board stated at this time, in June 1958, that any application for approval of a franchise would be held in abeyance until Vulcan had had a chance to negotiate with Canadian Western. The result of all this was that nothing was done by way of construction of the extension line in the year 1958. It became essential that it be constructed early in 1959 and that plans be made well ahead of time.

Canadian Western made a third offer on February 11, 1959, offering a price of $105,375. This increased offer had the concurrence of the Town of Vulcan before it was made

1966

CANADIAN WESTERN NATURAL GAS CO. LTD. v. CENTRAL GAS UTILITIES LTD. et al.

Judson J.

to forestall any complaint about possible inflation of the figures for a rate base. This offer was subject to these conditions:

(a) approval by the shareholders not later than March 16, 1959;

(b) approval by the Board not later than June 29, 1959;

(c) the acquisition by Canadian Western not later than June 29, 1959, of franchises for the distribution of natural gas in Vulcan and the three other small municipalities.

These conditions were not met and the offer lapsed, although it is the one that was subsequently accepted. The reasons for the delay were that the company was still hopeful that it would be able to do its own distribution and purchase gas wholesale. It was also having trouble with the Saskatchewan Power Corporation, which was expropriating the distribution system in Melville and offering what was considered to be a very low price.

On March 20, 1959, at a directors' meeting, the lapsed offer was renewed. H. R. Milner resigned as president and director. The directors referred the offer to a shareholders' meeting to be called and they recommended that it be accepted. The shareholders' meeting was held on April 8, 1959, and passed a resolution authorizing the acceptance of the offer. The votes cast numbered 356,220—195,171 in favour, 161,049 against. International voted its own block in favour. Immediately following the shareholders' meeting the directors accepted the offer.

The minority group complained to the Board of Public Utility Commissioners. On May 1, 1959, the Board made two orders approving the sale and the execution of a franchise agreement between the town and Canadian Western. The town then passed its by-law to grant the franchise. This was then approved by a vote of the electors, as required by statute, and the franchise agreement was executed on June 8, 1959.

I have set out these negotiations in some detail because they show that the purchase of the distribution system and the granting of the franchise were the result of hard bargaining at arm's length participated in not only by the two companies involved but by the town and with the knowledge of the Board of Public Utility Commissioners, which eventually approved both the sale and the grant of the franchise. There is no question here of the imposition of the will of the purchaser on a captive company. Any inferiority

in the position of the Vulcan Company was not the result of management or control by Canadian Western but came from its total inability to make any contribution towards anything that would bring natural gas to the town. The Board of Vulcan was an independent board, which, when it saw that it could not purchase gas wholesale, sold its assets at a good price—more than double what it would have cost Canadian Western to duplicate the existing system and far higher proportionately than they were able to get in Saskatchewan, and they got this price with the consent of the town and the board, who both knew that this high price would affect the rates. Yet the judgment of the Court of Appeal decides that Canadian Western Natural Gas Company Limited holds the natural gas franchise of the Town of Vulcan as trustee for the Vulcan Company and, subject to reasonable operation charges, is accountable to the Vulcan Company for the profits of the operation of the franchise.

The Vulcan Company's argument in support of the judgment of the Court of Appeal was fourfold. The first ground was based on management. The three other grounds were that Canadian Western lulled the shareholders of the Vulcan Company into a false sense of security; that contrary to its duty, it planned the eventual destruction of the Vulcan Company from the outset, and that it took active measures to destroy the company. The last three grounds have been rejected both at trial and on appeal in the dismissal of the conspiracy claim and I do no more here than to repeat the charges and agree with their dismissal.

To establish its claim the Vulcan Company must rely on its first ground. It comes down to management and it must be from this that the fiduciary position arises which, according to the Court of Appeal, makes necessary the imposition of the constructive trust. Throughout these reasons I have avoided using the term "fiduciary relationship". I have preferred to outline what the relationship was in fact and, in my opinion, it was not a relationship that prevented Canadian Western from accepting the franchise and buying the distribution system.

I agree with the conclusions of Milvain J. at trial and I quote only the following paragraph from his judgment:

> However, there is no evidence that Canadian Western, as a corporate entity, ever undertook the obligations and duties of management. Its board

1966

CANADIAN WESTERN NATURAL GAS CO. LTD. v. CENTRAL GAS UTILITIES LTD. et al.

Judson J.

of directors, so far as the evidence goes, never was called upon to make decisions and direct the persons who managed the affairs of Central. It is clear on the evidence that the control and direction of management remained at all times in the board of directors of Central. While this was going on it was only natural that International would continue a careful daily interest in the day-to-day functions of Central. That such should be the case is obvious for two reasons. In the first place, International had an interest as a large shareholder, not as a majority shareholder but as a very large minority one, and as an ever increasing creditor for moneys advanced. In the second place, by virtue of the agreement, Ex. 1, it was provided that further assistance to Central would be made from time to time, only if such met with the opinion of the directors of International. It is common knowledge that International did continue financial assistance so it is obvious and sensible that careful track would be kept of Central's activities. When this is realized, we see the need for detailed communications which make up the bulk of 196 exhibits filed on the trial of this action. Naturally, International and the individuals responsible to it and to them, as individuals, wanted up-to-date reports and the opinions and thoughts of the reporting people. It is natural that many such people were connected in some way with Canadian Western, the inter-company group, and other companies and organizations in which International had an interest. However wide the informational net, it did not embrace Canadian Western as a corporate entity in a fiduciary position, or remove legal control from the Central directors.

The dissenting judge in the Court of Appeal also accepted this interpretation of the relationship.

The progress of this litigation requires some mention. Canadian Western wrote on July 9 to enquire whether the Vulcan Company intended to perform its contract. Following this letter there were negotiations between the two companies and Canadian Western offered, subject to the approval of the Town of Vulcan and the Board of Public Utility Commissioners, to assign the franchise to the Vulcan Company and to supply natural gas wholesale to that company. The town refused to approve this settlement. Canadian Western then sued for specific performance of the agreement on August 25, 1959.

The defendant in its statement of defence offered to submit to specific performance but only on condition that Canadian Western was a trustee for it. The filing of this defence was a repudiation of the agreement of sale which was an agreement to convey free and clear of all encumbrances. Canadian Western so accepted this defence and discontinued its action. The Vulcan Company then, on September 8, 1959, began its action for its declaration of trust.

I would allow the appeal with costs both here and in the Court of Appeal and restore the judgment at trial dismissing the action. The Vulcan Company in this Court also

cross appealed on its claim for damages for conspiracy. In this it has been unsuccessful throughout. On another branch of the cross-appeal the Vulcan Company asks for a declaration that Canadian Western held the whole Vulcan extension as trustee for it. This claim, of course, fails in view of what I have written. The cross-appeal should be dismissed with costs.

1966

CANADIAN WESTERN NATURAL GAS CO. LTD. *v.* CENTRAL GAS UTILITIES LTD. *et al.*

Judson J.

Appeal allowed with costs and judgment at trial dismissing the action restored. Cross-appeal dismissed with costs.

Solicitors for the defendant, appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitors for the plaintiffs, respondents: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

1966

DONALD LE ROY STANTON (*Plaintiff*) ..... APPELLANT; *Apr. 28, 29 Apr. 29

AND

TAYLOR, PEARSON & CARSON (B.C.) LIMITED AND FRANK MILNE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Injury to trespasser—Pickets placing wooden beam in front of truck—Driver attempting to ride over beam—Injury to picket—Whether liability.

The plaintiff, with a group of striking union members, was picketing the premises of the corporate defendant. These pickets placed a wooden beam across a lane leading from the premises of the corporation in order to prevent a truck from being driven away by the defendant M, an employee of the corporate defendant. When M attempted to run over the obstruction he found that the beam dragged for a short distance and then shot out in front of the truck. On the third such attempt the plaintiff was struck and injured by the flying beam. The trial judge held that the defendant M had acted in a reckless manner, but that the plaintiff had failed to take reasonable precautions for his own safety. Liability was divided equally. On appeal, the action was dismissed. The plaintiff appealed to this Court.

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

1966

STANTON v. TAYLOR, PEARSON & CARSON (B.C.) LTD. et al.

J. J. Robinette, Q.C., and *Duncan W. Shaw*, for the plaintiff, appellant.

J. P. Van der Hoop, for the defendants, respondents.

At the conclusion of the argument of counsel for the appellant, the Court delivered the following oral judgment:

THE COURT:—We do not need to call upon you Mr. Van der Hoop. We are all of opinion that the appeal fails and that the action was rightly dismissed for the reasons given by Davey J.A. with which we are in full agreement.

The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the defendants, respondents: Harper, Gilmour, Grey & Co., Vancouver.

1966

* Juin 2
Juin 28

LÉO DUPRÉ (*Demandeur*) ..... APPELANT;

ET

LES COMMISSAIRES D'ÉCOLE POUR LA MUNICIPALITÉ DE ST-BERNARD DE LACOLLE (*Défenderesse*) ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Négligence—Institutrice—Enfant laissée en dehors de l'école par une journée froide—Procès devant jury—Devoir de la Cour d'appel—Verdict du jury supporté par la preuve.

Une institutrice qui était à l'emploi de la défenderesse a laissé dans un «tambour», à l'extérieur de l'école, durant environ une heure et demie, l'enfant du demandeur, âgée de six ans, alors que la température était de quelques degrés au-dessus de zéro. Le jury en est arrivé à la conclusion que l'enfant avait été victime d'un accident dû à la faute commune de l'institutrice et des parents. L'institutrice fut trouvée en

* CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Hall et Spence.

faute dans une proportion de 75 pour-cent. La Cour d'appel a renversé la conclusion du jury et a rejeté l'action. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le verdict du jury rétabli.

Une Cour d'appel n'a pas droit de substituer son opinion sur les faits pour celle du jury. Son devoir est d'accepter le verdict en autant qu'il y a une preuve pour le supporter, même si la Cour est fortement en désaccord avec la conclusion du jury. Dans le cas présent, il y avait amplement de preuve sur laquelle le jury pouvait se baser pour conclure comme il l'a fait.

Negligence—Teacher—Child left outside school house on a cold day—Jury trial—Duty of Appellate Court—Finding of jury supported by evidence.

A teacher, in the defendant's employ, left the plaintiff's six year-old daughter, dressed in outdoor clothing, for a period of about one and a half hour in a lean-to adjoining the school door on a day when the temperature was a few degrees above zero. The jury found that the child had been the victim of an accident which was due to the common fault of the teacher and the parents. The teacher was held to be 75 per cent at fault. The Court of Appeal reversed the jury's finding and dismissed the action. The plaintiff appealed to this Court.

Held: The appeal should be allowed and the jury's verdict restored.

An Appellate Court is not entitled to substitute its opinion on the facts for that of the jury. Its duty is to accept the verdict if there was evidence to support it, however it may disagree with the conclusion arrived at by the jury. In this case there was ample evidence on which the jury could base its finding of negligence.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a jury's finding. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant le verdict d'un jury. Appel maintenu.

Jacques Cartier, pour le demandeur, appelant.

Jean Duchesne, c.r., et *Ovide Loiselle,* pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—En novembre 1963, l'honorable Juge René Duranleau, siégeant à la Cour supérieure,

[1] [1966] B.R. 458.

1966

DUPRÉ v. COMMISSAIRES D'ÉCOLE POUR LA MUNICIPALITÉ DE ST-BERNARD DE LACOLLE

Taschereau J. C.

district de Montréal, a confirmé le verdict d'un jury condamnant les Commissaires d'école de la municipalité de St-Bernard de Lacolle à payer au demandeur-appelant la somme de $12,000, en sa qualité de tuteur à sa fille mineure, Jocelyne, et $840 à lui personnellement.

Les faits qui entourent les circonstances de cette réclamation ont été récités au long dans les jugements des honorables juges de la Cour d'appel et il serait inutile de les analyser de nouveau. La Cour a maintenu l'appel de la Commission scolaire et a rejeté l'action, M. le Juge en chef Tremblay et M. le Juge Brossard étant dissidents.

Il suffira pour l'intelligence du jugement de cette Cour de rappeler qu'une institutrice à l'emploi des défendeurs, et alors dans l'exercice de ses fonctions, laissa dans un «tambour», à l'extérieur de l'école, durant environ une heure et demie, l'enfant du demandeur, en bas âge, alors que la température était de trente degrés en-dessous du point de congélation.

Cette enfant, comme conséquence de cette exposition au froid, alors que la porte intérieure de l'école avait été verrouillée pour lui interdire tout accès à l'intérieur, fut affectée de sérieux troubles physiques et mentaux qui ont, d'après la preuve, un caractère de permanence.

C'est la conclusion à laquelle en sont arrivés les membres du jury quand ils ont affirmativement déclaré que l'institutrice était dans l'exercice de ses fonctions et que les maux qui affligent maintenant la jeune fille ont été causés par la négligence volontaire et la faute de l'institutrice. Le montant des dommages accordés n'est pas contesté.

Je suis d'opinion qu'il ne s'agit pas ici d'un cas où le verdict d'un jury doit être mis de côté. Évidemment, il existe des cas où les Cours d'appel peuvent et doivent intervenir, si, par exemple, le verdict est contraire à la loi ou au poids de la preuve (C.P. 498). Comme l'a dit cette Cour déjà et c'est la jurisprudence unanime, *Laporte v. C.P.R.*[1]:

. . . . . An appellate court is not entitled to substitute its opinion on the facts for that of the jury. Its duty is to accept the verdict if there be evidence to support it, however much it may disagree with the conclusion arrived at by the jury.

[1] [1924] R.C.S. 278.

Dans le cas qui nous est soumis il y a évidemment amplement de preuve sur laquelle le jury pouvait se baser pour conclure comme il l'a fait.

Je crois que l'appel doit être maintenu, que le verdict du jury doit être rétabli, ainsi que le jugement de M. le Juge Duranleau qui le confirmait, le tout avec dépens de toutes les Cours contre les intimés.

Appel maintenu avec dépens.

Procureur du demandeur, appelant: J. Cartier, Saint-Jean.

Procureurs de la défenderesse, intimée: Pagé, Beauregard, Duchesne & Renaud, Montréal.

SIGEAREAK E1-53 .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1966
*May 5
May 24

ON APPEAL FROM THE COURT OF APPEAL FOR NORTHWEST TERRITORIES

Eskimos—Criminal law—Game suitable for human consumption abandoned—Northwest Territories Act, R.S.C. 1952, c. 331, s. 13—Game Ordinance O.N.W.T. 1960 (Second Sess.), c. 2, s. 15 (1)(a).

The appellant, an Eskimo, was charged with killing and abandoning game fit for human consumption contrary to s. 15(1)(*a*) of the *Game Ordinance, O.N.W.T.* 1960 (Second Sess.), c. 2. There is no dispute that the appellant had killed three caribou and had abandoned parts of them which were fit for human consumption. The charge was dismissed by the Magistrate on the ground that the *Game Ordinance* did not apply to an Eskimo. On an appeal by way of stated case, the dismissal was confirmed for the same reason. The Court of Appeal reversed this finding and convicted the appellant. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The Royal Proclamation of 1763, upon which the appellant relied, has no application in the region in which the alleged offence took place.

The *Game Ordinance,* which was in force and which was validly enacted by the Commissioner-in-Council pursuant to powers conferred upon him by the Parliament of Canada, applies to the Eskimos. The caribou which were killed in this case were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts

* PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

1966

SIGEAREAK E1-53 v. THE QUEEN

thereof suitable for human consumption even if the appellant had the legal right to hunt them for food.

In so far as *Regina v. Kallooar* (1964), 50 W.W.R. 602, and *Regina v. Kogogolak* (1959), 28 W.W.R. 376, hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest Territories, they are not good law and must be taken as having been overruled.

Esquimaux—Droit criminel—Abadon de gibier apte à la consommation humaine—Loi sur les Territoires du Nord-Ouest, S.R.C. 1952, c. 331, art. 13—Ordonnance sur le Gibier, O.N.W.T. 1960 (2e Session), c. 2, art. 15(1)(a).

L'appelant, un Esquimau, a été accusé d'avoir tué et abandonné du gibier apte à la consommation humaine, le tout contrairement à l'art. 15(1)(*a*) de l'*Ordonnance sur le Gibier*, O.N.W.T. 1960 (2e Sess.), c. 2. Il n'est pas contesté que l'appelant avait tué trois caribous et avait abandonné des parties qui étaient aptes à la consommation humaine. L'acte d'accusation fut rejeté par le magistrat pour le motif que l'*Ordonnance sur le Gibier* ne s'appliquait pas à un Esquimau. Sur appel en vertu d'un dossier soumis, le rejet de l'accusation fut confirmé pour le même motif. La Cour d'appel a renversé cette décision et a trouvé l'appelant coupable. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Proclamation royale de 1763, sur laquelle l'appelant se basait, ne s'applique pas à la région où la présumée offense a été commise.

L'*Ordonnance sur le Gibier*, qui était en force et qui avait été validement édictée par le Commissaire-en-conseil en vertu des pouvoirs qui lui sont conférés par le Parlement du Canada, s'applique aux Esquimaux. Les caribous qui ont été tués dans le cas présent étaient du gibier dans le sens de l'*Ordonnance sur le Gibier* et l'offense dans l'espèce consistait dans l'abandon de certaines parties qui étaient aptes à la consommation humaine même si l'appelant avait le droit légal d'en faire la chasse en vue de se procurer de la nourriture.

En autant que les causes de *Regina v. Kallooar* (1964), 50 W.W.R. 602 et *Regina v. Kogogolak* (1959), 28 W.W.R. 376, décident que l'*Ordonnance sur le Gibier* ne s'applique pas aux Indiens ou aux Esquimaux dans les Territoires du Nord-Ouest, ces causes ne reflètent pas la loi et doivent être considérées comme ayant été cassées.

APPEL d'un jugement de la Cour d'appel des Territoires du Nord-Ouest[1], renversant un jugement du Juge Sissons. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories[1], reversing a judgment of Sissons J. Appeal dismissed.

[1] (1966), 55 W.W.R. 1, 55 D.L.R. (2d) 29.

1966

SIGEAREAK E1-53 v. THE QUEEN

W. G. Morrow, Q.C., and *A. E. Williams*, for the appellant.

D. H. Christie, Q.C., and *J. M. Bentley*, for the respondent.

The judgment of the Court was delivered by

HALL J.:—The appellant, an Eskimo, residing at Whale Cove, a settlement on the west coast of Hudson Bay about midway between Churchill and Chesterfield Inlet, was charged under s. 15(1)(*a*) of the *Game Ordinance*, being c. 2 of the Ordinances of the Northwest Territories, (1960) Second Session, that he, between the 20th day of July, 1964 and the 31st day of July, 1964 at or near a point two miles from an abandoned cabin on the north shore at the mouth of the Wilson River, Northwest Territories, did kill and abandon game fit for human consumption contrary to s. 15(1)(*a*) of the *Game Ordinance*.

Section 15(1)(*a*) referred to reads as follows:

> 15.(1) No person who has killed, taken or acquired game shall
>
> (*a*) abandon any part thereof that is suitable for human consumption;

The *Game Ordinance* was enacted by the Commissioner in Council pursuant to powers confered by s. 13 of the *Northwest Territories Act*, R.S.C. 1952, c. 331. The relevant parts of s. 13 read:

> 13. The Commissioner in Council may, subject to the provisions of this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territories in relation to the following classes of subjects, namely,
>
> * * *
>
> (*q*) the preservation of game in the Territories;

By s. 1 of c. 20 of the Statutes of Canada 1960, s. 14 of the *Northwest Territories Act* was amended to read:

> (2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.
>
> (3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

and s. 17 was amended by adding thereto the following:

(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

Acting under s. 14(3) above, the Governor in Council passed an Order in Council on September 14, 1960, reading as follows:

AT THE GOVERNMENT HOUSE AT OTTAWA

WEDNESDAY, the 14th day of SEPTEMBER, 1960.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of section 14 of the Northwest Territories Act, is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct.

(Seal)

Certified to be a true copy.

(sgd.) D. F. Wall
Assistant Clerk of the Privy Council.

Counsel for the appellant made a point that this Order in Council was not referred to in the proceedings before the magistrate. Nothing, however, turns on that fact. The Order in Council was part of the relevant law applicable to the charge whether referred to or not.

The charge was heard by P. B. Parker, a police magistrate in and for the Northwest Territories under the provisions of s. 466(*b*) of the *Criminal Code* of Canada at Whale Cove aforesaid on February 26 and 27, 1965. Magistrate Parker, holding that he was bound by the decision of Sissons J. in *Regina v. Kallooar*[1], dismissed the charge on the ground that the *Game Ordinance* did not apply to an Eskimo.

The Attorney General of Canada applied to Magistrate Parker to state a case under s. 734 of the *Criminal Code* of Canada. The learned magistrate stated the case which concluded with asking the following question:

Was I right in holding that the Game Ordinance and particularly Section 15(1)(*a*) thereof does not apply to Eskimos?

[1] (1964), 50 W.W.R. 602.

The appeal, by way of stated case, was heard by Sissons J. who, adhering to the views expressed by him in *Regina v. Kogogolak*[1] and in *Kallooar* answered the question in the affirmative and upheld the dismissal of the charge. Sissons J. in *Regina v. Kogogolak* had held at p. 384:

> The *Game Ordinance* of the Northwest Territories cannot and does not apply to the Eskimos.

The Attorney General of Canada appealed by leave to the Court of Appeal for the Northwest Territories. The appeal was heard by the Chief Justice, Parker and McDermid JJ.A. The Court of Appeal[2] reversed Sissons J. and convicted the appellant, remitting the case to the Summary Conviction Court for the purpose of deciding what penalty should be imposed on the appellant. The appellant applied for and was given leave to appeal to this Court from the judgment of the Court of Appeal.

It was contended by the appellant that the Royal Proclamation of 1763 applied to Indians and Eskimos in the area in question here and was still in effect notwithstanding the *Northwest Territories Act* and the *Game Ordinance*. Sissons J. so held in *Kogogolak* and in *Kallooar*. Johnson J.A. in *Regina v. Sikyea*[3], whose judgment was adopted in this Court[4], expressed himself to the contrary. There is no need for any doubt on the point. The Proclamation, insofar as it related to Indians, declared:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean

[1] (1959) 28 W.W.R. 376, 31 C.R. 12.
[2] (1966) 55 W.W. 1, 55 D.L.R. (2d) 29.
[3] (1964), 46 W.W.R. 65, 43 C.R. 83, 2 C.C.C. 325.
[4] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, *or within the Limits of the Territory granted to the Hudson's Bay Company,* as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the *Sea from the West and North West as aforesaid;* (The italics are mine.)

The term "Indians" includes Eskimos: *Reference as to whether the term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, includes Eskimo inhabitants of the Province of Quebec*[1].

The Letters Patent granted in 1670 to the Governor and Company of Adventurers of England, trading into Hudson's Bay, gave:

> . . . unto the said company and their successors the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds in whatsoever latitude they should be, that lay within the entrance of the straits commonly called Hudson's Straits together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid . . . . .

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question and the judgments to the contrary are not good law.

The substantive question which was fully and ably argued by counsel was whether the *Game Ordinance* and particularly s. 15(1)(*a*) thereof apply to Eskimos. In summary, the learned magistrate found as follows as set out in more detail in the stated case:

(1) That the appellant, an Eskimo, on the 20th day of July and the 31st day of July, 1964, killed three caribou being game within the meaning of the *Game Ordinance* and he took possession of them and removed the skin and rear parts of two caribou and the tongue of the third.

(2) That he showed intention to abandon and did abandon the parts of the three caribou he had killed and

[1] [1939] S.C.R. 104, 2 D.L.R. 417.

which he did not take, and that the meat abandoned was at that time fit for human consumption.

It was not questioned that the Whale Cove settlement is in the Barren Land region of the Northwest Territories, being a part of Canada under the legislative jurisdiction of the Parliament of Canada. Parliament, by s. 13 of the *Northwest Territories Act*, conferred legislative powers upon the Commissioner in Council to enact laws for the preservation of game in the Territories. The Commissioner in Council enacted the *Game Ordinance*. Parliament, by c. 20 of the Statutes of Canada, 1960, enacted by s. 2 thereof as follows:

> From the day on which this Act comes into force, the provisions of the Ordinances entitled
>
> (*a*) "An Ordinance respecting the Preservation of Game in the Northwest Territories", being chapter 42 of the Revised Ordinances of the Northwest Territories, 1956;
>
> (*b*) "An Ordinance to amend the Game Ordinance", being chapter 2 of the Ordinances of the Northwest Territories, 1956, 2nd Session;
>
> (*c*) "An Ordinance to amend the Game Ordinance", being chapter 1 of the Ordinances of the Northwest Territories, 1957, 1st Session;
>
> (*d*) "An Ordinance to amend the Game Ordinance", being chapter 1 of the Ordinances of the Northwest Territories, 1958, 1st Session; and
>
> (*e*) "An Ordinance to amend the Game Ordinance", being chapter 4 of the Ordinances of the Northwest Territories, 1959, 1st Session,
>
> have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms.

and also provided that:

> (3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

The Governor in Council then passed the Order in Council of September 14, 1960 previously quoted, declaring barren-ground caribou as game in danger of becoming extinct.

The power of Parliament to enact the Northwest Territories Act and the amendments thereto is not questioned nor is the power of the Commissioner in Council to enact the *Game Ordinance*. It is not in dispute that the appellant abandoned parts of game as defined in s. 2 of the *Game Ordinance* then suitable for human consumption. The only factual issue pressed by the appellant was that it had not

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

been shown that the three caribou which he killed and abandoned in part were barren-ground caribou. I have no doubt that this Court can and should take judicial notice of the fact that the caribou in question here were barren-ground caribou. The Whale Cove region is deep in the Barren Lands of Northern Canada and no suggestion is made in any of the literature to which the Court was referred that any caribou other than barren-ground caribou are to be found that far north. In any event, the caribou he killed were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts thereof suitable for human consumption even if he had the legal right to hunt them for food.

I am of opinion that the question put by Magistrate Parker in the case stated by him must be answered in the negative, the conviction of the appellant by the Court of Appeal affirmed and the direction remitting the case to the Summary Conviction Court upheld.

I think it desirable to say specifically that insofar as *Regina v. Kallooar* and *Regina v. Kogogolak* hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest Territories, they are not good law and must be taken as having been overruled.

The appeal should, accordingly, be dismissed. The Attorney General states in his factum that he does not ask for costs. There will, therefore, be no Order as to costs.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitor for the respondent: D. H. Christie, Ottawa.

STROLL'S INC. (*Defendant*) .....APPELLANT;

AND

DAME LILY GORN (*Plaintiff*) .....RESPONDENT.

1966

*June 1
June 28

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

Lease and hire—Action for rental of store—Leased premises damaged by fire in adjoining building—Cross-demand in resiliation of lease.

The defendant company leased premises from the plaintiff for a term of five years at a rental of $700 per month payable in advance. Some two years later, a fire occurred in the adjoining premises, also owned by the plaintiff. The evidence revealed that the damages to the premises occupied by the defendant were slight. However, the defendant alleged that the premises were unusable and asked for the dissolution of the lease. The plaintiff sued for the rental. The trial judge dismissed the action and annulled the lease. This judgment was reversed by the Court of Appeal. The defendant company appealed to this Court.

Held: The appeal should be dismissed.

The Court of Appeal had made a thorough examination of the evidence and its conclusions were supported.

Louage—Action pour le loyer d'un magasin—Local loué endommagé par un incendie dans un édifice contigu—Demande reconventionnelle pour faire résilier le bail.

La compagnie défenderesse a loué de la demanderesse un local pour un terme de cinq ans à un loyer de $700 par mois payable d'avance. Quelque deux ans plus tard, un incendie s'est déclaré dans un édifice contigu appartenant aussi à la demanderesse. La preuve a révélé que les dommages occasionnés au local occupé par la compagnie défenderesse étaient minimes. Cependant, la défenderesse a allégué que les lieux loués étaient inutilisables et a demandé l'annulation du bail. La demanderesse a poursuivi pour le loyer. Le juge au procès a rejeté l'action et a annulé le bail. Ce jugement fut renversé par la Cour d'appel. La compagnie défenderesse en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Cour d'appel a fait un examen complet de la preuve et ses conclusions étaient supportées.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Jean. Appel rejeté.

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*PRESENT: Taschereau C.J. and Fauteux, Abbott, Judson and Ritchie JJ.

[1] [1965] Que. Q.B. 994.

1966

STROLL'S INC. v. GORN

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Jean J. Appeal dismissed.

Gilles Godin, Q.C., for the defendant, appellant.

H. L. Aronovitch, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a judgment of the Court of Queen's Bench[1] maintaining respondent's principal action in the amount of $2,100, as well as the incidental demand in the amount of $8,400. The principal action was for rent for the months of May, June, July and August 1962 and the incidental demand was for rent for the months of September 1962 to August 1963 inclusive. Mr. Justice Jean, who heard the case at trial, dismissed the principal action and the incidental demand with costs. As to the cross-demand, he annulled the lease entered into by the parties on December 31, 1959, and condemned the cross-defendant to pay to Stroll's Inc., the cross-plaintiff, the sum of $470.80, which is the proportion of the rent from January after the fire which occurred.

On December 31, 1959, the respondent, Dame Lily Gorn, leased to the appellant a store bearing civic number 77 St. Catherine St. East, in the City of Montreal. This lease was for a term of five years commencing May 1, 1960, and the rent was $700 per month payable in advance.

On January 10, 1962, a fire occurred in adjoining premises belonging also to the respondent, but the evidence reveals that the damages were slight in the appellant's store. The appellant alleged that the premises leased were completely "inutilisable" and that this called necessarily for the dissolution of the lease "de plein droit".

Mr. Justice Hyde, of the Court of Appeal, with whom Mr. Justice Owen and Mr. Justice Badeaux concurred, made a thorough examination of the evidence and I entirely agree with his appreciation of all the circumstances of this case, and with the conclusions he has arrived at.

[1] [1965] Que. Q.B. 994.

I would dismiss the appeal with costs throughout.

Appeal dismissed with costs.

1966
STROLL'S INC. v. GORN
Taschereau C.J.

Attorneys for the defendant, appellant: Chaussé, Godin, Deschênes, Melançon & Prat, Montreal.

Attorneys for the plaintiff, respondent: Chait, Aronovitch, Klein, Salomon, Gelber & Bronstein, Montreal.

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

1966
*June 7, 8
June 28

AND

BEN LECHTER ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Expropriation of land by federal government—Time at which profit required to be accounted for—Date of taxation year.

In 1952, the respondent had acquired certain lands which, at a later date, were expropriated by the federal government. The respondent, who operated a jewelry business and was engaged in extensive real estate dealings, carried out his business accounting on the accrual basis. His fiscal year ended on January 31 of each year. The taxability of the moneys received from the expropriation was not in issue before this Court. But the year in which the profit became income was disputed. The Minister contended that it was in the taxation year ending January 31, 1956, since the Treasury Board had authorized the payment in February 1955, and payment had been received in May 1955. The taxpayer contended that it was either in the taxation year ending January 31, 1954, since the notice of expropriation by virtue of which the property was deemed to be transferred was served on January 15, 1954; or, alternatively, the taxation year ending January 31, 1955, since the government's formal order of settlement was made and accepted in July 1954. The Exchequer Court annulled and set aside the Minister's reassessment. The Minister appealed to this Court, where the respondent agreed that three minor items, not specifically dealt with by the trial judge should not have been disallowed.

Held: The appeal should be allowed in part.

Assuming that ratification of the authority of the government agent to make the settlement was required, such ratification was afforded by

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*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Spence JJ.

1966

MINISTER OF NATIONAL REVENUE v. LECHTER

the Treasury Board minute of February 1955 (which was during the taxpayer's 1956 taxation year) and, in accordance with the ordinary rules of mandate, it had retroactive effect to July 1954 (which was the date of the offer and which was during the taxpayer's 1955 taxation year). It followed that the respondent, operating on an accrual basis, was bound to treat the profit as having been earned prior to January 31, 1955, and that it was not taxable income in his taxation year ending January 31, 1956.

Revenu—Impôt sur le revenu—Expropriation de terrains par le gouvernement fédéral—Période lors de laquelle le contribuable doit rendre compte du profit—Année d'imposition.

En 1952, l'intimé avait acquis des terrains qui furent subséquemment expropriés par le gouvernement fédéral. L'intimé, qui était un bijoutier et qui s'occupait beaucoup d'achats et de ventes d'immeubles, se servait du principe de comptabilité d'exercice. Son année fiscale se terminait le 31 janvier de chaque année. Il ne fut pas contesté devant cette Cour que les argents reçus en vertu de l'expropriation étaient taxables. Mais, cependant, l'année durant laquelle le profit était devenu un revenu fut mise en doute. Le Ministre prétend que c'était durant l'année d'imposition se terminant le 31 janvier 1956, puisque le Conseil du Trésor avait autorisé le paiement en février 1955 et que ce paiement avait été reçu en mai 1955. Le contribuable prétend que l'année en question était l'année d'imposition se terminant le 31 janvier 1954, puisque l'avis d'expropriation en vertu duquel la propriété était censée avoir été transférée a été signifié le 15 janvier 1954; ou, alternativement, l'année d'imposition se terminant le 31 janvier 1955, puisque l'offre formelle de règlement de la part du gouvernement a été reçue et acceptée en juillet 1954. La Cour de l'Échiquier a annulé et mis de côté la cotisation du Ministre. Durant l'appel du Ministre devant cette Cour, l'intimé a admis que trois item mineurs, qui n'avaient pas été spécifiquement traités par le juge au procès, n'auraient pas dû avoir été désavoués.

Arrêt: L'appel doit être maintenu en partie.

Assumant qu'une ratification de l'autorité du représentant du gouvernement d'offrir un règlement était requise, une telle ratification se trouve dans les minutes du Conseil du Trésor en date de février 1955, et, en vertu des règles ordinaires du mandat, cette ratification avait un effet rétroactif à juillet 1954. Il s'ensuit que l'intimé, qui faisait affaires en vertu du principe de comptabilité d'exercice, devait traiter le profit comme ayant été obtenu avant le 31 janvier 1955, et que ce profit n'était pas un revenu taxable de l'année d'imposition se terminant le 31 janvier 1956.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], mettant de côté la cotisation du Ministre. Appel maintenu en partie.

[1] [1965] 1 Ex. C.R. 413, [1964] C.T.C. 510, 64 D.T.C. 5311.

1966

MINISTER OF NATIONAL REVENUE v. LECHTER

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], setting aside the Minister's assessment. Appeal allowed in part.

Paul Ollivier, Q.C., for the appellant.

Philip F. Vineberg, Q.C., Norman Genser, Q.C., and *S. Phillips, Q.C.*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment of Mr. Justice Dumoulin of the Exchequer Court[1] allowing the respondent's appeal from an assessment made on March 15, 1962, with respect to the 1956 taxation year of the respondent, whereby a sum of $251,166.59 was added to the respondent's income.

The said sum of $251,166.59 consists, for the most part, of profit alleged to have been made by the respondent on the disposition of land (including land acquired by the Crown) and is made up as follows:

Casual McCauley Realties (See T-4 1956)		
casual	$ 4,500.00	
Land profits—507 Parish of St. Laurent	125,100.36	
" " 507 Parish of St. Laurent	109,406.55	
" " 368 Parish of St. Laurent	3,847.70	
" " 25-27 Pointe-Claire	8,311.98	
		$251,166.59

The respondent operates a jewelry business in Montreal under the name "American Watch Company of Canada". In addition to this business, he was engaged in extensive real estate dealings in 1954 and for some time prior thereto, and in March 1952 had purchased lot 507 in the Parish of St. Laurent. Respondent carried out his business accounting on the accrual basis and was operating on this basis in 1954, 1955 and subsequent years. His fiscal year, accepted by the Department of National Revenue, for the years in question, ended on January 31 of each year, so that his taxation year 1954 ended January 31, 1954, his taxation year 1955 January 31, 1955, and his taxation year 1956 January 31, 1956.

[1] [1965] 1 Ex. C.R. 413, [1964] C.T.C. 510, 64 D.T.C. 5311.

1966

MINISTER OF NATIONAL REVENUE v. LECHTER

Abbott J.

The chronological order of events with respect to the land expropriated by the Crown and a contiguous parcel sold to the Crown under threat of expropriation, is as follows:

January 7, 1954—A notice of expropriation dated December 28, 1953, covering part of Lot 507 was deposited at the Montreal Registry Office.

January 15, 1954—An expropriation notice was served on respondent. This notice specified that the expropriation was made pursuant to the Expropriation Act and that title "vests in Her Majesty the Queen in the Right of Canada as from the date of deposit of record in the Office of the Registrar of Deeds of a plan and description of the said lands".

July 13, 1954—A formal offer of settlement in the amount of $318,776 was made to respondent with respect to the expropriated parcel and "that part of Lot 507 severed by reason of the expropriation", and covered also all damages arising from the expropriation.

July 14, 1954—Respondent accepted in writing the offer of settlement contained in the letter of July 13.

May 13, 1955—Respondent received payment in accordance with the settlement.

In the Court below, respondent argued that the moneys received from the disposal of the lands in question were not taxable, but this is no longer in issue. Alternatively, he argued that, if they were taxable, assessment should not have been made for the year 1956, because:

(*a*) With respect to the part expropriated, the amount attributable under this portion was taxable at the moment of the transfer of title, which took place on January 7, 1954, in the taxpayer's 1954 taxation year.

(*b*) Alternatively, that compensation for all the land taken should, at the latest, be taxable at the time the amount was clearly established, which was in July, 1954, during the taxpayer's 1955 taxation year.

The amount of the payment received by respondent in May 1955 was assessed as taxable in his 1956 taxation year. At the hearing before us counsel for the Crown agreed that if it should have been assessed in an earlier year, it was immaterial for the purposes of this appeal whether that year were 1954 or 1955.

The principal issue to be determined on this appeal is whether respondent's profit of $234,506.91 with respect to lot 507, was taxable income in his taxation year ending January 31, 1956.

The answer to this question depends primarily upon the effect of the two letters of July 13, 1954, and July 14, 1954, above referred to, and I quote them in full.

Your file No.
Our file No. Q-1003-71-1

Canada

DEPARTMENT OF TRANSPORT

Room 222,
131 St. James S. West,
MONTREAL,
July 13, 1954.

REGISTERED

Mr. Ben Lechter,
1470 Peel Street,
MONTREAL.

Dear Sir:

Pursuant to the expropriation of January 7th 1954 affecting part of lot 507 in the Parish of St. Laurent, we are now authorized to make you a formal offer of settlement in the amount of $318,776 in full compensation for the area expropriated, that part of lot 507 severed by reason of the expropriation and all damages arising from the said expropriation. The foregoing is all without prejudice to the rights of the Crown.

Would you kindly advise us as soon as possible of your decision with respect to this offer.

Yours truly,

(signed) J. P. Adam
J. P. Adam
District Land Agent

PL:jdb

Ben H. LECHTER

Montreal, July 14th, 1954

Registered

Department of Transport, Lands Branch,
Room 222,
131 St. James St. West,
Montreal.

Re: Your file No. Q-1003-71-1
Att'n: Mr. J. P. Adam

Dear Sirs:

In reply to your letter of the 13th instant, I wish to notify you that I accept your formal offer of settlement in the amount of Three Hundred and eighteen thousand seven hundred and seventy-six dollars ($318,776.) in full compensation for all damages arising out of the expropriation of January 7th, 1954 affecting part of my property bearing lot No. 507 Parish of St. Laurent.

In view of the expropriation having been filed six months ago, I would appreciate payment within the next sixty days.

Very truly yours,

(signed) Ben H. Lechter.

1966

MINISTER OF NATIONAL REVENUE v. LECHTER

Abbott J.

On February 11, 1955, payment to respondent of the sum of $318,776 above referred to, was authorized by a Treasury Board Minute, and the amount appears to have been actually paid in May 1955, when notarial deeds of sale and release were executed.

Appellant's contention is that no taking of land and no agreement of sale is valid until the approval of Treasury Board has been obtained—in this case February 11, 1955—and that in consequence the amount in question only became an account receivable by respondent on that date.

Mr. J. P. Adam, who signed the letter of July 13, 1954, was District Land Agent of the Department of Transport at Montreal. There is no suggestion that he was acting in bad faith or that he was not authorized by his Departmental superiors to write the letter which he did. By his letter of July 14, 1954, respondent accepted the offer contained in the letter of July 13, and he was bound by that acceptance. In fact, settlement was eventually made in the precise amount specified in the two letters and Adam himself signed the notarial deeds of sale and release acting under a power of attorney from the then Minister of Transport.

Appropriate Treasury Board authority was necessary to make the payment agreed upon and this was forthcoming in due course. Assuming that ratification of the authority of Adam to make the settlement was required, such ratification was afforded by the Treasury Board Minute of February 11, 1955, and, in accordance with the ordinary rules of mandate, it had retroactive effect to July 13, 1954—See Mignault, Droit Civil canadien, vol. 8 at p. 58.

It follows, that respondent, operating on an accrual basis, was bound to treat the profit of $234,506.91 on the disposition of part of lot 507, as having been earned prior to January 31, 1955, and that it was not taxable income in his taxation year ending January 31, 1956.

One minor point remains. The Minister's assessment of March 15, 1962, in addition to the two items relating to lot 507, included as income of respondent three amounts of $4,500, $3,847.70 and $8,311.98 relating to other properties. No evidence was adduced at the trial with respect to these three items, and they are not dealt with in the judgment below but the assessment was vacated *in toto*. Counsel for

1966

MINISTER OF NATIONAL REVENUE v. LECHTER

Abbott J.

respondent agreed that in the circumstances these three items should not have been disallowed, and that to this extent the appeal should succeed.

The appeal is therefore allowed in part, the judgment below varied and the assessment appealed from referred back to the Minister for reconsideration and reassessment on the basis that the sums of $125,100.36 and $109,406.55, being the profit realized by respondent as a result of the sale and expropriation of a part of lot 507 in the Parish of St. Laurent, did not constitute income in the hands of respondent for his taxation year 1956.

The respondent is entitled to his costs in this Court.

Appeal allowed in part, costs to the respondent.

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondent: Genser, Friedman, Phillips & Friedman, Montreal.

1966

*June 7
June 28

CRAFT FINANCE CORPORATION (*Intervenant*) ..... APPELLANT;

AND

LOUIS BELLE-ISLE LUMBER INC. (*Plaintiff*) ..... RESPONDENT;

AND

FERNHILL HOMES LIMITED (*Defendant*).

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

Privilege—Supplier of materials—Building materials supplied for construction of houses—Intervention by party providing building funds—Whether privilege cancelled by intervention—Civil Code, arts. 2013, 2013e, 2103.

The defendant entered into an agreement with the plaintiff for the supply of lumber required by the defendant to construct a number of houses. All lumber was delivered before March 29. By a deed of loan dated March 22 and registered March 26, the defendant hypothecated six lots to the intervenant in order to secure a building loan. The

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Spence JJ.

1966

CRAFT FINANCE CORPN. v. BELLE-ISLE LUMBER INC. et al.

plaintiff registered its privilege on May 14 for the sum of $31,906 for materials supplied. On June 14, the defendant was declared bankrupt. On July 11, the intervenant, taking advantage of a giving-in payment clause in the deed of loan, obtained judgment declaring it the owner retroactively to the date of the deed of loan of the hypothecated lots. The plaintiff began an action on June 17 to have its privilege judicially recognized. The trial judge recognized the debt owing to the plaintiff but cancelled the privilege. The Court of Appeal allowed the plaintiff's appeal and restored the privilege. The intervenant appealed to this Court.

Held: The appeal should be dismissed.

Privilège—Fournisseur de matériaux—Matériaux fournis pour la construction de maisons—Intervention par un tiers ayant fourni des fonds pour la construction—Le privilège est-il cancellé par l'intervention—Code Civil, arts. 2013, 2013e, 2103.

Par contrat intervenu entre la compagnie défenderesse et la compagnie demanderesse, cette dernière s'engageait à fournir à la compagnie défenderesse le bois requis pour la construction d'un certain nombre de maisons. Tout le bois fut livré avant le 29 mars. En vertu d'un contrat de prêt passé le 22 mars et enregistré le 26 mars, la compagnie défenderesse, dans le but d'obtenir des fonds pour construire, a hypothéqué six lots en faveur de l'intervenante. La compagnie demanderesse a enregistré son privilège le 14 mai pour la somme de $31,906 pour les matériaux fournis. La compagnie défenderesse a été mise en faillite le 14 juin. L'intervenante, prenant avantage de la dation en paiement contenue dans le contrat de prêt, a obtenu jugement le 11 juillet la déclarant propriétaire des lots hypothéqués rétroactivement à la date de l'enregistrement du contrat de prêt. La compagnie demanderesse a institué une action le 17 juin pour faire reconnaître judiciairement son privilège. Le juge au procès a reconnu la dette qui était due à la compagnie demanderesse mais a cancellé le privilège. La Cour d'appel a rétabli le privilège. L'intervenante en a appelé devant cette Cour.

Arrêt: L'appel doit être rejeté.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Bertrand. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Bertrand J. Appeal dismissed.

S. B. Sederoff and *Wilbrod Gauthier,* for the intervenant, appellant.

Nat. H. Salomon, for the plaintiff, respondent.

[1] [1966] Que. Q.B. 135.

1966

CRAFT FINANCE CORPN. v. BELLE-ISLE LUMBER INC. et al.

The judgment of the Court was delivered by

ABBOTT J.:—I am in agreement with the reasons and conclusions of Mr. Justice Montgomery of the Court of Queen's Bench, which were concurred in by the other Members of the Court, and I am content to adopt them.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the intervenant, appellant: Kaufman, Hoffman, Respitz & Sederoff, Montreal.

Attorneys for the plaintiff, respondent: Chait, Aronovitch, Klein, Salomon, Gelber & Bronstein, Montreal.

1966

*May 2, 3, 4
June 28

HAROLD MUNRO ..... APPELLANT;

AND

NATIONAL CAPITAL COMMISSION .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional law—Expropriation of land for Green Belt in National Capital area—Whether Parliament has legislative authority to do so—National Capital Act, 1958 (Can.), c. 37, s. 13(1)—B.N.A. Act, 1867-1960, ss. 91, 92.

The National Capital Commission, with the approval of the Governor in Council, and acting under s. 13(1) of the *National Capital Act*, 1958 (Can.), c. 37, expropriated a farm in the township of Gloucester in the province of Ontario owned by the appellant. It was conceded that the appellant's lands were taken for the purpose of establishing the Green Belt proposed in the Master Plan (Greber) for the development of the National Capital Region. On an application before the Exchequer Court for a special case, it was directed that the following question be tried before the trial of the other questions raised in the action:

> "Whether, on the special case stated by the parties, the expropriation of the lands of the defendant by the National Capital Commission therein referred to is a nullity because the legislative authority of the Parliament of Canada under the *British North America Act*, 1867 to 1960, does not extend to authorizing the expropriation."

The trial judge answered the question in the negative. The defendant appealed to this Court. Leave to intervene in this appeal was granted to the Attorney General for Ontario and the Attorney General for Quebec, but the former subsequently withdrew his intervention.

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* PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

1966

MUNRO v. NATIONAL CAPITAL COMMISSION

Held: The appeal should be dismissed.

The subject matter of the *National Capital Act* is the establishment of a region consisting of the seat of the Government of Canada and the defined surrounding area which are formed into a unit to be known as the National Capital Region which is to be developed, conserved and improved "in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance". That subject matter is not referred to in either s. 91 or s. 92 of the *British North America Act*. Consequently, the sole power rests with Parliament under the preliminary words of s. 91, relative to "laws for the peace, order and good government of Canada". It was therefore within the powers of Parliament to authorize the Commission, for the attainment of its objects and purposes as defined in the Act, to make the expropriation of the lands of the appellant.

Droit constitutionnel—Expropriation d'une terre en vue d'une ceinture de verdure dans la région de la Capitale nationale—Le Parlement a-t-il l'autorité législative d'exproprier ainsi—Loi sur la Capitale nationale, 1958 (Can.), c. 37, art. 13(1)—Acte de l'Amérique du Nord britannique, 1867-1960, arts. 91, 92.

La Commission de la Capitale nationale, avec l'approbation du gouverneur-en-conseil, et agissant en vertu de l'art. 13(1) de la *Loi sur la Capitale nationale*, 1958 (Can.), c. 37, a exproprié une ferme appartenant à l'appelant, dans le canton de Gloucester, province d'Ontario. Il est admis que la terre de l'appelant a été expropriée pour les fins d'établir la ceinture de verdure proposée dans le Plan Maître (Gréber) pour le développement de la région de la Capitale nationale. Advenant une requête devant la Cour de l'Échiquier pour établir un dossier spécial, il fut ordonné que la question suivante soit déterminée avant le procès sur les autres questions soulevées dans la contestation:

> «A savoir si, sur un dossier spécial soumis par les parties, l'expropriation des terres du défendeur par la Commission de la Capitale nationale est une nullité parce que l'autorité législative du Parlement du Canada en vertu de l'*Acte de l'Amérique du Nord britannique*, 1867-1960, ne comprend pas l'autorité de procéder à cette expropriation.»

Le juge au procès a répondu négativement à la question. Le défendeur en a appelé devant cette Cour. La permission d'intervenir dans cet appel a été accordée au procureur général de l'Ontario et au procureur général du Québec, mais le premier a subséquemment retiré son intervention.

Arrêt: L'appel doit être rejeté.

La matière de la *Loi sur la Capitale nationale* est l'établissement d'une région comprenant le siège du gouvernement du Canada et les alentours qui sont formés en un tout connu du nom de la région de la Capitale nationale qui doit être développée, conservée et embellie «afin que la nature et le caractère du siège du gouvernement du Canada puissent être en harmonie avec son importance nationale». Cette matière n'est mentionnée ni dans l'art. 91 ni dans l'art. 92 de l'*Acte de l'Amérique du Nord britannique*. En conséquence, l'unique pouvoir appartient

au Parlement en vertu du paragraphe introductif de l'art. 91, relativement aux «lois pour la paix, l'ordre et le bon gouvernement du Canada». Il était donc de la compétence du Parlement d'autoriser la Commission, en vue d'atteindre ses buts et objets tels que définis dans le statut, d'exproprier la terre de l'appelant.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1]. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada [1]. Appeal dismissed.

B. J. MacKinnon, Q.C., and *Roydon Hughes, Q.C.*, for the appellant.

D. S. Maxwell, Q.C., and *G. W. Ainslie*, for the respondent.

Gérald LeDain, Q.C., for the intervenant, Attorney General for Quebec.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of Gibson J. in the Exchequer Court[1] pronounced on April 28, 1965, answering in the negative the following question which, by order of the President of the Court, had been directed to be tried before the trial of the other questions raised in the action:

Whether, on the special case stated by the parties, the expropriation of the lands of the defendant by the National Capital Commission therein referred to is a nullity because the legislative authority of the Parliament of Canada under the *British North America Act*, 1867 to 1960, does not extend to authorizing the expropriation.

On June 25, 1959, the respondent, with the approval of the Governor in Council, expropriated a farm of 195 acres in the Township of Gloucester in the Province of Ontario owned by the appellant. In so doing the respondent was acting under subs. (1) of s. 13 of the *National Capital Act*, Statutes of Canada 1958, 7 Elizabeth II, Chap. 37, hereinafter sometimes referred to as "the Act", which came into force on February 6, 1959.

[1] [1965] 2 Ex. C.R. 579.

1966

MUNRO v. NATIONAL CAPITAL COMMISSION

Cartwright J.

By information filed in the Exchequer Court on January 31, 1963, the respondent recited the taking of the lands for the purposes of the Act and stated its willingness to pay $200,000 by way of compensation.

In his statement of defence filed on October 13, 1964, the appellant asked, firstly, a declaration that the expropriation "was illegal, null and void because it was beyond the jurisdiction of the Parliament of Canada to grant to the Plaintiff (the respondent) powers of expropriation for establishing a Green Belt outside the limits of the said City of Ottawa", secondly, in the alternative, that compensation be awarded to him in the sum of $420,000.

By order of the Chief Justice of Canada it was directed that notice of the constitutional question raised in this appeal should be served on the Attorneys General of the Provinces and on the Clerks of the City of Ottawa, the City of Hull, the Township of Nepean and the Township of Gloucester and a date was fixed for the making of applications for leave to intervene.

By order of Judson J. made on September 9, 1965, leave to intervene was granted to the Attorney General for Ontario and the Attorney General for Quebec. Subsequently the Attorney General for Ontario withdrew his intervention. Counsel for the Attorney General for Quebec filed a factum and presented a full and helpful argument in support of the appeal. It will be observed that the question which Gibson J. was called upon to decide is limited to whether the expropriation of the appellant's land is a nullity for a single specified reason:

> because the legislative authority of the Parliament of Canada under the *British North America Act*, 1867 to 1960, does not extend to authorizing the expropriation.

The main ground relied on by counsel who support the appeal is that the power of expropriation which the Act gives to the respondent has been exercised, in the case of the appellant's land, for the imposition upon the use of land within the National Capital Region of controls or restrictions of the nature of zoning regulations contemplated by the Planning Acts passed by the Provinces. It is said, more particularly, that the power has been used for the purpose of the establishment of a "Green Belt" in the

Region. It is argued that such a use of the power of expropriation is in its nature, character and purpose a use in relation to a matter falling within the classes of subjects assigned exclusively to the Legislatures of the Provinces by the *British North America Act* and that, consequently, if the *National Capital Act* purports to confer such a power upon the Commission it is, *pro tanto, ultra vires* of Parliament.

It is conceded by counsel for the respondent, and so stated in their factum, that the appellant's lands were taken for the purpose of establishing the Green Belt proposed in the Master Plan for the development of the National Capital Region. The constitutional question to be determined is whether it is within the powers of Parliament to authorize the establishment of a Green Belt within the National Capital Region.

The learned trial judge has made a careful review of the legislative history of the *National Capital Act* and of the *Planning Act,* R.S.O. 1960, c. 296, and of the development of the Master Plan for the Region. I do not find it necessary to repeat this review because I propose, for the purposes of this appeal, to accept the following conclusions that counsel for the appellant and for the intervenant seek to draw, in part, from that history: (i) that the making of zoning regulations and the imposition of controls of the use of land situate in any province of the sort provided, for example, in the *Planning Act* (Ontario) are matters which, generally speaking, come within the classes of subjects assigned to the Legislatures by s. 92 of the *British North America Act*; (ii) that the legislative history of the predecessors of the *National Capital Act* indicates that Parliament, up to the time of the passing of that Act, contemplated that the "zoning" of the lands comprised in the National Capital Region should be effected by co-operation between the Commission established by Parliament and the municipalities which derive their powers from the Provincial Legislatures; and (iii) that it was only after prolonged and unsuccessful efforts to achieve the desired result by such co-operation that Parliament decided to confer upon the National Capital Commission the powers necessary to enable it to carry out the zoning contemplated in the Master Plan.

1966

MUNRO v. NATIONAL CAPITAL COMMISSION

Cartwright J.

It is first necessary to consider what is the matter in relation to which the *National Capital Act* was passed and this requires an examination of its terms.

Its full title is "an Act respecting the Development and Improvement of the National Capital Region".

It establishes a "National Capital Region", described in the Schedule to the Act, comprising approximately 1,800 square miles, including and surrounding the City of Ottawa, situate partly in the Province of Ontario and partly in the Province of Quebec. This region is defined as "the seat of the Government of Canada and its surrounding area". It includes the lands of the appellant in the Township of Gloucester.

By s. 3 of the Act, the respondent is created as a corporation to be called the "National Capital Commission" and by s. 27 it and the Federal District Commission are declared for all purposes to be one and the same corporation. By s. 4(1) it is declared that the Commission is for all purposes of the Act an agent of Her Majesty and that its powers under the Act may be exercised only as an agent of Her Majesty.

Section 10 defines the objects and purposes of the Commission and confers the powers to be used for the purposes of the Act. It reads as follows:

10.(1) The objects and purposes of the Commission are to prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.

(2) The Commission may for the purposes of this Act,

(*a*) acquire, hold, administer or develop property;

(*b*) sell, grant, convey, lease or otherwise dispose of or make available to any person any property, subject to such conditions and limitations as it considers necessary or desirable;

(*c*) construct, maintain and operate parks, squares, highways, parkways, bridges, buildings and any other works;

(*d*) maintain and improve any property of the Commission, or any other property under the control and management of a department, at the request of the authority or Minister in charge thereof;

(*e*) co-operate or engage in joint projects with, or make grants to, local municipalities or other authorities for the improvement, development or maintenance of property;

(*f*) construct, maintain and operate, or grant concessions for the operation of, places of entertainment, amusement, recreation, refreshment, or other places of public interest or accommodation upon any property of the Commission;

(*g*) administer, preserve and maintain any historic place or historic museum;

(*h*) conduct investigations and researches in connection with the planning of the National Capital Region; and

(*i*) generally, do and authorize such things as are incidental or conducive to the attainment of the objects and purposes of the Commission and the exercise of its powers.

Section 13(1) reads as follows:

13.(1) The Commission may, with the approval of the Governor in Council, take or acquire lands for the purpose of this Act without the consent of the owner, and, except as otherwise provided in this section, all the provisions of the *Expropriation Act*, with such modifications as circumstances require, are applicable to and in respect of the exercise of the powers conferred by this section and the lands so taken or acquired.

Subsection (3) of this section provides that all claims for compensation for lands taken under the section may be heard and determined in the Exchequer Court of Canada.

By section 18, it is provided that the Commission may make by-laws for the conduct and management of its activities and for carrying out the purposes and provisions of the Act.

In my view, it is clear, from a reading of the Act as a whole, that the matter in relation to which it is enacted is the establishment of a region consisting of the seat of the Government of Canada and the defined surrounding area which are formed into a unit to be known as the National Capital Region which is to be developed, conserved and improved "in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance".

The next question is whether this subject matter comes within any of the classes of subjects which, by s. 92 of the *British North America Act*, are assigned exclusively to the Legislatures of the Provinces.

The only reference to the National Capital of Canada contained in the *British North America Act* is in s. 16, which reads as follows:

16. Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

1966

MUNRO v. NATIONAL CAPITAL COMMISSION

Cartwright J.

The authority reserved by this section to the Queen to change the location of the Seat of Government of Canada would now be exercisable by Her Majesty in the right of Canada and, while the section contemplates executive action, the change could, doubtless, be made by Act of Parliament in which Her Majesty acts with the advice and consent of the Senate and House of Commons of Canada.

The subject matter of the *National Capital Act*, as I have sought to define it above, is not referred to in either s. 91 or s. 92 of the *British North America Act*. In *Attorney-General for Alberta v. Attorney-General for Canada*,[1] Viscount Maugham said at p. 371:

> It must not be forgotten that where the subject matter of any legislation is not within any of the enumerated heads either of s. 91 or of s. 92, the sole power rests with the Dominion under the preliminary words of s. 91, relative to "laws for the peace, order, and good government of Canada".

In *In re Regulation and Control of Radio Communication in Canada*[2], Viscount Dunedin had made a similar observation at p. 312:

> Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces".

In *Johannesson v. Rural Municipality of West St. Paul*[3], in which it was held that the subject of aeronautics is within the exclusive jurisdiction of Parliament, this Court (at pages 308, 311, 318 and 328) adopted as the true test, to be applied in determining whether a subject matter falls within the legislative authority of Parliament under the general words at the opening of s. 91, that formulated by Viscount Simon in the *Canada Temperance Federation*[4] case, in the following words:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics*

[1] [1943] A.C. 356, 1 W.W.R. 378, 1 All E.R. 240, 2 D.L.R.I.

[2] [1932] A.C. 304, 1 W.W.R. 563.

[3] [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609.

[4] [1946] A.C. 193 at 205, 2 W.W.R. 1, 85 C.C.C. 225, 1 C.R. 229, 2 D.L.R. 1.

case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

I find it difficult to suggest a subject matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance. Adopting the words of the learned trial judge, it is my view that the Act "deals with a single matter of national concern".

There is no doubt that the exercise of the powers conferred upon the Commission by the *National Capital Act* will affect the civil rights of residents in those parts of the two provinces which make up the National Capital Region. In the case at bar the rights of the appellant are affected. But once it has been determined that the matter in relation to which the Act is passed is one which falls within the power of Parliament it is no objection to its validity that its operation will affect civil rights in the provinces. As Viscount Simon, adopting what had been pointed out by Rand J., said in *Attorney-General for Saskatchewan v. Attorney-General for Canada*[1]:

> Consequential effects are not the same thing as legislative subject matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters.

The passage from the judgment of Duff J., as he then was, in *Gold Seal Limited v. Dominion Express Company and Attorney-General for Alberta*[2], quoted by the learned trial judge, correctly states the law. It is as follows:

> The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation "in relation to" civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause.

[1] [1949] A.C. 110 at 123, 1 W.W.R. 742, 2 D.L.R. 145.
[2] (1921), 62 S.C.R. 424 at 460, 3 W.W.R. 710, 62 D.L.R. 62

1966

MUNRO v. NATIONAL CAPITAL COMMISSION

Cartwright J.

I have already indicated my view that the matter in relation to which the *National Capital Act* was passed does not come within any of the classes of subjects enumerated in s. 92.

It has been said repeatedly that, in dealing with questions that arise under the *British North America Act* as to the allocation of law-making powers between Parliament and the Legislatures of the Provinces, the court will be well advised to confine itself to the precise question raised in the proceeding which is before it. It is sufficient in this case to say that in my opinion it is within the powers of Parliament to authorize the Commission, for the attainment of its objects and purposes as defined in the Act, to make the expropriation of the lands of the appellant referred to in the question submitted to the Exchequer Court. It follows from this that I agree with the conclusion of the learned trial judge that the question submitted to him should be answered in the negative.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Hughes, Laishley, Mullen & Touhey, Ottawa.

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

Solicitor for the intervenant: G. LeDain, Montreal.

PESO SILVER MINES LIMITED (N.P.L.) (*Plaintiff*) .....APPELLANT;

1966

*April 27, 28
June 20

AND

STANLEY E. CROPPER (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Companies—Directors—Fiduciary relationship—Offer of mining claims considered and rejected by full board of directors—Interest in claims subsequently acquired by director—Whether director liable to account—Counter-claim for wrongful dismissal.

The respondent was the managing director of the appellant company which held about 20 square miles of mineral claims in the Yukon Territory. An offer made to the appellant by a prospector, Dickson, of three groups of unproven claims, one of which was contiguous to the appellant's ground and the other two some miles to the northeast, was considered by the company's full board of directors and was rejected.

After the appellant had rejected Dickson's offer and the matter had passed out of the respondent's mind, the possibility of a group being formed to acquire Dickson's claims was suggested to the respondent. It was agreed that the respondent and three others would take up these claims and they did so, each contributing an equal amount to finance the purchase. A company, *Cross Bow,* was incorporated to make the purchase, and the four participants put up in equal shares the money necessary to have the intervening ground between the groups of claims "staked blind" by Dickson. Shortly afterwards a public company, *Mayo,* was incorporated to take over, finance and develop the properties.

Some time later an offer by a company, *Charter,* to purchase a large interest in the appellant company was accepted. A term of the offer provided that the number of directors of the appellant should be increased to nine of whom five should be chosen by *Charter.* At a meeting of the new board, the respondent, acting in compliance with a notice from the chairman that it was imperative that all officers of the company make full disclosure of their connection with other mining companies, disclosed his interest in *Cross Bow* and *Mayo.* However, at a subsequent meeting of the board he refused to comply with the chairman's request that he turn over his interest in *Cross Bow* (and two other companies with which the present appeal was not concerned) at cost. Thereupon a motion was passed rescinding the appointment of the respondent as executive vice-president and as a member of the executive committee. The respondent was asked to vacate the offices of the company and the chairman asked him to resign as a director. The respondent refused to resign as a director but did so later and his resignation was accepted.

In an action commenced by the appellant a declaration was claimed that the shares in *Cross Bow, Mayo* and in two other companies acquired

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

1966

PESO SILVER MINES LTD. v. CROPPER

by the respondent were held by him in trust for the appellant and it was asked that he be required to deliver the shares to the appellant or to account for the proceeds thereof. The respondent counter-claimed for damages for wrongful dismissal. At trial the action was dismissed and the counter-claim was allowed in the amount of $10,000. On appeal by the appellant to the Court of Appeal, the appeal was dismissed in so far as the appellant's action was concerned. However, the Court of Appeal reduced the respondent's damages from $10,000 to $6,500. An appeal and a cross-appeal from the judgment of the Court of Appeal were then brought to this Court.

Held: The appeal and the cross-appeal should be dismissed.

On the facts of this case it was impossible to say that the respondent obtained the interests he held in *Cross Bow* and *Mayo* by reason of the fact that he was a director of the appellant and in the course of the execution of that office.

When Dickson offered his claims to the appellant it was the duty of the respondent to take part in the decision of the board as to whether that offer should be accepted or rejected. At that point he stood in a fiduciary relationship to the appellant. There were affirmative findings of fact that he and his co-directors acted in good faith, solely in the interests of the appellant and with sound business reasons in rejecting the offer. There was no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any information by reason of his office. When the later proposal with respect to Dickson's claims was made to the respondent, it was not in his capacity as a director of the appellant but as an individual member of the public.

Regal (Hastings), Ltd. v. Gulliver et al., [1942] 1 All E. R. 378, applied; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438; *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd. et al.*, [1958] S.C.R. 314, referred to.

As to the counter-claim, the trial judge had indicated that he would have fixed the damages at $6,500 were it not for the circumstances of the respondent's dismissal. This Court agreed with Bull J.A. that the claim having been founded on breach of contract the damages could not be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. The Court was also in agreement with Bull J.A. that in view of the respondent's evidence that he remained unemployed for only five months the award should be reduced to $6,500.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Gregory J. in so far as that judgment dismissed the appellant's action for a declaration of constructive trust and allowing in part the appeal as to the judgment on the counter-claim. Appeal and cross-appeal dismissed.

[1] (1965), 54 W.W.R. 329, 56 D.L.R. (2d) 117.

1966

PESO SILVER MINES LTD. v. CROPPER

J. S. Maguire, Q.C., and *K. S. Fawcus*, for the plaintiff, appellant.

D. T. Braidwood, Q.C., and *F. A. Melvin*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from a judgment of Gregory J. in so far as that judgment dismissed the action and allowing in part the appeal as to the judgment on the counter-claim. Norris J.A., dissenting, would have allowed in part the appeal as to the judgment in the action and allowed the appeal as to the counter-claim *in toto*.

In the action the appellant claimed a declaration that the shares in Cross Bow Mines Limited, hereinafter referred to as "Cross Bow", Mayo Silver Mines Limited, hereinafter referred to as "Mayo", and in two other companies acquired by the respondent were held by him in trust for the appellant and asked that he be required to deliver the shares to the appellant or to account for the proceeds thereof. The respondent counter-claimed for $10,000 damages for wrongful dismissal. In this Court the appellant limited its claim to the shares in Cross Bow and Mayo and consequently we are not concerned with the claims in regard to the shares in the two other companies which were asserted in the Courts below.

The findings of fact made by the learned trial judge were concurred in by the Court of Appeal and were not challenged before us. In order to appreciate the questions to be decided it is necessary to set out the facts in some detail.

The respondent resides in Vancouver. At the date of the trial, in December 1964, he stated that he had had twenty years of successful business experience. He was then president of Traders Investment Limited in Vancouver and of several mining companies. He has a practical knowledge of mining and had done some prospecting for himself in 1958 and 1959.

In 1959, R. Verity, D. Ross and the respondent caused a company, Tanar Gold Mines Limited, hereinafter referred

[1] (1965), 54 W.W.R. 329, 56 D.L.R. (2d) 117.

1966

PESO SILVER MINES LTD. v. CROPPER

Cartwright J.

to as "Tanar" to be incorporated and became its first directors. At the invitation of the respondent C. S. Walker also became a shareholder and director of Tanar.

On March 17, 1961, Tanar caused the appellant to be incorporated as a private company. Walker, Verity and the respondent were its first directors and a month later three additional directors, Whittal, Lennox and Hodges were duly appointed. Tanar transferred to the appellant a number of claims in the Mayo district in the Yukon Territory which it had acquired from one C. D. Poli together with additional claims which had been staked on Tanar's instructions. In return for these, shares in the appellant were issued to Tanar.

On September 18, 1961, the appellant was converted into a public company and from time to time a considerable number of its shares were sold to raise funds to explore, develop and add to its properties. Until the commencement of the action the appellant, Tanar and Cal-Mac Gold Mines Ltd., another company which Tanar had caused to be incorporated, had their offices in the same suite in Vancouver.

By the end of 1961 or early in 1962 the appellant had acquired, in addition to the claims which it had been formed to take over, a further 128 claims from the Barker Estate. In the result in the spring of 1962 it held about 20 square miles of mineral claims in the Yukon and was doing field work and exploration thereon. It had strained the financial resources of the appellant to take over the Barker claims. The appellant had been advised by its engineers that it should spend on the properties it then held from $40,000 to $50,000 per month during 1962. The acquisition of additional claims would have involved increased expenditures and the appellant neither needed nor wanted any more ground at this time.

On April 20, 1961, the respondent was appointed managing director of the appellant at a monthly salary of $750 which was increased to $11,000 per annum in June 1962.

Early in the spring of 1962 a prospector, Dickson, was endeavouring to sell three groups of claims in the Mayo district totalling 126 claims. One group was contiguous to the appellant's ground, a second was about five miles to the north-east and the third about eleven miles to the

north-east. The claims were unproven and of speculative value. Dickson's asking price was some $31,000 in cash together with a block of shares in a public company to be formed to take over the property. Dickson approached Dr. Aho, a consulting geologist who was retained by the appellant and by many other mining companies. Dr. Aho suggested that Dickson should offer the claims to the appellant and he did so. Dickson's offer was considered by the full board of directors of the appellant in March 1962, and was rejected. On this point there are concurrent findings of fact which were expressed as follows in the reasons of Bull J.A.:

> It was common ground, and so found by the learned trial Judge, that this decision rejecting the acquisition was an honest and considered decision of the appellant's board of directors as a whole and done in the best of faith and solely in the interest of the appellant, and not from any personal or ulterior motive on the part of any director, including the respondent.

During the time that the respondent was an officer of the appellant there were between 200 and 300 mining properties offered to it; it was usual for it to receive two or three of such offers a week.

After the appellant had rejected Dickson's offer and the matter had passed out of the respondent's mind, Dr. Aho came to the respondent and suggested the possibility of a group being formed to acquire Dickson's claims. After some discussion it was agreed that Dr. Aho, Walker, Verity and the respondent would take up these claims and they did so, each contributing an equal amount to finance the purchase. Dr. Aho who knew the property advised his associates that he was unaware of any specific mineralization thereon and it is common ground that the purchase was a highly speculative venture.

In May 1962, Cross Bow was incorporated to make the purchase, the four participants put up in equal shares the money necessary to have the intervening ground between the groups of claims "staked blind" by Dickson thus increasing the total holdings to approximately 326 claims. Shortly afterwards Mayo was incorporated as a public company to take over, finance and develop the properties and Cross Bow received 600,000 escrowed shares of Mayo for the properties out of which Dickson received his agreed proportion. Later the respondent and his associates bought for cash about 50,000 free treasury shares of Mayo at

1966

PESO SILVER MINES LTD. v. CROPPER

Cartwright J.

10 cents to 12 cents per share. The respondent was at all relevant times a director of both Cross Bow and Mayo.

In November 1963, Charter Oil Company Limited, hereinafter referred to as "Charter", offered to purchase 1,000,000 shares of the capital stock of the appellant at the price of $1 per share, payable $200,000 on the date of closing and $200,000 on or before the tenth days of February, April, June and August, 1964. It was a term of the offer that Charter should have an option to purchase an additional 400,000 shares of the appellant at $1 per share at any time prior to October 11, 1964, and that at the annual meeting of the appellant to be held on December 16, 1963, the number of directors of the appellant should be increased to nine of whom five should be chosen by Charter. It was provided that these five should be P. O. Berliz, H. M. Beaumont, D. G. Buchanan, D. M. Clark and N. Johns and that P. O. Berliz should be appointed Chairman of the Board. This offer was accepted and the acceptance was approved at a meeting of the appellant's directors held on December 10, 1963. At the annual meeting of the appellant on December 16, 1963, the five persons named above were elected directors and the other four elected were C. S. Walker, P. L. Whittal, S. D. Anfield and the respondent.

At a meeting of the directors of the appellant held on December 16, 1963, following the annual meeting the following resolution was passed:

> Appointment of Officers
>
> Upon Motion it was resolved that the following persons be appointed officers of the Company for the ensuing year:
>
> | | |
> |---|---|
> | P. O. Berliz | Chairman |
> | C. S. Walker | President |
> | S. E. Cropper | Executive Vice-President |
> | D. M. Clark | Secretary-Treasurer |

It was also resolved that the respondent's salary be increased by $2,000 per annum, thus bringing his yearly salary up to $13,000.

According to the evidence of Mr. Walker, who was called by the plaintiff, there was a disagreement between Berliz and the respondent in regard to the making of the payment of $200,000 from Charter to the appellant which fell due in February 1964 and this resulted in "a spirit of unfriendliness between the two of them". On February 26, 1964,

1966

PESO SILVER MINES LTD. v. CROPPER

Cartwright J.

Berliz sent a memorandum to the respondent reading in part: "It is imperative that all officers of Peso Silver Mines make full disclosure of their connection with other mining companies." At a meeting of the executive committee of the appellant on March 6, 1964, the respondent disclosed his interest in Cross Bow and Mayo and repeated this at a meeting of the directors of the appellant on March 16, 1964. At the last-mentioned meeting Berliz asked the respondent if he was prepared to turn over his interest in Cross Bow (and two other companies with which we are not now concerned) at cost. The respondent stated that he would give the matter further consideration. The meeting was later adjourned to the following day. When it reconvened Berliz repeated his request and the respondent refused. Thereupon a motion was passed rescinding the appointment of the respondent as Executive Vice-President and as a member of the Executive Committee. The respondent was asked "to vacate the offices of the Company" and Berliz asked him to resign as a director. The respondent refused to resign as a director but did so later and his resignation was accepted at a meeting of the directors on April 8, 1964.

The action was commenced on March 19, 1964.

The appellant submits that the shares in Cross Bow and Mayo held by the respondent are property obtained by him as a result of his position as a director of the appellant, without the approval of the latter's shareholders, and that equity imposes upon him an obligation to account to the appellant for that property which is unaffected by the circumstances that he acted throughout in good faith, that the appellant had decided for sound business reasons not to acquire the property and had suffered no loss by reason of the respondent's actions.

Counsel for the appellant founded his argument on the decision of the House of Lords in *Regal (Hastings), Ltd. v. Gulliver et al.*[1], in which the principles of equity relating to the liability of a person who acquires property in regard to which a fiduciary relationship exists are considered and the leading cases are reviewed. The judgment in *Regal* has been followed by this Court in *Zwicker v. Stanbury*[2] and in *Midcon Oil & Gas Ltd. v. New British Dominion Oil*

[1] [1942] 1 All E.R. 378. [2] [1953] 2 S.C.R. 438.

1966

PESO SILVER MINES LTD. v. CROPPER

Cartwright J.

Co. Ltd. et al.[1] Counsel for the respondent accepts the statements of the law contained in *Regal* and submits that their application to the facts of the case at bar does not result in imposing liability on the respondent.

It is not necessary to review the somewhat complicated facts of the *Regal* case. While each of the Law Lords stated his reasons in his own words, there was no difference in substance between their statements of the test to be applied in determining whether or not the directors were liable to account for the profit which they personally had made on the purchase and resale of shares in a subsidiary of *Regal*. It will be of assistance to consider the actual words which were used.

Viscount Sankey said, at p. 381:

> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust*.

Lord Russell of Killowen, with whose reasons Lord Macmillan, Lord Wright and Lord Porter agreed, said at p. 385:

> We have to consider the question of the respondents' liability on the footing that, in taking up these shares in Amalgamated, they acted with *bona fides*, intending to act in the interest of Regal.
>
> Nevertheless they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have *by reason and in course of that fiduciary relationship* made a profit.

and at p. 386:

> The rule of equity which insists on those, who *by use of a fiduciary position* make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, *in the stated circumstances*, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

Later on the same page he posed and answered the question which he regarded as the crux of the case:

> Did such of the first five respondents as acquired these very profitable shares acquire them *by reason and in course of their office of directors of*

[1] [1958] S.C.R. 314.

Regal? In my opinion, when the facts are examined and appreciated, the answer can only be that they did.

and at p. 389:

In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares *by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office*, are accountable for the profits which they have made out of them.

In *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd. et al., supra,* at p. 327, Locke J., giving the judgment of the majority of this Court quoted this passage and said that it summarized the ground on which the judgment of the House of Lords proceeded. The difference of opinion in this Court was not as to the principles of law stated in *Regal* but as to whether the facts of the case fell within those principles.

In the course of his short concurring speech Lord Macmillan said at p. 391:

The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relationship to it, they entered *in the course of their management* into a transaction in which *they utilised the position and knowledge possessed by them in virtue of their office as directors,* and that the transaction resulted in a profit to themselves.

and at pp. 391 and 392:

The issue thus becomes one of fact. The plaintiff company has to establish two things, (i) that what the directors did was *so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors;* and (ii) that what they did resulted in a profit to themselves.

Lord Wright said at p. 393:

Many instances can be quoted from the books of the stringency with which the courts have enforced the rule that a director must account to his company for any benefit which he obtains *in the course of and owing to his directorship,* even though the benefit comes from a third person and involves no loss to the company.

Lord Porter said at p. 395:

The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not make a profit which he can acquire *only by use of his fiduciary position,* or, if he does, he must account for the profit so made.

1966

PESO SILVER MINES LTD. v. CROPPER

Cartwright J.

and on the same page:

> Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit *out of property acquired by reason of his relationship to the company of which he is a director.*

The phrases which I have italicized in some of the passages quoted above appear to me to state in varying words the principle which Lord Russell of Killowen laid down, at p. 389 of the *Regal* judgment, in the passage quoted above which was adopted by Locke J. in the *Midcon* case.

On the facts of the case at bar I find it impossible to say that the respondent obtained the interests he holds in Cross Bow and Mayo by reason of the fact that he was a director of the appellant and in the course of the execution of that office.

When Dickson, at Dr. Aho's suggestion, offered his claims to the appellant it was the duty of the respondent as director to take part in the decision of the board as to whether that offer should be accepted or rejected. At that point he stood in a fiduciary relationship to the appellant. There are affirmative findings of fact that he and his co-directors acted in good faith, solely in the interests of the appellant and with sound business reasons in rejecting the offer. There is no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any such information by reason of his office. When, later, Dr. Aho approached the appellant it was not in his capacity as a director of the appellant, but as an individual member of the public whom Dr. Aho was seeking to interest as a co-adventurer.

The judgments in the *Regal* case in the Court of Appeal are not reported but counsel were good enough to furnish us with copies. In the course of his reasons Lord Greene M.R. said:

> To say that the Company was entitled to claim the benefit of those shares would involve this proposition: Where a Board of Directors considers an investment which is offered to their company and *bona fide* comes to the conclusion that it is not an investment which their Company ought to make, any Director, after that Resolution is come to and *bona fide* come to, who chooses to put up the money for that investment

himself must be treated as having done it on behalf of the Company, so that the Company can claim any profit that results to him from it. That is a proposition for which no particle of authority was cited; and goes, as it seems to me, far beyond anything that has ever been suggested as to the duty of directors, agents, or persons in a position of that kind.

In the House of Lords, Lord Russell of Killowen concluded his reasons, at p. 391, with the following paragraph:

> One final observation I desire to make. In his judgment Lord Greene, M.R., stated that a decision adverse to the directors in the present case involved the proposition that, if directors *bona fide* decide not to invest their company's funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive therefrom. As to this, I can only say that to my mind the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal.

I agree with Bull J.A. when after quoting the two above passages he says:

> As Greene, M.R. was found to be in error in his decision, I would think that the above comment by Lord Russell on the hypothetical case would be superfluous unless it was intended to be a reservation that he had no quarrel with the proposition enunciated by the Master of the Rolls, but only that the facts of the case before him did not fall within it.

As Bull J.A. goes on to point out, the same view appears to have been entertained by Lord Denning M.R. in *Phipps v. Boardman*[1].

If the members of the House of Lords in *Regal* had been of the view that in the hypothetical case stated by Lord Greene the director would have been liable to account to the company, the elaborate examination of the facts contained in the speech of Lord Russell of Killowen would have been unnecessary.

The facts of the case at bar appear to me in all material respects identical with those in the hypothetical case stated by Lord Greene and I share the view which he expressed that in such circumstances the director is under no liability. I agree with the conclusion of the learned trial judge and of the majority in the Court of Appeal that the action fails.

It remains to consider the counter-claim. In this Court the appellant did not argue that the dismissal without notice was justified unless it should be held that the respondent was under a duty to account to the appellant for his interests in Cross Bow and Mayo; consequently the

[1] [1965] 1 All E.R. 849 at 856.

1966

PESO SILVER MINES LTD. v. CROPPER

Cartwright J.

only remaining question is as to the quantum of damages. The learned trial judge awarded the respondent $10,000 which represented the balance of his salary for the year ending December 16, 1964. He indicated, however, that he would have fixed the damages at $6,500 were it not for the circumstances of the respondent's dismissal, namely that the unsubstantiated allegations of impropriety made against him and the fact of his dismissal so shortly after Charter had taken control of the appellant could not fail to damage his reputation among mining men. I agree with Bull J.A. that the claim being founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. I am also in agreement with Bull J.A. that in view of the respondent's evidence that he remained unemployed for only five months the award should be reduced to $6,500.

For the above reasons I would dismiss both the appeal and the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.

Solicitors for the defendant, respondent: Sutton, Braidwood, Morris, Hall & Sutton, Vancouver.

PREMIUM IRON ORES LIMITED .....APPELLANT;

AND

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

1965
*Nov. 25, 26
1966
June 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sales agent of mining company—Payment of 20 per cent of income receipts paid to third party under contract for sharing financing obligation—Whether deductible expenses or capital outlay—Legal expenses incurred in resisting U.S. income tax claim—Whether deductible—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a), (b).

The appellant company was incorporated in Ontario to participate in the financing of the Steep Rock Iron Ore Mines Ltd. and in the marketing of the ore produced by it. Initially the financing had been undertaken by Transcontinental Resources Ltd. When it became necessary to obtain substantial additional capital, the appellant company was incorporated so as to have all the financing and marketing operations done through one agency. Thereupon, by contract dated January 15, 1943, the appellant became the exclusive sales agent for Steep Rock and became entitled to a commission of 2 per cent of the value of all ores sold. The agreement also provided for the appellant to purchase shares of Steep Rock and to lend it money. Eighteen days later, the appellant entered into an agreement with a Mr. Carr, president of Transcontinental Resources Ltd., whereby the appellant agreed to pay over to him 20 per cent of the moneys received from Steep Rock. In that agreement, Mr. Carr had waived his right to be appointed sales agent for Steep Rock. Additional funds were soon needed, and another agreement, dated December 29, 1944, was entered into whereby the appellant agreed to take 267,000 shares of Steep Rock for $600,000, of which 100,000 shares were to be taken by Transcontinental Resources Ltd. in its role as a continuing participant in the financing. The appellant covenanted at that time to pay to Transcontinental Resources Ltd., from the 2 per cent commission on Steep Rock Iron Ore sales, the 20 per cent which it had previously undertaken to pay to Carr.

The first issue under appeal was the question as to whether the appellant could deduct from its taxable income the 20 per cent paid in the years 1951 and 1952 to Transcontinental Resources Ltd. The Minister refused to allow the deduction. The Tax Appeal Board allowed the deduction but its decision was reversed by the Exchequer Court.

The second issue under appeal involved the question as to whether legal expenses incurred by the appellant in 1951 and 1952, in successfully contesting a claim asserted by the United States tax authorities, were deductible as business expenses. The Minister disallowed these expenses and his decision was supported by the Tax Appeal Board and by the Exchequer Court. The taxpayer appealed to this Court on both issues.

Held (on the first issue): The appeal should be allowed.

Held (on the second issue) (Ritchie and Abbott JJ. dissenting): The appeal should be allowed.

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

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

[AS TO THE FIRST ISSUE]

Per Curiam: There is no doubt that agreements are to be construed in accordance with the plain and ordinary meaning of the words which they contain, and that the words used in a written agreement are to be construed in the light of the circumstances under which it was concluded. In the present case, it was apparent that from the time of its incorporation the appellant company was engaged with Transcontinental Resources Ltd. in the joint venture of financing Steep Rock and that the 20 per cent represented Transcontinental's share in the venture. Therefore, the appellant was never beneficially entitled to retain more than 80 per cent of the commissions which it received from Steep Rock, and the remaining 20 per cent could not be said to form a portion of its taxable income.

[AS TO THE SECOND ISSUE]

Per Martland and Spence JJ.: While the legal expenses were not made solely for the purpose of earning income, they were made with a view to protecting the income earning capacity of the appellant. Had the claim of the U.S. government been established, it would have created a liability in relation to the appellant's income. The expense incurred here was for the purpose of resisting the demands of a foreign taxing authority which, had it succeeded, would have substantially depleted the income of a Canadian company. A claim of that kind is a claim by a third party. It mattered not, so far as the Canadian authority was concerned, that the nature of the claim was one for income tax. In so far as the Canadian taxing authority was concerned, there was no difference in principle between an expenditure in the form of legal fees paid by a railway company to defend a damage claim by a passenger, and thus protect the company's income, and the expenditure for legal fees paid by the appellant to resist a foreign tax claim and thus to protect its income. A payment made for legal services in an attempt to protect income against encroachment by a third party is in principle properly deductible on the authority of *The Minister of National Revenue v. The Kellogg Co. of Canada,* [1943] S.C.R. 58 and *Evans v. The Minister of National Revenue,* [*1960*] *S.C.R. 391.*

Per Hall J.: The working capital of the appellant and its profit earning potential were preserved by the successful resistance of the unjustified U.S. claim for income tax. The majority judgment in *Smith's Potato Estates Ltd. v. Bolland,* [1948] 2 All E.R. 367, is not the correct statement of the law as applied to the provisions of the Canadian *Income Tax Act.* The "income" means the net receipts over disbursements in the taxation year in the totality of the taxpayer's business as an on-going concern, other than capital expenditures, gifts and the like. There is no reason to regard legal expenses as differing from other expenses. No distinction is to be drawn between proper legal expenses and other business expenses. The expenditures in this case were ones which under sound accounting and commercial practices would be deducted as expenditures for the year in determining the profit, if any, of the company for that year.

Per Abbott and Ritchie JJ., *dissenting in part:* The reasoning in the majority judgment in *Smith's Potato Estates* case, *supra,* applies to the present case. The cost of ascertaining the true amount of tax to be paid is not an expense made in order to earn profits but rather for the purpose of preserving profits already earned. There is no material

distinction between a payment made to resist income tax demand abroad and one to resist a similar demand at home.

Revenu—Impôt sur le revenu—Représentant d'une compagnie minière—Paiement de 20 pour-cent des sommes reçues à une tierce personne en vertu d'un contrat pour partager une obligation de financement—Ce paiement est-il une dépense déductible ou un déboursé en capital—Dépenses légales encourues lors de la contestation d'une réclamation pour impôt provenant des États-Unis—Ces dépenses sont-elles déductibles—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(a), (b).

La compagnie appelante a été incorporée dans l'Ontario dans le but de participer au financement de la compagnie Steep Rock Iron Ore Mines Ltd. et de mettre sur le marché le minerai produit par cette dernière. Au début, la compagnie Transcontinental Resources Ltd. avait entrepris ce financement. Lorsqu'il devint nécessaire d'obtenir un capital substantiel additionnel, la compagnie appelante fut incorporée pour que le financement et les opérations de marché puissent passer par les mains d'une seule agence. Conséquemment, en vertu d'un contrat en date du 15 janvier 1943, l'appelante est devenue le représentant exclusif de Steep Rock avec droit à une commission de 2 pour-cent de la valeur du minerai vendu. En vertu du contrat, l'appelante devait se porter acquéreur d'actions de Steep Rock et devait lui avancer des fonds. Quelque dix-huit jours plus tard, l'appelante et un monsieur Carr, président de Transcontinental Resources Ltd., signèrent un contrat en vertu duquel l'appelante s'engagea à payer à monsieur Carr 20 pour-cent des argents reçus de la Steep Rock. Dans ce contrat, monsieur Carr a renoncé à son droit d'être nommé représentant de Steep Rock. Des fonds additionnels ayant été requis, un autre contrat, en date du 29 décembre 1944, fut signé par les parties. Par ce contrat, l'appelante devait se porter acquéreur de 267,000 actions de Steep Rock pour une somme de $600,000. De ces actions, 100,000 devaient être acquises par Transcontinental Resources Ltd. en vertu de son rôle de participant continuel au financement. L'appelante s'engagea alors à payer à Transcontinental Resources Ltd. à même le 2 pour-cent de commission sur les ventes de Steep Rock, le 20 pour-cent qu'elle s'était engagée préalablement à payer à monsieur Carr.

Le premier point sous appel était celui de savoir si l'appelante pouvait déduire de son impôt taxable le 20 pour-cent qui avait été payé durant les années 1951 et 1952 à Transcontinental Resources Ltd. Le Ministre a refusé de permettre la déduction. La Commission d'Appel de l'Impôt a permis la déduction mais sa décision fut renversée par la Cour de l'Échiquier.

Le second point sous appel était celui de savoir si les dépenses légales encourues par l'appelante en 1951 et 1952, lorsqu'elle contesta avec succès une réclamation d'impôt présentée par le gouvernement des États-Unis, étaient déductibles comme dépenses d'affaires. Le Ministre n'a pas permis ces dépenses et sa décision a été supportée par la Commission d'Appel de l'Impôt et par la Cour de l'Échiquier. Le contribuable en appela devant cette Cour sur les deux points.

Arrêt (sur le premier point): L'appel doit être maintenu.

Arrêt (sur le second point): L'appel doit être maintenu, les Juges Ritchie et Abbott étant dissidents.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

[SUR LE PREMIER POINT]

La Cour: Il n'y a aucun doute que les contrats doivent être interprétés conformément au sens clair et ordinaire des mots qu'ils contiennent, et que les mots dont on se sert dans un écrit doivent être interprétés à la lumière des circonstances en vertu desquelles l'accord a été conclu. Dans le cas présent, il était évident qu'à partir du moment de son incorporation la compagnie appelante était engagée avec Transcontinental Resources Ltd. dans une opération en commun pour le financement de Steep Rock et que le 20 pour-cent représentait la part de Transcontinental Resources Ltd. dans l'opération. En conséquence, l'appelante n'avait jamais eu droit de garder plus que 80 pour-cent de la commission qu'elle recevait de Steep Rock, et on ne peut pas dire que le 20 pour-cent qui restait formait une partie de son impôt taxable.

[SUR LE SECOND POINT]

Les Juges Martland et Spence: Quoique les dépenses légales n'avaient pas été faites seulement en vue de produire un revenu, cependant elles avaient été faites en vue de protéger la capacité de l'appelante de gagner un revenu. Si la réclamation du gouvernement des États-Unis avait été établie, ceci aurait créé une charge sur les revenus de l'appelante. La dépense avait été encourue en vue de résister à la demande venant d'une autorité étrangère qui, si elle avait réussi, aurait substantiellement réduit le revenu d'une compagnie canadienne. Une telle réclamation est une réclamation par une tierce partie. En autant que l'autorité canadienne était concernée, cela n'avait pas d'importance que la réclamation en soit une pour impôt sur le revenu. En autant que l'autorité canadienne était concernée, il n'y avait aucune différence en principe entre une dépense pour frais légaux payés par une compagnie de chemin de fer pour se défendre contre une réclamation d'un passager, et ainsi protéger le revenu de la compagnie, et la dépense pour frais légaux payés par l'appelante pour résister à une réclamation pour taxe étrangère, et ainsi protéger son revenu. Un paiement fait pour services légaux dans le but de protéger le revenu contre les empiétements d'une tierce partie est en principe déductible en vertu de l'autorité des causes *The Minister of National Revenue v. Kellogg Co. of Canada,* [1943] R.C.S. 58 et *Evans v. The Minister of National Revenue,* [1960] R.C.S. 391.

Le Juge Hall: La contestation de la réclamation non justifiée des États-Unis a eu pour effet de conserver le capital d'exploitation de l'appelante ainsi que son potentiel de gagner un revenu. Le jugement de la majorité dans la cause *Smith's Potato Estates Ltd. v. Bolland,* [1948] 2 All E.R. 367, ne reflète pas la loi qui doit s'appliquer aux dispositions de la *Loi de l'Impôt sur le revenu* du Canada. Le mot «revenu» signifie les reçus nets après déboursements durant l'année de taxation dans la totalité des affaires du contribuable, autres que des dépenses de capital, donations et autres semblables. Il n'y a aucune raison de considérer que les déboursés légaux comme étant différents des autres déboursés. On ne peut établir aucune distinction entre des dépenses légales et des dépenses d'affaires. Les dépenses dans le cas présent étaient de celles qui, en vertu des principes de comptabilité et de commerce, seraient déductibles comme dépenses pour l'année dans la détermination du profit d'une compagnie pour ladite année.

Les Juges Abbott et Ritchie, *dissidents en partie:* Le raisonnement de la majorité de la Cour dans la cause *Smith's Potato Estates, supra,* s'applique au cas présent. Le coût de la détermination du montant véritable de taxe à être payé n'est pas une dépense faite en vue de gagner un profit mais plutôt en vue de conserver des profits déjà gagnés. Il n'y a aucune distinction matérielle entre un paiement fait pour résister à la demande pour impôt sur le revenu venant d'un pouvoir étranger et un paiement fait pour résister à une demande similaire domestique.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], dans une matière d'impôt sur le revenu. Appel maintenu, les Juges Abbott et Ritchie étant dissidents en partie.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in a matter of income tax. Appeal allowed, Abbott and Ritchie JJ. dissenting in part.

Hazen Hansard, Q.C., and *D. O. Mungovan, Q.C.,* for the appellant.

D. S. Maxwell, Q.C., and *B. Verchère,* for the respondent.

The judgment of Abbott and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting in part*):—This is an appeal from two judgments of the Exchequer Court of Canada[1] based on a single decision rendered by Cattanach J. whereby he allowed the appeal of the Minister of National Revenue from a decision of the Tax Appeal Board and thereby approved a reassessment of the present appellant's taxable income for the years 1951 and 1952 adding thereto amounts of $46,532.56 and $45,192.03 which were described by the Minister of National Revenue as "Commissions paid pursuant to agreement of December 29, 1944 with Transcontinental Resources Limited" and whereby he also dismissed the present appellant's cross appeal from a decision of the Tax Appeal Board disallowing a deduction from its taxable income for the years 1951 and 1952 of $20,832.51 being the total amount paid in those two years as legal expenses incurred in respect of a disputed claim for income tax by the United States Internal Revenue Service.

The appellant company was incorporated in Ontario in November 1942 for the purpose of undertaking, in co-operation with other Canadian and United States interests, the

[1] [1965] 1 Ex. C.R. 25, [1964] C.T.C. 202, 64 D.T.C. 5131.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

financing of the development of an iron ore deposit at Steep Rock Lake in northwestern Ontario and for the further purpose of marketing the ore produced from that deposit and the question raised by this appeal with respect to the payment of commissions must, in my view, be considered in light of the circumstances surrounding the early stages of this important mining development.

The ore deposit in question was discovered in 1938 on property owned by Steep Rock Iron Ore Mines Limited (hereinafter called "Steep Rock") and the financing of the very considerable operation necessary to extract the ore from under the Lake was initially undertaken by a Canadian group consisting of Mr. Arthur Carr, the President of Transcontinental Resources Limited and his associates in that Company. Large sums of money were expended in sinking a shaft and running drifts under the Lake in an effort to mine the ore but this proved unsuccessful and it was decided that the only alternative was to embark on the extensive and very costly task of pumping over 100 billion gallons of water out of Steep Rock Lake.

In order to obtain the substantial additional capital necessary to finance this difficult operation, contact was made with Mr. Cyrus Eaton and the Otis Company of Cleveland, Ohio, of which he was the President. It was originally contemplated that the financing would be arranged by Steep Rock issuing $7,500,000 worth of first mortgage bonds of which $1,500,000 were to be marketed in Canada through Mr. Carr and Transcontinental Resources Limited (hereinafter referred to as "Transcontinental") and the balance in the United States through Otis and Company; Steep Rock, however, found it more convenient to deal through one agency and it was for this reason that after discussing the matter with Otis and Company and Transcontinental it was decided that the appellant company should be incorporated. The way in which this decision was made is perhaps best described in the evidence of Mr. William R. Daley, who is now President of Otis and Company and Chairman of the Board of Directors of the appellant company and who was the only witness called in these proceedings. In this regard he said:

> Q. In your previous testimony when you have referred to Mr. Carr and his associates, we must imply that you referred to Transcontinental as being the principal associate?

A. Yes, I am. We ran into some complications in that Steep Rock wanted to deal with one agency. So in the ultimate—I guess it is a long time before we got to the ultimate setup, *but we then agreed we would form one agency, which would be a Canadian company—Premium Iron Ores Limited, which would have a branch company in the United States.* Arthur Carr and his associates would have a contract to distribute the iron ore that was being sold in Canada. Steep Rock wanted to deal with one agency, so it was finally agreed that Premium Iron Ores Limited itself would have exclusive agency and that it would have the co-operation of Arthur Carr and his associates both in the financing and in the sale of the iron ore.

The italics are my own.

In the result, by reason of wartime conditions the Canadian Minister of Finance refused to permit the marketing of these bonds in Canada and therefore the major portion of the financing had to be arranged by way of a loan from the United States Reconstruction Corporation. This loan was granted on the understanding that the appellant would undertake to procure firm purchasing contracts for the delivery of 10,000,000 tons of ore during a period of the next ten years, not less than 500,000 tons of which was to be delivered in each year, and upon a further undertaking by the appellant to furnish additional funds up to $1,000,000 if the actual cost of bringing the mine into production proved greater than the then estimate of $7,500,000.

In furtherance of these arrangements an agreement was entered into between Steep Rock and the appellant on January 15, 1943, wherein it was recited that Steep Rock had appointed the appellant the exclusive selling agent in respect of the iron ore to be mined and produced and the appellant agreed to procure firm purchasing orders for 10,000,000 tons of ore in the manner aforesaid and to render financial assistance up to $1,000,000 if the same were required. The terms of this agreement which most directly concern the issues in this appeal are contained in paragraphs 5, 9, 10 and 11.

Paragraph 5 contains an express covenant by Steep Rock

> ...subject as herein provided, to pay Premium for services referred to herein an amount equal to two percentum (2%) of the value of all Steep Rock ores sold by Premium and Steep Rock during the life of this agreement, whether such ores are delivered within the life of this agreement or not.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

and by paragraphs 9, 10 and 11 the appellant undertook to provide on demand additional financing for Steep Rock of $1,000,000 by way of a loan against promissory notes to be issued and further undertook to deposit voting trust certificates representing 800,000 shares of Steep Rock in trust with an approved trust company by way of assurance to Steep Rock of its ability to make such a loan. It was also agreed by paragraph 18 that 1,437,500 shares of Steep Rock would be allotted to Premium forthwith at a price of 1 cent per share.

Eighteen days after the execution of the last-mentioned agreement, *i.e.*, on February 2, 1943, an agreement was entered into between the appellant and Arthur W. Carr wherein it was recited that Carr had agreed to waive his right to be appointed sales agent by Steep Rock and whereby the appellant covenanted and agreed

> ...that in each year hereafter during the lifetime of the Agency Contract it will pay to Carr a sum equal to Twenty Per Centum (20%) of all monies paid to it by Steep Rock or its successor during such year by way of commission or other compensation under the terms of the said Agency Contract.

As an indication of the continuing participation of Transcontinental in the financing of the Steep Rock Project, it is to be noted that on May 29, 1943, it entered into an agreement with the appellant whereby it agreed to contribute voting trust certificates representing 200,000 of the 800,000 shares of Steep Rock which the appellant had agreed to deposit under the terms of the agreement of January 15th.

In the latter part of 1944 it became apparent that the $7,500,000 which had been estimated as the cost of bringing the mine into production was not enough and Steep Rock accordingly called on Premium Iron Ores to put up part of the $1,000,000 which it had agreed to furnish but in accordance with the contracts existing between Steep Rock and the Reconstruction Finance Corporation, the form of the advance had to be approved by the latter body with the results which are described in the following evidence of Mr. Daley:

> When Steep Rock and Carr and myself reached Washington and took the matter up with Mr. McCartney, who represented the R.F.C. at that time, after a discussion with his associates he said the R.F.C. was not willing to let Steep Rock undertake any further obligations to pay out

money. We pointed out, of course, to Mr. McCartney that R.F.C. had agreed to the provision in the Steep Rock/Premium Contract whereby it was to be represented, the advances were to be represented by an obligation of Steep Rock up to a maximum of six percent, as I recall it, for up to a five-year period.

Mr. McCartney said in spite of that they were not willing to let Steep Rock assume any more debt but that they would agree if Steep Rock desired to do it, to let them issue stock at the market price for the amount that was needed.

The Steep Rock officials and Mr. Carr and I then conferred on that proposal, which resulted in an agreement whereby Premium agreed to take 267,000 shares of Steep Rock stock for approximately $600,000.00, of which Transcontinental Resources was to take 100,000 shares with the balance to be taken by Premium Iron Ores.

A formal agreement was accordingly entered into on December 29, 1944, whereby Transcontinental in its role as a continuing participant in the financing, agreed to purchase 100,000 of the Steep Rock shares which the appellant had agreed to take up and the appellant covenanted to pay to Transcontinental from the 2 per cent commission on Steep Rock Iron Ore sales for which provision was made under the agreement of January 15, 1943, the 20 per cent which it had previously undertaken to pay to Carr under the agreement of February 2, 1943.

The sums of $46,532.56 and $45,192.03 which are now sought to be deducted from the appellant's taxable income represent the 20 per cent payable in accordance with the December 1944 agreement which were paid by the appellant in the years 1951 and 1952 respectively to one A. C. McFadyen who was the ultimate assignee of the rights of Transcontinental thereunder.

In disallowing the deduction of these amounts from the appellant's taxable income for the years in question, Cattanach J. basing his judgment upon his construction of the "plain ordinary meaning" of the words used in the agreements of January 15, 1943, and December 29, 1944, concluded that the payments were made in consideration of Transcontinental purchasing the 100,000 shares of Steep Rock and his analysis of the effect of the 1944 agreement is summarized in the following excerpt from his judgment:

On the one hand, as I view it, the respondent provides services as a sales agent to Steep Rock. On the other hand, the respondent has made an investment in Steep Rock shares. The purchase of such shares is an investment of capital and monies paid to a third party for purchasing some of those shares is equally a capital outlay and cannot be regarded as a current expense of the respondent's business.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

In my opinion the Minister was, therefore, right in assessing the respondent as he did and accordingly the appeal herein must be allowed with costs.

With the greatest respect it appears to me that in confining himself to the two agreements to which he refers, Mr. Justice Cattanach has failed to take into account the gradually developing chain of circumstances which led up to the mine being finally brought into production and in which Carr and his associates in Transcontinental had played a dominant role from the outset.

There is, of course, no doubt that the agreements are to be construed in accordance with the plain and ordinary meaning of the words which they contain. It is equally clear, however, that the words used in a written agreement are to be construed in light of the circumstances under which it was concluded. In this regard I accept the opinion expressed by Lord Blackburn in *River Wear Commissioners v. Adamson*[1], where he said:

> ...I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; ...In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

The same proposition was more succinctly stated by Jessel M.R. in *Cannon v. Villers*[2]:

> When construing all instruments you must know what the facts were when the agreements were entered into.

When the series of agreements which are exhibits in the present case are considered against the background of Mr. Daley's evidence it is, as I have indicated, apparent that the appellant was incorporated at the instance of Otis and Company and Transcontinental for the purpose of participating in the financing of Steep Rock in co-operation with the two financial groups represented by these companies and that the agreement of January 1943 was entered into as the first step in fulfilment of this purpose, while the agreements of February and May 1943 and December 1944

[1] (1877), 2 A.C. 743 at 763. [2] (1878), 8 Ch. D. 415 at 419.

were entered into in recognition of the continuing participation of the Transcontinental interests in the development of a final plan for the successful outcome of a venture with which they had been closely associated from the beginning.

It is to be remembered that the 2 per cent commission payable to the appellant under the January 1943 agreement was

> ...two percentum (2%) of the value of all Steep Rock ores sold by Premium and Steep Rock...

and that within eighteen days of entering into that agreement, *i.e.*, on February 2, 1943, 20 per cent of this 2 per cent commission was assigned to Carr and later made payable to Transcontinental under the agreement of December 1944 by which, to use the language of Mr. Daley, "the Carr agreement was absorbed".

It is thus apparent that from the time of its incorporation the appellant was engaged with the Transcontinental group in the joint venture of financing Steep Rock, and that before the ore deposits had been brought into commercial production, it had agreed to forego 20 per cent of its commission on their sale which represented the share of its associates in this venture. By reason of the agreement which it entered into in recognition of the part played by its associates, the appellant was never beneficially entitled to retain more than 80 per cent of the commissions which it received from Steep Rock, and the remaining 20 per cent cannot in my opinion be said to form a portion of its taxable income. In this regard I agree with the following statement made by Mr. R. S. W. Fordham in the course of his reasons for judgment rendered by him on behalf of the Tax Appeal Board:

> I think too, it may be said that the appellant and Transcontinental were in a kind of joint adventure; each played an important part in making it possible for Steep Rock to acquire needed funds. The appellant—and not Steep Rock—became obligated to Transcontinental as a consequence. The monies paid to the latter were for a valued service rendered to the appellant in its fulfilment of an important part of the agency agreement with Steep Rock. Appellant was entitled to retain 80 per cent of the monies received from Steep Rock and no more. The remaining 20 per cent had become, by formal and enforceable agreement, the property of Transcontinental or its assignees. Hence, it was on the beneficial assignee that liability for tax on the 20 per cent fell and not on the appellant, which had no proprietary interest therein.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

I would accordingly allow the appeal with respect to the commissions paid by the appellant to Mr. McFadyen in the years 1951 and 1952 and direct that the reassessment by the Minister of National Revenue in this regard be set aside.

The legal expenses which the appellant seeks to deduct for the years 1951-52 were incurred in respect of a claim asserted by the United States tax authorities in the year 1950 relating to earnings of the appellant during the years 1943-1950 inclusive. The exact nature of the claim in respect of which the legal expenses were incurred can best be explained by somewhat lengthy reference to the evidence of Mr. Daley.

After having been questioned as to the arrangement whereby Premium Iron Ores was permitted to purchase 1,437,500 shares of Steep Rock for $14,375, Mr. Daley's examination continued:

Q. Turning to the question of the legal expenses involved in the United States and here, Mr. Daley, I did not quite understand when you said that the matter first came up in 1950 and you indicated, I think, some two or three million dollars in tax that they wanted. For what period was this two to three million dollars—how long? Was it from the beginning of operations or for the year 1950 or what?

A. I recall that Premium received this large block of shares of Steep Rock at one cent per share and while the Canadian Income Tax Department had said no tax will result from this transaction the United States government tried to assert a claim on profit for the difference between the market value on the Toronto Stock Market and the one cent.

Q. That was with respect to your capital gain between the one cent and the 1.66?

A. No, it was not. They said that was income for services.

* * *

Q. I am not getting into whether it is a capital gain or profit, but it represented what we might normally call the capital gain, whether it was considered profit or what it was considered. It represented the difference between the one cent and the 1.66?

A. Yes, that is correct.

Q. Was that the chief substance of what they were claiming against you?

A. From 1945 on the claim also included all of the commissions that had been received from Steep Rock.

Q. Generally it was with respect to the income from the beginning of Premium's existence; is that the idea?

A. You say 'generally'. Of course that amount was not as large as the other amount, but they did assert a claim against all of those commissions claiming that was United States' income.

Mr. Daley was later asked:

> Q. Can you tell me any better than you have, Mr. Daley, with respect to what precise years the United States government were claiming tax? I do not want to put words into your mouth. Was it 1943 and every year up to 1950?
>
> A. 1943 was the most important one and it was every year up through.
>
> Q. To the end?
>
> A. To, I think, 1950—the time they started their investigation.
>
> Q. Did you have accounts after the cases proceeded to court? Did you have accounts—presumably you did—from solicitors?
>
> A. Yes.

The appellant contends that these legal expenses in the years 1951-52 were deductible as having been incurred "for the purpose of gaining or producing income" under the provisions of s. 12(1)(*a*) of the *Income Tax Act* which reads as follows:

> 12 (1) In computing income no deduction shall be made in respect of
>
> (*a*) an outlay or expense *except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.*

The italics are my own.

In disallowing the deduction sought by the appellant for these expenses, Mr. Justice Cattanach adopted the reasoning of the majority of the House of Lords in *Smith's Potato Estates Limited v. Bolland (Inspector of Taxes)*[1], in which it was held that under Rule 3(*a*) Schedule D of the English *Finance Act* 1940, the expense incurred for legal and accounting costs in the preparation and prosecution of an appeal to the Board of Referees was not deductible in computing the taxable income of a taxpayer on the ground that the cost of ascertaining the true amount of tax to be paid is not an expense made in order to earn profits but rather an application of profits after they had been earned. The view of the majority of the Law Lords in this case which was later followed in the unanimous judgment of the House of Lords in *Rushden Heel Co., Ltd. v. Inland Revenue Comrs.*[2] is epitomized in the following paragraph from the reasons of Lord Simonds to which Cattanach J. has referred:

> ...Neither the cost of ascertaining taxable profit nor the cost of disputing it with the revenue authorities is money spent to enable the trader to earn

[1] [1948] A.C. 508, 2 All E.R. 367.
[2] [1948] 2 All E.R. 378.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

profit in his trade. What profit he has earned, he has earned before ever the voice of the taxgatherer is heard. He would have earned no more and no less if there was no such thing as income tax.

The appellant sought to distinguish these cases from the present one on the ground that the wording of the English Rule 3(*a*) differs from s. 12(1)(*a*) of the *Income Tax Act*. The English Rule reads as follows:

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of
>
> (*a*) disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade...

It is to be noted, however, that the reasons of the majority in the *Smith's Potato Estates Ltd.* case were predicated on an acceptance of the interpretation placed on Rule 3(*a*) by Lord Davey in *Strong & Co. v. Woodifield*[1]. In that case Lord Davey, in commenting on the words "wholly and exclusively laid out or expended for the purposes of the trade" as they occur in Rule 3(*a*), had this to say:

> These words...appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade.

Viewed in this light I am of opinion that the reasoning employed in the *Smith's Potato Estates Ltd.* case applies to the interpretation to be placed on s. 12(1)(*a*).

It was not until 1964, twelve years after the last payment of legal expenses had been made by the appellant in the present case that Canadian taxpayers were afforded relief from the effect of the *Smith's Potato Estates Ltd.* case, *supra*. In that year Parliament enacted section 11(1)(*w*) of the *Income Tax Act*, the relevant portions of which read as follows:

> 11(1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*w*) *Expenses of objection or appeal.*—amounts paid by the taxpayer in the year in respect of fees or expenses incurred in preparing, instituting or prosecuting an objection to, or an appeal in relation to, an assessment of tax, interest or penalties under this Act.

It has been suggested that the decision of this Court in the case of *Evans v. Minister of National Revenue*[2] affords some support for the contention of the appellant on

[1] [1906] A.C. 448.

[2] [1960] S.C.R. 391, C.T.C. 69, 60 D.T.C. 1047, 22 D.L.R. (2d) 609.

this branch of the appeal, but that was not a case in which the taxpayer was seeking to deduct legal fees paid in respect of a dispute as to tax liability. There the taxpayer had incurred legal expenses in respect of an originating notice to the Supreme Court of Ontario for the opinion, advice and direction of the Court as to whether she was entitled to be paid income for life under the will of the father of her first husband. It was ultimately decided in the Ontario Court that she was so entitled and the very considerable legal fees were deducted by the trustee of the will out of the income to which she would otherwise have been entitled for the taxation year in question. The question at issue was whether in computing her income for that year the taxpayer was entitled to deduct those fees. The main question to be determined was whether the life interest to which the taxpayer was found to be entitled was a capital asset or whether it was income, and Cartwright J. who delivered the reasons for judgment on behalf of the majority of the Court held that it was income to which the taxpayer was entitled but the payment of which could not have been obtained without the expense of litigation, and he therefore allowed the deduction. It will be seen that these circumstances are very different from those in the present case, and I find it to be clearly distinguishable.

It is, however, argued on behalf of the appellant that even if it be accepted that such legal expenses are not deductible when they have been incurred to dispute a claim of the tax authorities of the taxpayer's own country, entirely different considerations apply when the outlay is made in order to determine the taxpayer's position in relation to a claim by a foreign government. In this regard, like the learned judge in the Exchequer Court, I am persuaded that the reasoning of the House of Lords in *Inland Revenue Commissioners v. Dowdell O'Mahoney & Co., Ltd.* [1] applies to such a claim. That was a case in which a company resident in Eire carried on business at two branches in England. The whole of its profits, including those arising from business in England, were subject in Eire to income tax and the company sought to deduct a proportion of the Eire taxes in computing the profits of the business in England for assessment of excess profits tax. In the course

[1] [1952] A.C. 401, 1 All E.R. 531.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

of his reasons for judgment disallowing the deduction, Lord Radcliffe appears to me to have come to the heart of the matter when he said at p. 543:

> *But, once it is accepted that the criterion is the purpose for which the expenditure is made* in relation to the trade of which the profits are being computed, I have been unable to find any material distinction between a payment made to meet such taxes abroad and a payment made to meet a similar tax at home.

The italics are my own.

In the present case, as I have indicated, the purpose for which the expenditure was made concerned a claim for income tax in the United States in relation to profits made by the appellant in 1943 which the Canadian authorities had characterized as capital profits as well as a claim in respect of income which had been earned in the years 1945-1950 inclusive. These expenditures made in the years 1951 to 1952 do not appear to me to have been made "for the purpose of gaining or producing income" but rather for the purpose of preserving profits already earned by the appellant from a claim made by the United States tax authorities. The exceptional cases in which a taxpayer is permitted to deduct expenses when computing taxable income are confined by the terms of s. 12(1)(*a*) to expenses

> ...made or incurred by the taxpayer for the purpose of gaining or producing income...

and except as otherwise expressly provided by s. 11, do not extend to expenses made for the purpose of preserving that income once it has been earned.

The effect of the provisions of s. 12(1)(*a*) is discussed and explained by Mr. Justice Abbott in the course of the reasons for judgment which he delivered on behalf of the majority of this Court in *B. C. Electric Ry. Co. Ltd. v. Minister of National Revenue*[1], where he said:

> Since the main purpose of every business undertaking is presumably to make a profit, any expenditure made 'for the purpose of gaining or producing income' comes within the terms of s. 12(1)(*a*) whether it be classified as an income expense or as a capital outlay.
>
> Once it is determined that a particular expenditure is one made for the purpose of gaining or producing income, in order to compute income tax liability it must next be ascertained whether such disbursement is an income expense or a capital outlay. *The principle underlying such a*

[1] [1958] S.C.R. 133 at 137, C.T.C. 21, 71 C.R.T.C. 29, 58 D.T.C. 1022, 12 D.L.R. (2d) 369.

distinction is, of course, that since for tax purposes income is determined on an annual basis, an income expense is one incurred to earn income of the particular year in which it is made and should be allowed as a deduction from gross income in that year.

The italics are my own.

It cannot in my opinion be said that the legal expense in question in the present case was incurred to earn the income of the particular year in which it was made and it should therefore not "be allowed as a deduction from gross income in that year".

For these reasons, as well as for those expressed in the opinion of Mr. Justice Cattanach, I would dismiss the appeal from the reassessment of the Minister of National Revenue with respect to legal expenses incurred in the years 1951 and 1952 in the resisting of the claim of the United States taxing authority.

In the result, the appeal in respect of the commissions paid in the years 1951 and 1952 is allowed and the appeal with respect to legal expenses in the same years is dismissed.

As the appellant has been substantially successful in this Court it will have the costs of this appeal together with the costs of the appeal to the Exchequer Court. The order as to costs of the cross appeal in the Exchequer Court will, of course, remain undisturbed.

MARTLAND J.:—I agree with my brother Ritchie that the commissions paid by the appellant to Mr. McFadyen in the years 1951 and 1952 were not taxable in the hands of the appellant. I agree with the conclusion reached by my brother Hall that the appellant was entitled to deduct as items of expense the amounts of $12,317.36 and $8,514.16, paid for legal expenses, in the years 1951 and 1952 respectively, when determining its taxable income in those two years. I have, however, reached this conclusion on somewhat narrower grounds than those which he has stated.

The reason for these payments is given in the judgment of the Tax Appeal Board, as follows:

Turning to the second phase of the matter, the appellant learned some years after it had begun to sell ore in substantial quantities that the American revenue authorities had designs on its income on the alleged grounds that it had been earned in the United States of America and that the appellant had a permanent establishment there within the meaning of the Tax Convention and Protocol between Canada and the United States

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

of America, signed on or about 4th March, 1942. The suggestion that tax liability obtained in the latter country was both surprising and startling to the appellant and steps were taken promptly to ascertain its legal position. It was a matter of great importance to the appellant as, if liability were to be established, the income relating to past, present and future years would be in jeopardy and, according to the evidence heard, in the event of the American claim proving successful, immense harm would be done to the appellant, financially. On this account, opinions were sought in Canada and the United States of America and great trouble was gone to and expense incurred in the latter country for the purpose of ascertaining all relevant facts and reaching a position in which the claim could be effectively opposed if it were proceeded with in the appropriate American court.

The relevant provisions of the *Income Tax Act*, R.S.C. 1952, c. 148, are s. 12(1)(*a*) and (*b*) which provide:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

The predecessor of s. 12(1)(*a*) was s. 6(1)(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, which provided that:

> 6. (1) In computing the amount of the *profits or gains to be assessed,* a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not *wholly, exclusively and necessarily* laid out or expended for the purpose of earning *the* income.

It seems clear that the present wording of para. (*a*), which first appeared in the 1948 *Income Tax Act*, 1948 (Can.), c. 52, was intended to broaden the definition of deductible expenses. The *Income War Tax Act* defined "income" as meaning "the annual net profit or gain or gratuity." Under s. 6(1)(*a*), in computing such profit or gain it was only permissible to deduct expenses wholly, exclusively and necessarily expended for the purpose of earning that income. The present Act does not contain this definition of "income." It frequently uses the phrase "income for a taxation year", which appears in s. 11(1) dealing with allowable deductions. The phrase does not appear in s. 12(1)(*a*) which, as now worded, permits the deduction of any expense made for the purpose of producing income from a property or business.

Even under the narrower provisions of s. 6(1)(*a*) of the *Income War Tax Act,* legal expenses were deductible in the ordinary course as a current expenditure. This was stated by Duff C.J. in *The Minister of National Revenue v. The Dominion Natural Gas Company Limited,*[1] a case which involved the application of s. 6(1)(*a*) and (*b*) of the *Income War Tax Act.* The statement was affirmed by unanimous decision of this Court when he delivered the judgment in *The Minister of National Revenue v. The Kellogg Company of Canada, Limited*[2]. In that case the question in issue was as to the right of the Kellogg Company to claim as an expense, in determining its taxable income under the *Income War Tax Act,* legal fees incurred by it in successfully defending a suit for an injunction against alleged infringement of registered trade marks by using certain words in connection with the sale of its products. These expenses were held to be deductible under s. 6(1)(*a*) of that Act, and not to constitute an outlay or payment on account of capital within s. 6(1)(*b*). They fell within the general rule that in the ordinary course legal expenses are simply current expenditures and deductible as such.

Clearly these expenses were not made solely for the purpose of earning income in the year in which they were incurred. They did not directly result in the earning of income at all. But they were made with a view to protecting the income earning capacity of the company, since it must be assumed that the loss of the right to the use of the words in connection with its sales would have indirectly resulted in a reduction of its income, not only in the year in which they were incurred, but also in future years as well.

In *Evans v. The Minister of National Revenue*[3], the question in issue was as to the right to deduct, under s. 12(1)(*a*) of the *Income Tax Act,* legal expenses incurred by the appellant in connection with an application by the trustee of an estate for advice and directions. What the Court had to determine upon the application was the appellant's right to receive the income from a portion of the estate. Judgment on that application was given in 1954. There were appeals to the Court of Appeal for Ontario and to this Court. The final judgment was given in 1955 and

[1] [1941] S.C.R. 19 at 25, 4 D.L.R. 657.
[2] [1943] S.C.R. 58 at 61, 3 Fox Pat. C. 13, 2 C.P.R. 211, 2 D.L.R. 62.
[3] [1960] S.C.R. 391, C.T.C. 69, 60 D.T.C. 1047, 22 D.L.R. (2d) 609.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

the appellant sought to deduct from her income for that year her legal fees which she paid in that year.

Here again, the expense was not one which was made solely for the purpose of earning income in that year. In the light of the decision of this Court, she had been entitled to that income all along. Such expense was made in order to protect her right to receive income, not only in 1955, but in each of the years in which income became available for distribution from the estate. This right was held not to be a capital asset, and the expense in question did not fall within s. 12(1)(*b*). Such expense was held to be properly incurred within s. 12(1)(*a*) for the purpose of gaining an income to which the appellant was entitled.

In the present case the legal fees paid by the appellant were expended with a view to resisting the claim of the American government that the appellant had a permanent establishment in the United States and so was liable for the payment of income tax there. As stated in the reasons of the Tax Appeal Board, previously cited:

> It was a matter of great importance to the appellant as, if liability were to be established, the income relating to past, present and future years would be in jeopardy, and, according to the evidence heard, in the event of the American claim proving successful, immense harm would be done to the appellant, financially.

I have great difficulty in seeing how, in principle, this expense for legal services, made as it was for the purpose of protecting the appellant's income, can be regarded as being different from that which was held to be properly deductible in the Kellogg case and also in the Evans case. The disbursement made was not an outlay or replacement of capital, nor a payment on account of capital, within s. 12(1)(*b*). The claim of the American government was not in respect of the appellant's capital, but a claim which, if established, would have created a liability in relation to its income. It is true that the American government considered as taxable income items of profit which had not been so regarded in Canada, but the basis of the claim was in respect of income. It is also true that the disbursement was made to protect profits earned in years prior to the year in which the disbursement was made as well as the income of that and subsequent years. But in the light of the present wording of s. 12(1)(*a*) and its application in the Evans case, this does not prevent this expense from being deducti-

ble. In both that case and the Kellogg case the expense involved was to establish a right to receive income, or for the protection of income in other years as well as that of the year in which the expenditure was made.

The learned trial judge refused to allow the deduction of these expenses because he felt that the matter was determined by the judgment of the House of Lords in *Smith's Potato Estates Limited v. Bolland (Inspector of Taxes)*[1]. In that case, by a majority of three to two, the appellant was held not to be entitled, in determining its taxable income, to deduct legal and accountancy expenses made to contest an assessment to excess profits tax.

Assuming, without agreeing, that the reasoning of the majority should be preferred to that of the minority, I do not agree that that case is a parallel to the present one. The relevant statutory provision in that case was materially different from s. 12(1)(*a*) of our Act. The English statute only permitted deduction of:

> money *wholly and exclusively* laid out and expended for the *purposes of the trade*.

Reference to the words which I have italicized, as compared with the wording of our s. 12(1)(*a*), indicates that the English provision was much narrower in its scope.

The *Smith* case was concerned with legal expenses made by an English company in England with a view to reducing its liability for tax in England. The effect of the decision is that an expenditure by a trader for legal fees incurred for the purpose of contesting an assessment of income tax cannot, *as against the assessor of that tax*, be claimed as money wholly and exclusively expended for the purpose of the trade. But that is not this case. The expense incurred here was for the purpose of resisting the demands of a foreign taxing authority, which, had it succeeded, would have substantially depleted the income of a Canadian company. In my opinion, a claim of that kind is a claim by a third party. The resistance of the claim is an attempt to protect Canadian income, and it matters not, so far as the Canadian taxing authority is concerned, that the nature of the claim is one for income tax. In so far as the Canadian taxing authority is concerned, I can see no difference, in

[1] [1948] A.C. 508, 2 All E.R. 367.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

principle, between an expenditure in the form of legal fees paid by a railway company to defend a damage claim by a passenger, and thus to protect the company's income, and the expenditure for legal fees paid by the appellant to resist a foreign tax claim and thus to protect its income. The former type of expense is admittedly properly deductible.

The other authority relied upon by the learned trial judge, also a decision of the House of Lords, was *Inland Revenue Commissioners v. Dowdell O'Mahoney & Co. Ltd.*[1]. That case is also distinguishable. It dealt with a claim by an Irish company, doing business in England, to deduct, in computing its excess profits tax in England, tax paid by it in Ireland. This claim was refused. The case does not involve legal fees at all. The payment of the Irish tax was not made with a view to resisting a claim which would reduce its income.

In my opinion a payment made for legal services in an attempt to protect income against encroachment by a third party is, in principle, on the authority of the Kellogg and Evans cases in this Court, properly deductible.

I would allow the appeal in toto, with costs throughout.

HALL J.:—I have had the opportunity of reading the reasons for judgment of my brother Ritchie and I agree with him that the commissions paid by the appellant to Mr. McFadyen in the years 1951 and 1952 were not taxable in the hands of the appellant. However, with respect, I disagree as to the $20,832.51 paid in the two years in question as legal expenses incurred as a result of an unwarranted claim for income tax and capital gains tax amounting to between two and three million dollars by the United States Internal Revenue Service which claim was successfully resisted resulting in this very substantial saving to the appellant, or, put differently, the working capital of the appellant and its profit earning potential were preserved by the rejection of this unjustified demand. Had the claim succeeded, according to the witness Daly whose evidence was not challenged, it would have taken up nearly all the income of the appellant, leaving the appellant unable to carry out its obligations under the sales contract of January 15, 1943, and to earn the income needed to sustain its operations.

[1] [1952] A.C. 401, 1 All E.R. 531.

Mr. Justice Cattanach[1] dealt with this item as follows:

It is well settled that the legal costs incurred in disputing a claim for income tax may not be allowed as a deduction in computing business profits. In *Smith's Potato Estates, Ltd., v. Bolland,* (1948) 2 All E.R. 367 Lord Simonds said at page 374:

> "...neither the cost of ascertaining taxable profit nor the cost of disputing it with the revenue authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the taxgatherer is heard. He would have earned no more and no less if there was no such thing as income tax..."

I cannot accept the proposition that "it is well settled that the legal costs incurred in disputing a claim for income tax may not be allowed as a deduction in computing business profits".

Cattanach J. quotes Lord Simonds in *Smith's Potato Estates* case[2], but he also said on the same page:

My Lords, I suppose that few expressions have been discussed more often in the courts than that which you have once again to consider, "money wholly and exclusively laid out or expended for the purposes of the trade," but it is their application rather than their meaning that is in doubt. I agree with the submission of learned counsel that it does not help to substitute other words for those which are found in the statute and then to put a gloss on those other words, but it is, I think, important to emphasize that the words "for the purposes of the trade" in their context, i.e., where a computation of "profits" for the ascertainment of taxable income is being made, must mean "for the purpose of enabling a person to carry on and earn profits in the trade." These familiar words I cite from LORD DAVEY'S speech in *Strong & Co. Ltd. v. Woodifield* ((1906) A.C. 448, 453). They have been cited and applied over and over again, and, if they are kept firmly in mind, they dispose *in limine* of the argument which prevailed with ATKINSON J., and has been urged before your Lordships.

It will be seen that Lord Simonds adopts a phrase from Lord Davey's speech in *Strong & Co., Ltd. v. Woodifield*[3].

Strong v. Woodifield was a case where the taxpayers, innkeepers, were seeking to deduct costs and damages paid to a person staying in their inn who was injured by the fall of a chimney. I do not think it has ever been successfully contended in Canada that damages and costs payable by a common carrier or by an occupier to an invitee or licensee or in any similar circumstances were not proper deductions in arriving at the taxable income of such a taxpayer. I understood counsel for the Minister to concede that such

[1] [1965] 1 Ex. C.R. 25, [1964] C.T.C. 202, 64 D.T.C. 5131.
[2] [1948] A.C. 508, 2 All E.R. 367 at 374.
[3] [1906] A.C. 448.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

deductions are not challenged. Even in *Strong v. Woodifield* Lord Loreburn said at p. 452:

> In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise.

and Lord James of Hereford said at p. 454:

> The only question is as to the application of that principle in one small matter to the facts of this case. If the fact were that the accident had occurred to a stranger walking in the street, then I should have no doubt at all. The doubt that did arise in my mind was as to the rule applicable when the accident occurred to a person who was a customer in the house who would not have been injured unless the business of an innkeeper was being carried on, and when it was in the course of the carrying on of a portion of that business that the customer injured was there; then I think a different principle might arise, and my doubts consequently existed.

Now reverting to *Smith's Potato Estate* case, Viscount Simon said regarding Lord Davey's statement in *Strong v. Woodifield* at p. 369:

> It seems to me that it is essential for the proper carrying on of a trade that the trader should know what portion of his profits in a given year is left to him after the Revenue has taken its share by taxation. If, therefore, he considers that the Revenue seeks to take too large a share and to leave him with too little, the expenditure which the trader incurs in endeavouring to correct this mistake is a disbursement laid out for the purposes of his trade. If he succeeds, he will have more money with which to earn profits next year. It is true that the *result* of his success is to reduce the tax he had to pay—alternatively, one may say that the result is to show that the profit of the years trading left to him after paying tax is greater than the Revenue was willing to admit—but, to my mind, the *purpose* was a trading purpose and nothing else. The trade is not to be regarded as extending over twelve months and no more. Indeed, as I have already pointed out, excess profits tax is liable to be adjusted in the light of subsequent trading results, and assessment for income tax is arrived at on figures of the previous year. With all respect to those who think otherwise, I regard it as fallacious to argue that the trader's expenditure in fighting the Revenue's assessment is not "wholly and exclusively" incurred for the purposes of the trade because the expenditure would not be

incurred if there was no tax to pay. If there was no tax to pay, the benefit realised by the trader from carrying on the trade would not be reduced by taxation, and it is the purpose of trade (at any rate, under private enterprise) to make its legitimate profit.

Viewed in this light, I do not see why the expenditure here in question is not wholly and exclusively laid out for the purposes of the trade—if it had not been incurred, the trade would be less profitable. LORD DAVEY'S gloss on the words of the statute in *Strong & Co., Ltd. v. Woodifield* (1) ((1906) A.C. 448, 453) is well known, but I think it is better to concentrate on the statutory words themselves. Rightly understood, however, I do not find that LORD DAVEY'S words contradict the view I am disposed to take. *Strong & Co., Ltd. v. Woodifield* (1) was a case in which the taxpayer sought to deduct a loss not connected with or arising out of his trade. LORD LOREBURN said (ibid., 452): "I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself." LORD DAVEY'S test was that the purpose of the expenditure must be "the purpose of enabling a person to carry on and earn profits in the trade..." (ibid., 453). Here, the expenditure was, in my view, incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax does increase the fund in the trader's hands after tax is paid and so promotes the carrying on of the trade and the earning of trading profits. The incidental consequence that the trader is not taxed so heavily in respect of his profits from trade does not, as it seems to me, alter the fact that the litigation was wholly and exclusively undertaken for the purposes of the trade.

Lord Oaksey in the same case said at p. 377:

My Lords, the question in this appeal is whether the costs of litigation undertaken for the purpose of arriving at the true profits of a trade for the purposes of taxation are proper deductions in order to arrive at the balance of profits and gains or as expenses wholly and exclusively laid out or expended for the purposes of the trade within the meaning of 3. (*a*) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. The contention on behalf of the Crown is that no expenses connected with taxation are deductible because it is said they are not expended for the purposes of the trade and it is sought to limit the words "the purposes of the trade" to the purpose of earning the profits of the trade by the operations of the trade. Reliance is placed on the *dictum* of LORD DAVEY in *Strong & Co., Ltd. v. Woodifield* (1) ((1906) A.C. 448, 453), which has frequently been cited with approval in other cases, but it is to be observed that LORD DAVEY did not say earning the profits by the operations of the trade and, in my opinion, the words "the purposes of the trade" ought not to be construed in this way. A trader does not expend money in an action brought for or against him for negligence or breach of contract in the course of his trade for the purpose of earning the profits of the trade in this sense, for it is not an operation of his trade to engage in litigation. It is, of course, an incident which he may think reasonably necessary for the purposes of his trade to bring or defend actions, but so it is an incident which he may think reasonably necessary for the purposes of his trade to engage in litigation as to the amount of his taxes. If he succeeds in either case he increases the profits arising from his trade, and it appears to me to be no straining

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

of language to say that a trader who increases his profits by incurring a certain expense incurs that expense for the purpose of earning the profits.

In my opinion, the real question which has to be decided in every case is whether the expense is one which is incurred in order to earn gain or profit from the trade, or is the application of the gain or profit when earned: see *per* LORD SELBORNE, L.C. in *Mersey Docks & Harbour Board v. Lucas* (6) ((1883) 8 App. Cas. 891, 906), and, in my opinion, it cannot be truly said that the expense of paying accountants or of litigating the question of what is the balance of profits and gains for the purposes of taxation is the application of these profits. Profits cannot properly be applied or divided until they are ascertained, and every expense which is properly incurred for the ascertainment of profits is, in my opinion, an expense of earning the profits and not an application of them. That is not to say that all expenses which are incurred in point of time before the profits are ascertained can be deducted. The point of time is unimportant. Some expenses which are clearly the application or distribution of profits may be incurred before the ascertainment of profits, e.g., capital investments or payments of interim dividends, but it is the character of the expense which must be considered. The expense in this case was not a capital investment. It was incurred, not to distribute, but to increase, and, in that sense, to earn, the profits. On the other hand, if it is to be held that such expenses are not deductible, what is to be said of the costs of audit which the Companies Acts make necessary or of that part of the cost of bookkeeping which is used in the preparation of such an audit or of accounts for taxation? They are not incurred for the purposes of earning the profits of the trade in the limited sense contended for by the Crown. It is said that the expense of litigating questions of taxation has never been sought to be deducted, and it may be so, but it is also true that the expense of paying accountants and auditors has been deducted, and, in any event, the fact, if it be the fact, throws no legal light on the construction of the words in question.

The judgment in *Smith's Potato Estate* case is persuasive and entitled to respect, but as Lord Oaksey says, Lord Davey's statement in *Strong v. Woodifield*, relied on so strongly by the majority was *dictum* (p. 377).

I cannot accept the majority judgment in *Smith's Potato Estates* case as being the correct statement of the law as applied to the provisions of the *Income Tax Act*. It will be observed that the English rule differs somewhat in wording from the Canadian Act. The former reads:

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of
>
> (*a*) disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade...

The latter reads:

> 12. (1) In computing income no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

It cannot be overlooked that Parliament, in enacting s. 12(1)(*a*), did not include the words 'not wholly, exclusively and necessarily laid out or expended' which were in s. 6 of the *Income War Tax Act* prior to 1948 and which are found almost verbatim in the English counterpart quoted above except for the word "necessarily". Consequently, the English decisions like *Strong v. Woodifield* and all those founded on *Strong v. Woodifield* based on the wording of the English rule cannot now be invoked as wholly applicable and indistinguishable in the interpretation of s. 12(1)(*a*). Some significance must be given to the difference in wording noted above and to the change in wording when the *Income Tax Act* was enacted in 1948. The statement by Abbott J. in *B.C. Electric Railway Co. Ltd. v. Minister of National Revenue*[1],

> The less stringent provisions of the new section should, I think, be borne in mind in considering judicial opinions based upon the former sections.

points up the error that may arise from an unquestioned acceptance of such cases as *Smith's Potato Estates* as being completely applicable in Canada after 1948. In that year the words 'wholly, exclusively and necessarily' were replaced with the much broader 'made or incurred for the purpose of gaining or producing income from property or a business'. The limitation, spelled out in s. 12(1)(*a*), does not, in referring to 'producing income from the property or business of a taxpayer', limit the words quoted solely to the taxation year in which the deduction is being claimed. It is a clear indication to me that the income thus referred to may be the income of the taxation year under review or of a succeeding year.

A company such as the appellant exists to make a profit. All its operations are directed to that end. The operations must be viewed as one whole and not segregated into revenue producing as distinct from revenue retaining functions, otherwise a condition of chaos would obtain. For example, is the function of the Paymaster's Department to be considered as directly relating to the production of income, which it undoubtedly is, as distinct from the Audit Department which scrutinizes the disbursements made by the

[1] [1958] S.C.R. 133 at 136, C.T.C. 21, 71 C.R.T.C. 29, 58 D.T.C. 1022, 12 D.L.R. (2d) 369.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

Paymaster? What of the sophisticated systems of internal and external audits adopted by commercial companies to assure that the income received by the company is properly retained? What of security arrangements to protect income already earned? What of claims against, say, a shopping centre for damages sustained by a customer or claimed to have been sustained and the legal costs of investigating and defending such claims? Counsel for the Minister freely admitted that these are routinely allowed as expenses incurred in earning "the income".

"The income" surely means the net receipts over disbursements in the taxation year in the totality of the taxpayer's business as an on-going concern other than capital expenditures, gifts and the like. I can see no reason to regard legal expenses as differing from other expenses in that they differ solely by the fact that they are disbursements paid to lawyers as distinct from payments made to auditors or to accountants and others for work done in preparing the yearly income tax returns, or premiums paid for insurance to indemnify the taxpayer from loss by fire or from negligence or liability imposed by law. In my view, no distinction is to be drawn between proper legal expenses and other business expenses. All must be tested by the same standards.

Canadian courts have not always accepted the result in *Strong v. Woodifield.* Angers J. in *Hudson's Bay Company v. Minister of National Revenue*[1] made an exhaustive review of many cases, including *Strong v. Woodifield.* The facts in the *Hudson Bay* case were that a company calling itself Hudson Bay Fur Company was organized to deal in furs in the States of Oregon and Washington and for a time operated two stores in Seattle, Washington. The Hudson Bay Company took action in the State of Washington to restrain Hudson Bay Fur Company from interfering with its trade and it was successful. It paid out for legal costs in connection with that action the sum of $10,377 in 1938 and $22,952.80 in 1939 and included these disbursements as deductible expenses in its income tax returns for the said years. The Minister disallowed these deductions and Hudson Bay Company appealed the disallowances.

[1] [1947] Ex. C.R. 130, 6 Fox Pat. C. 49, C.T.C. 86.

Section 6 of the *Income War Tax Act* then read:

(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income,

(*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or absolescence, except as otherwise provided in this Act.

Angers J. at pp. 148-9 said:

Can the expenses or costs paid out by the appellant in the circumstances hereinabove related be considered as disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"? This is the question which I have to solve.

Counsel for the appellant in his argument pointed out that the Minister, assisted by a very able staff, did not think at first that there was any objection to the legal costs and expenses in issue being deducted from the income and the return was accepted. He submitted that it was only when the decision of the Supreme Court in the case of *The Minister of National Revenue v. Dominion Natural Gas Company Limited,* (1941) S.C.R. 19, was rendered that the Minister changed his mind, reopened the assessment and disallowed the deduction of the said costs and expenses.

Counsel intimated that the reassessment was made on an erroneous view of what was decided in the *Minister of National Revenue v. Dominion Natural Gas Company Limited* case and that, if the case of *Income Tax Commissioner v. Singh,* (1942) 1 A.E.R. 262, had been decided before the *Minister of National Revenue v. Dominion Natural Gas Company Limited* case, the decision of the Supreme Court in the latter case might have been different. Counsel suggested that the Supreme Court thought that they were compelled to give judgment against their own opinions possibly, because they considered themselves bound by some remarks of the Privy Council. He drew the conclusion that it is clear, according to the judgment in the case of *Income Tax Commissioner v. Singh,* that the Privy Council did not intend to lay down any such rule as that suggested in the Supreme Court judgment.

Counsel for respondent on the other hand relied on the case of *Minister of National Revenue v. Dominion Natural Gas Company Limited,* among several others, and it seems convenient to analyze it first.

It is important to note that at p. 25 of *Minister of National Revenue v. Dominion Natural Gas Company Limited,* Duff C.J.C. said:

In the ordinary course, it is true, legal expenses are simply current expenditure and deductible as such; but that is not necessarily so. The legal expenses incurred, for example, in procuring authority for reduction of capital were held by the Court of Sessions not to be deductible in *Thomson v. Batty* ((1919) S.C. 289).

and Mr. Justice Crocket said at p. 26:

If we were free to decide this appeal on considerations of practical business sense and equity, or to deduce from decided cases the governing

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

rule, which should be applied in determining whether the respondent was or was not entitled, under the formula prescribed by s. 6 of the Canadian *Income War Tax Act*, to the deduction claimed in computing its assessable profits or gains for the year 1934, I should have no hesitation in adopting the conclusion at which the learned President of the Exchequer Court arrived and the reasons he has given therefor. We are confronted, however, with a recent judgment of the Judicial Committee of the Privy Council in the case of the appeal of *Tata Hydro-Electric Agencies, Ltd., Bombay, v. Commissioner of Income Tax, Bombay Presidency and Aden* ((1937) A.C. 685) in which a test, formulated in 1924 by Lord President Clyde of the Scottish Court of Session in the case of *Robert Addie & Sons Collieries, Ltd. v. Commissioners of Inland Revenue* ((1924) S.C. 231), for determining whether a deduction is allowable under practically identical provisions of the English *Income Tax Act*, 1918, is expressly adopted and applied. The English Act of 1918, ch. 40, 8 & 9 Geo. V. by rule 3 of Schedule "D", prohibits deductions in respect of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation," or in respect of "any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade," etc., as well as other specified capital expenditures for improvements and the like, the effect of which, as regards this case, it seems to be impossible to distinguish from the prohibitions (*a*) and (*b*) of s. 6 of the Canadian Act. I apprehend, therefore, that the test so distinctly adopted by the Judicial Committee in the *Tata* case ((1937) A.C. 685) is binding upon us.

Maclean P. in the *Dominion Natural Gas* case at pp. 19 and 20 said:

> It seems to me that if legal expenses are incurred in successfully defending an action in which one's title to existing assets, rights or facilities are put in serious question, such expenses should normally be admissible as deductions, and particularly would this be so in the case where the earning of profits are directly dependent upon and require the utilization of such assets, rights or facilities, as was the case here. If the action is unsuccessfully defended the revenue authorities might contend that there was no asset, right or facility to defend, and that therefore such expenses should not be allowed as a deduction in computing net taxable income, but that is not this case. If such expenses arose out of the promotion or acquisition of additional assets, rights or facilities, it is probable no deduction would be permissible. It was imperative here that the Dominion Company defend the action and the failure of its directors to do so would probably have rendered themselves liable in damages to the shareholders of that company. The action threatened the earnings of the Dominion Company, wholly or partially, and had the action succeeded it would have been unable to sell gas, at least in some sections of the City of Hamilton; the company's capacity to earn revenue was put in jeopardy and, I think, it is immaterial that its capital assets, or some of them, were incidentally threatened with extinction or depreciation. It was because the Dominion Company was producing and selling gas that it had to defend the action and thus protect and preserve its credit and its revenue. The United Company sought an injunction restraining the Dominion Company from continuing to supply gas to the inhabitants of the City of Hamilton, which, had the United Company been successful, would have prevented the Dominion Company from earning its usual revenue.

The Supreme Court reversed Maclean P. because they felt bound by *Tata Hydro-Electric Agencies, Ltd.*[1] (see remarks of Crocket J. above).

Angers J. in the *Hudson Bay Company* case dealt at length with the *Tata* decision at pp. 156, 157 and 158 and concluded by saying that the *Tata* decision had very little, if any, weight in the circumstances of the *Hudson Bay Company* case. The facts in *Tata were:*

...the appellant was a private limited company carrying on the business of managing agents of Tata Power Co. Ltd. and other hydro-electric companies. The company acquired this agency business from Tata Sons Ltd. under an assignment whereby the latter transferred to the appellant their rights and interest as agents of the hydro-electric companies under their subsisting agreement with them, but subject, as to their rights and interest under their agreement with Tata Power Co. Ltd., to their obligations under two agreements with F. E. Dinshaw Ltd. and Richard T. Smith. The assignment declared that the appellant should thenceforth be and act as the agents of the hydro-electric companies and be entitled to all benefits conferred by the agreement between Tata Sons Ltd. and these companies and should perform all the obligations thereby imposed and that the appellant should receive all the commissions to which Tata Sons Ltd. were entitled thereunder. The appellant agreed to carry out the conditions of the agreements with F. E. Dinshaw Ltd. and Richard T. Smith and to indemnify Tata Sons Ltd. against any consequences of the non-observance thereof. Under the agency agreement between Tata Sons Ltd. and Tata Power Co. Ltd., the benefit whereof the appellant acquired, the remuneration of Tata Sons Ltd. for their services consisted of a commission of 10 per cent on the annual net profits of Tata Power Co. Ltd., with a minimum of Rs. 50,000 whether the company should make any profits or not, and they were entitled to have their expenses reimbursed. In return, Tata Sons Ltd. undertook to endeavour to promote the interests of Tata Power Co. Ltd. The agreement was declared assignable and Tata Power Co. Ltd. undertook to recognize any assignees as its agents and, if required, to enter into an identical agreement with such assignees. In 1926, Tata Power Co. Ltd., being in need of financial assistance, Tata Sons Ltd., its then managing agents, approached F. E. Dinshaw Ltd. and Richard T. Smith, who agreed to provide the necessary funds. One of the conditions on which they agreed to do so was that in addition to the interest payable by Tata Power Co. Ltd. for the loan, they should each receive from Tata Sons Ltd. two annas in the rupee or 12½ per cent of the commission earned by Tata Sons Ltd. under their agreement with Tata Power Co. Ltd. Agreements were entered into between Tata Sons Ltd. and F. E. Dinshaw Ltd. and between Tata Sons Ltd. and Richerd T. Smith dated October 15 and 19, 1926, respectively. After the acquisition of the agency business by the appellant the Tata Power Co. Ltd., in fulfilment of its obligation under the agreement with Tata Sons Ltd., entered into a new agency agreement with the appellant in terms identical with those of its previous agreement with Tata Sons Ltd. and the appellant also entered into agreements with F. E. Dinshaw Ltd. and the administrator of the estate of Richard T. Smith, who had died in the meantime, in terms identical with those of the previous agreements

[1] [1937] A.C. 685.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

between Tata Sons Ltd. and these parties. By these transactions the appellant came in the place and stead of Tata Sons Ltd., both as regards the right to receive from Tata Power Co. Ltd. the agency remuneration and as regards the obligation to pay out of its remuneration 12½ per cent to F. E. Dinshaw Ltd. and 12½ per cent to the administrator of Richard T. Smith's estate. The assessment of appellant's income for the fiscal year to March 31, 1934, is based on its income, profits and gains for the year 1932 and the question is whether in the computation for tax purposes of its income, profits and gains for that year it is entitled to deduct a sum representing the 25 per cent of the commission earned and received from Tata Power Co. Ltd. which it paid to F. E. Dinshaw Ltd. and Richard T. Smith's administrator.

It was held that in computing its income, profits and gains, the appellant was not entitled to deduct the 25 per cent in question; that this percentage of the commission paid to F. E. Dinshaw Ltd. and the administrator of Richard T. Smith's estate was not expenditure incurred by appellant "solely for the purpose of earning...profits or gains" of its business; that the obligation to make the payments was undertaken by appellant in consideration of its acquisition of the right and opportunity to earn profits, i.e. of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business.

I am bound to paraphrase Angers J. in saying that in my opinion the Tata case has little, if any, relevance to the present case except that it may resemble it on the first question upon which we all agree the Minister fails.

The following quotation from Angers J. starting at p. 166 is very helpful:

There are two cases in which the judgments were delivered subsequently to the hearing by the Supreme Court of the case of the Minister of National Revenue and Dominion Natural Gas Company. These cases, in my opinion, offer as much relevancy to the problem at issue herein as those previously referred to and they certainly deserve being noted.

The first of these cases is that of *Southern v. Borax Consolidated, Ltd.*, (1940) 4 A.E.R. 412.

The respondent purchased certain property for the purposes of its business. Subsequently an action was taken against the company claiming that its title was invalid. The company defended the action and incurred legal expenses amounting to 6,249£, which it claimed to be entitled to deduct as business expenses in computing its profits for the purposes of assessment to income tax.

The Crown contended that the action concerned the capital assets of the company and was contested in order to preserve the existence of those assets and that the sum of 6,249£ was a capital expense.

The King's Bench Division (Lawrence, J.) held that the expense had been incurred, not in creating any new asset, but in maintaining the title to the company's property and was, therefore, an expense wholly and exclusively incurred for the purposes of the company's trade and, as such, properly deductible.

Lawrence J., after reviewing the precedents cited by counsel, concluded as follows (p. 419):

> "It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title, and not the value, of the company's business does not make it any different."

The second case is *Income Tax Commissioner v. Singh* (exactly Maharajadhiraj Sir Rameshwar Singh of Darbhanga) (1942) 1 A.E.R. 362.

In this case the Judicial Committee of the Privy Council affirmed the judgment of the High Court of Judicature at Patna, India, which had decided a reference made to it, at the request of the respondent, in favour of the latter.

The summary of the judgment, fairly comprehensive and exact, may advantageously be quoted:

> "The respondent's father made a loan of 10 lakhs of rupees to a company in which he was a shareholder, and recovered this loan in an action, the costs of which were allowed as an expense incurred in his moneylending business in the assessment of his income tax. Certain shareholders in the company brought an action against the respondent's father and others for conspiracy, collusion, misrepresentation, and breach of contract. The basis of this action was an alleged transaction, of which the loan was part, whereby the respondent's father agreed to finance and manage the company. The action was dismissed, the version of what took place relied upon by the plaintiffs being found to be completely false. The respondent's father died before the conclusion of the suit, and the respondent who continued his business claimed to deduct the costs in arriving at the assessment of profits. The appellant contended that there was no connection between the loan and the alleged transaction which was the basis of the action against the respondent's father, the action being of a personal character and unrelated to his business as a moneylender:
>
> *Held*: the respondent was entitled to make the deduction claimed. The allegations against the respondent's father were built up upon the transaction in which the loan was made, and the defence of the action was necessary for the protection of his rights as the creditor in the loan."

Lord Thankerton, who delivered the judgment of the Court, stated (p. 365, *in fine*):

> "Their Lordships are, therefore, of opinion that the facts stated by the commissioner cannot justify the opinion expressed by him, but that the expenditure in question was incurred solely for the purpose of earning the profits or gains of the moneylending business, and that the High Court are right in holding the respondent entitled to the deduction claimed and in answering the question of law asked by the commissioner in favour of the respondent."

Angers J. concluded by allowing the deductions. No appeal was taken from his judgment.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

The decision in *Kellogg Company of Canada Limited and the Minister of National Revenue*[1] is very helpful. Angers J. deals with it at pp. 177-8 as follows:

> . . . the appellant, a manufacturer of cereal products, and one of its customers were made defendants in an action brought by Canadian Shredded Wheat Company which claimed infringement by both defendants of certain trade mark rights and asked for an injunction restraining them from using the words "Shredded Wheat" or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit" or any words only colourably differing therefrom and damages. The appellant successfully defended the action on behalf of both defendants. In computing its income for 1936 and 1937 the appellant deducted the sums of money paid out for legal expenses on account of said action. These deductions were disallowed by the Commissioner of Income Tax. The latter's disallowance was naturally affirmed by the Minister of National Revenue, from whose decision an appeal was taken to the Court. It was held that the payments were made involuntarily in the course of business to enable the appellant to continue the sales of its products as before action was taken against it and not to secure or preserve an actual asset or enduring advantage to appellant.
>
> A brief extract from the judgment of Maclean J. may be convenient (p. 43):
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> > "The broad principle laid down by Lord Cave in *British Insulated v. Atherton,* (1926) A.C. 205 at 213, is not, in my opinion, of any assistance in the present case. Applying that test to the present case, the payment here made was not, I think, an expenditure incurred or made "once and for all", with a view of bringing a new asset into existence, nor can it, in my opinion, properly be said that it brought into existence an advantage for the enduring benefit of Kellogg's trade within the meaning of the well known language used by Lord Dave in a certain passage of his speech in that case. What the House of Lords was considering in that case was a sum irrevocably set aside as a nucleus of a pension fund established by a trust deed for the benefit of the company's clerical staff, and, as was said by Lawrence L. J. in the *Anglo Persian Oil Company Limited v. Dale* case, (1932) 1 K.B. 124, I have no doubt that Lord Cave had that fact in mind when he spoke of an advantage for the enduring benefit of the company's trade. Such an expenditure differs fundamentally from the expenditure with which we are concerned in the present case. Here, the expenditure brought no such permanent advantage into existence for the taxpayer's trade. I do not think it can be said that the expenditure in question here brought into existence any asset that could possibly appear as such in any balance sheet, or that it procured an enduring advantage for the taxpayer's trade which must pre-suppose that something was acquired which had no prior existence."

After stating that the case of *Kellogg and the Minister of National Revenue* closely resembles that of *Mitchell v. B. W. Noble Limited,* (1927) 1 K.B. 719, in which a large sum of money was expended by a company to get rid of a managing director, and quoting passages from the reasons of the Master of the Rolls and of Lord Justice Sargent, which I do not deem necessary to transcribe here and which may be easily referred

[1] [1942] Ex. C.R. 33, 3 Fox Pat. C. 1, 2 D.L.R. 337.

to, Maclean J. declared that these remarks would appear to be applicable and added (p. 45):

> "Here, Kellogg had encountered a business difficulty, one associated directly with the sales branch of its business, which it had to get rid of, if possible, in order to continue the sales of its products as it had in the past."

An appeal was taken by the Minister of National Revenue and the same was dismissed (1943) S.C.R. 58. Sir Lyman Duff, who delivered the judgment of the Court, after referring to the case of the *Minister of National Revenue v. The Dominion Natural Gas Company, Limited,* made, among others, the following statements (p. 60):

> "The present appeal concerns expenditures made by the respondent company in payment of the costs of litigation between that company and the Canadian Shredded Wheat Company.
>
> * * *
>
> As regards this payment, the question in issue was whether or not the registered trade marks of the plaintiffs in the action were valid trade marks, or, in other words, whether or not the present respondents, the Kellogg Company, and all other members of the public were excluded from the use of the words in respect of which the complaint was made. The right upon which the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them."

Halsbury, 3rd ed., at p. 168, states as part of para. 287:

> Legal expenses have been allowed where they did not create a new asset but maintained a company's title to land abroad (h) *Southern v. Borax Consolidated, Ltd.,* (1941) 1. K.B. 111; (1940) 4 All E.R. 214; 23 T. C. 597, and where they were incurred by a moneylender in protection of his rights as a creditor for a loan (i) (*Income Tax Commissioners (Bihar and Orissa) v. Singh,* (1942) 1 All E.R. 362, P.C., Sums paid by a company to settle an action for fraud in connection with its trade have also been allowed, together with incidental legal expenses (k) (Golder *(Inspector of Taxes) v. Great Boulder Proprietary Gold Mines, Ltd.,* (1952) 1 A11 E.R. 360; 33 T. C. 75.)

and again on p. 169:

> Though it is clear that the expenses allowable are such only as are necessary to earn the receipts of the trade (u), (*Russell v. Town and County Bank* (1888) 13 App. Cas. 418, at p. 424; 2 T.C. 321, at p. 327, per LORD HERSCHELL: *Gresham Life Assurance Society v. Styles,* (1892) A. C. 309, H. L., at p. 316; 3. T.C. 185, at p. 189; and see p. 166, ante.), this proposition must be applied in a reasonable way, and must not be construed so as to preclude the deduction of those expenses as a result of which receipts or profits may accrue in the future. For example, the cost of a reasonable amount of advertising is usually admitted as a business expense, although the result of a particular advertisement might not be reflected in an increase in trade receipts in the year in which the cost was

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

incurred. The principle is that expenses to earn future profits are allowable deductions (a),

> (a) *Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)*, (1910) S.C. 519; 5. T.C. 529 (a rubber company part only of whose estate was producing rubber was allowed the cost of weeding, watching, manuring and clearing immature areas); *Whelan (Inspector of Taxes) v. Dover Harbour Board* (1934), 151 L.T. 288, C.A.; 18 T.C. 555, cited in note (1), p. 227, *post*; *Cooke (Inspector of Taxes) v. Quick Shoe Repair Service* (1949), 30 T.C. 460 (purchaser of business paid, by sale agreement, vendor's business debts to preserve goodwill and continuity of supplies; allowed as deductions)

and this principle has been extended to include expenditure to avoid future expense which does not bring into being a tangible asset (b)

> (b) *Mitchell v. B. W. Noble, Ltd.*, (1927) 1. K.B. 719, C.A.; 11 T.C. 372 (payment to get rid of a director); *Hancock v. General Reversionary and Investment Co., Ltd.*, (1919) 1 K.B. 25; 7 T.C. 358 (an annuity purchased to get rid of an annual payment to a retired servant); *Anglo-Persian Oil Co., Ltd. v. Dale*, (1932) 1 K.B. 124, C.A.: 16 T. C. 253 (payment to cancel an agency agreement); *Scammell and Nephew, Ltd. v. Rowles*, (1939) 1 All E.R. 337, C.A.; 22 T.C. 479 (payments to compromise action procuring termination of disadvantageous trading relations); *Inland Revenue Commissioners v. Patrick Thomson, Ltd.* (1956), L. (T.C.) 1813 (change in control of company; compensation to managing director for cancellation of service agreement; right of company to treat compensation as trade expense not affected by subsequent liquidation of company and carrying on of company's trade by the other company which had secured control of the company which went into liquidation); but see *Alexander Howard & Co., Ltd. v. Bentley* (1948), 30 T.C. 334 (lump sum paid by a company for the surrender of a right to an annuity to widow of previous owner of company's business; not deducted).

It is of interest that all of the decisions referred to in footnotes (a) and (b) above were decided after *Strong v. Woodifield.*

The Privy Council decision in *Income Tax Commissioner v. Singh*[1], referred to on p. 168 of Halsbury, in which the appellant relied on *Strong v. Woodifield, supra,* shows how far the English courts have moved since *Strong v. Woodifield* was decided in 1906. The editorial note on p. 363 of the report points this out as follows:

> It is clear that in the conduct of any business the bringing of proceedings to enforce the payment of sums due to the owner of the business must from time to time form part of the transactions necessary to the proper carrying on of the business. The expenses of bringing these actions are recognised as a proper deduction against profits. The present case takes the matter a considerable step further. Here an action, which the court in the exercise of considerable judicial restraint has characterised

[1] [1942] 1 All E.R. 362.

as unfounded, was brought against the taxpayer. The action in fact was based on matters which the plaintiffs found it quite impossible to prove, and it seems that the plaint itself covered some 80 pages of print, and was said to be quite unintelligible. The defence of such an action, which must be a serious charge upon the profits of the business, is held to be undertaken as part of the transactions of the business and the costs incurred in such defence are held to be a proper deduction against profits. The material provisions of the Indian Act in this connection are the same as those of the English Act, and the decision can be cited in relation to the latter Act to the same extent as any other decision of the Privy Council may—that is, though not absolutely binding, it is to be treated with the greatest respect.

The references to advertising in some of the cases are most apt. The millions now spent by commercial companies on advertising in any given taxation year which admittedly is aimed at securing business in succeeding years could not, on an acceptance of the so-called rule in *Strong v. Woodifield,* be allowed. But such expenses are allowed without question and it is only common sense that they should be allowed. While it may be possible to isolate the receipts and expenditures of a salaried individual for a one taxation year period, it is impossible to do so with commercial or corporate enterprises whose business activities are continuous and where expenditures made in one taxation year may have no effect nor be intended to have any effect in producing the income of that year but are expected to produce income from the business operation of the taxpayer in subsequent taxation years within the meaning of s. 12(1)(*a*) of the *Income Tax Act.*

A passage from the reasons for judgment of Abbott J. in *B.C. Electric Railway Co. Ltd. v. Minister of National Revenue* at p. 137 has been quoted by my brother Ritchie. I think the important fact to note is that in *B.C. Electric Railway Co. Ltd. v. Minister of National Revenue,* Abbott J. went on to find that the expenditure then in question was a *capital outlay* within the terms of s. 12(1)(*b*), (p.138), of the *Income Tax Act.* As such it was not deductible as an income expense in any event. The *B.C. Electric Railway Co. Ltd.* decision does not in consequence deal with the type of expenditure in issue here. To limit the expenditure, if it is to qualify as a deductible, to the income of the particular year in which it was made requires writing into s. 12(1)(*a*) of the *Income Tax Act* words which Parliament did not put there. The only qualification which Parliament imposed was that the outlay or expense be

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

"made or incurred by the tax-payer for the purpose of gaining or producing income from the property or business of the taxpayer". No limitation as to time can be found in the section in question.

Two other Canadian decisions are very much in point. They are *Minister of National Revenue v. Goldsmith Bros.* and *Minister of National Revenue v. L.D. Caulk Co.* (tried together)[1] and *Rolland Paper Co. v. Minister of National Revenue*[2]. In the *Goldsmith* and *Caulk* cases, Rand J. said:

> The question here is whether expenses incurred by the respondent company in defending itself against charges of violating the criminal law by combining with others to prevent or lessen unduly competition in the commercial distribution of dental supplies, are deductible in ascertaining taxable income. The agreement or arrangement alleged to have been unlawful purported to regulate day to day practices in the conduct of the respondent's business. It formed no part of the permanent establishment of the business; it was a scheme to govern operations rather than to create a capital asset; and the payment to defend the usages under it was a beneficial outlay to preserve what helped to produce the income. These expenses included legal fees both for appearing before the Commissioner under the *Combines Investigation Act* and at the trial which resulted in acquittal.
>
> The provisions of the *Income Tax Act* are imposed on the settled practices of commercial accounting, but they create in effect a statutory mode of determining taxable income. Deductions from revenue must have been "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Each word of this requirement is significant, and decisions based on different statutory language are strictly of limited assistance.
>
> The payment arose from what were considered the necessity of the practices to the earning of the income. The case is then governed by *The Minister v. Kellogg,* (1943) S.C.R. 58. Proceedings there had been brought against the company to restrain it from using certain ordinary descriptive words in connection with the sale of its products and the expenses had been incurred in successfully resisting them. That use was likewise part of the day to day usage in marketing the company's products and the expenses were held to be deductible.
>
> The word "necessarily" was urged by Mr. Varcoe as being unsatisfied by the facts. This term is not found in the English Act and it cannot be taken in a literal or absolute sense. Fire insurance, for instance, is admittedly a deductible expense, and yet how can it be said to be necessary when thousands of business houses have gone through generations of trade without loss from fire? The word must be taken as it was in *Kellogg* in the commercial sense of necessity.
>
> The judgment of this Court in *The Minister v. Dominion Natural Gas,* (1941) S.C.R. 19, is clearly distinguishable as having been a case of expenses to preserve a capital asset in a capital aspect.

[1] [1954] S.C.R. 55, C.T.C. 28, 54 D.T.C. 1011, 20 C.P.R. 68, 2 D.L.R. 1.
[2] [1960] Ex. C.R. 334, C.T.C. 158, 60 D.T.C. 1095.

In the *Rolland Paper* case the deduction challenged was for legal fees of $5,948.27 paid in the taxation year 1955 as its share of the legal costs of an appeal against the judgment of the Supreme Court of Ontario finding Rolland Paper Company and others guilty of illegal trade practices contrary to s. 498(1)(*d*) of the *Criminal Code*. The case resembled *Goldsmith and Caulk* but differed in that where the Goldsmith Company and the Caulk Company had been acquitted Rolland Paper Company was convicted. Fournier J. followed the *Goldsmith* and *Caulk* decision, holding that the fact of conviction was not material. He allowed the deduction. Notice of Appeal to this Court was given by the Minister. The appeal was not proceeded with, Notice of Discontinuance having been filed.

Finally, this Court dealt with s. 12(1)(*a*) of the *Income Tax Act* in *Evans v. The Minister of National Revenue*[1]. The facts of that case are stated in the headnote as follows:

> Exercising a power of appointment conferred upon him by the will of his father, the appellant's first husband bequeathed her the income for life of a one-third share of the father's estate. The trustee of the father's estate applied to the Court for advice and direction as to whether she was entitled to the income. In 1955, the matter was finally decided by this Court in favour of the appellant who had been represented by counsel in all the proceedings. In computing her income tax return for 1955, she deducted the legal fees she had paid her solicitors. The deduction was disallowed by the Minister. The Income Tax Appeal Board allowed the deduction, but the Minister's assessment was affirmed by the Exchequer Court of Canada.

Cartwright J., speaking for the majority, said at p. 395 *et seq.*:

> As I read the whole of his reasons, the learned judge was of opinion that if the decisions of the courts in England were applicable he would have decided the question in favour of the tax-payer but felt himself bound by the decision of this Court in *Dominion Natural Gas Ltd. v. M.N.R.* (1941) S.C.R. 19, (1940) 4 D.L.R. 657 to reach a contrary conclusion. That case was decided under s. 6(1) of the *Income War Tax Act*, quoted above. In giving the judgment of the majority of this Court in *B.C. Electric Ry. Co. v. M.N.R.* (1958) S.C.R. 133 at 136, 12 D.L.R. (2d) 369, 77 C.R.T. c. 29, my brother Abbott said:
>
> > "The less stringent provisions of the new section should, I think, be borne in mind in considering judicial opinions based upon the former sections."
>
> Whether, in view of the later decisions of this Court in *M.N.R. v. The Kellogg Company of Canada Ltd.* (1943) S.C.R. 58, 2 D.L.R. 62 and *M.N.R. v. Goldsmith Bros. Smelting and Refining Co. Ltd.* (1954) S.C.R. 55, 2. D.L.R. 1, the *Dominion Natural Gas* case would be decided in the

[1] [1960] S.C.R. 391, C.T.C. 69, 60 D.T.C. 1047, 22 D.L.R. (2d) 609.

1966

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE

Hall J.

same manner if it arose to-day under the present section is a question which I do not have to consider. It is distinguishable from the case at bar.

* * *

The "asset" or "advantage" under consideration in *Dominion Natural Gas* was a valuable, exclusive perpetual franchise; this franchise did not of itself yield any income to the Company which held it; it was a permanent right used and useful in the earning of the company's income by the sale of its product to the persons residing in the territory covered by the franchise; it was rightly regarded as an item of fixed capital.

* * *

If the circumstances of the case at bar are viewed in the light most favourable to the respondent it can be said that the legal expenses were incurred not only to collect the income to which the appellant was entitled and which was being wrongly withheld from her but also to prevent the right to receive that income being destroyed; the right in question remains throughout a right to income. In the *Dominion Natural Gas* case, on the other hand, the expenses were incurred in litigation the subject matter of which was an item of fixed capital.

In my opinion, in the circumstances of this case there are two relevant questions both of which must, on the admitted facts, be answered in the affirmative; (i) was the appellant's claim in regard to which the expenses were incurred a claim to income to which she was entitled? (ii) were the legal expenses properly incurred in order to obtain payment of that income? It does not appear to me to be either necessary or relevant to inquire further as to what were the grounds (held by the Court to be without substance) upon which the payment of the income was withheld. It would be a strange result if the question, whether legal expenses incurred in enforcing or preserving a right should be regarded as an outlay on account of capital or on account of income, fell to be determined on a consideration not of the true nature of that right but of the nature of the ill-founded grounds on which it was disputed.

For the above reasons it is my opinion that the outlay of the legal expenses in question was not a payment on account of capital falling within s. 12 (1)(*b*) but was an expense, falling within s. 12(1)(*a*), incurred by the appellant for the purpose of gaining income from property, to which income she was at all relevant times entitled but of which she was unable to obtain payment without incurring these expenses.

These observations are equally applicable to the expenditures made by the appellant in the instant case.

In conclusion, as I see it, the expenditures here were ones which under sound accounting and commercial practice would be deducted in the Statement of Profit and Loss as expenditures for the year in determining the profit, if any, of the company for that year. Cattanach J. appears to have placed too much reliance on Lord Simond's words in *Smith's Potato Estates* case: "What profit he has earned, he has earned before ever the voice of the taxgatherer is heard." I think it proper to observe that in each of the years in question *before ever the voice of the taxgatherer was heard* the expenditures in question had to be made to preserve the income and the working capital

from the unwarranted claim of a foreign taxing authority otherwise the Canadian taxgatherer would have called in vain. He would have found an empty treasury and a commercial operation condemned to pay the United States Internal Revenue Service tribute by way of income tax in future years.

I would accordingly allow the appeal *in toto* with costs throughout payable by the respondent.

SPENCE J.:—I am in agreement with my brother Ritchie as to the appeal on the first judgment and would allow the appeal to permit the deduction of $46,532.56 and $45,192.03 described as "commissions paid pursuant to agreement of December 29, 1944, with Transcontinental Resources Limited".

However, I must differ with Ritchie J. as to his disposition of the appeal from the second judgment as to the deduction of $20,831.51 being the total amount paid in the years 1951 and 1952 as legal expenses incurred in respect of a disputed claim for income tax asserted by the United States Inland Revenue Services. With regard to this latter appeal, I am in agreement with the reasons of my brother Martland and would allow the appeal and permit the deduction.

In the result, I would allow the appeal *in toto* with costs throughout.

Appeal allowed with costs, ABBOTT and RITCHIE JJ. *dissenting in part.*

Solicitors for the appellant: Mungovan & Mungovan, Toronto.

Solicitor for the respondent : E. S. MacLatchy, Ottawa.

1966
*May 20, 24
June 28

FRANK CONRAD OLAFSON and OLIVE DOROTHY LEECH (*Plaintiffs*) ..... APPELLANTS;

AND

TWILIGHT CARIBOO LODGE LTD. (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Companies—Agreement to purchase all outstanding shareholders' loans and shares in capital of company—Mortgage of company to secure unpaid purchase price—Whether mortgage given without consideration and in contravention of s. 152(1) of the Companies Act, R.S.B.C. 1960, c. 67.

At the time the respondent company was incorporated by the appellants in connection with the purchase of a certain hotel property, only 20 shares of common stock were issued, 10 of which were allotted to each of the appellants for the price of $1 each and the real capital of the company with which the property was purchased was supplied by the appellants in the form of a shareholders' loan of $195,000. The appellants later entered into a formal agreement for the sale of the company to two individuals.

The agreement of sale provided that the purchasers would purchase all of the outstanding shareholders' loans ($142,369.55) and shares in the capital of the company for $225,500, $65,000 of which was to be paid in cash out of which the appellants agreed to forthwith retire an existing mortgage debt of the company of $59,461.42. The appellants also undertook to pay off a bank loan to the company of $12,500 and to deliver all the issued shares (*i.e.* 20 shares) to the purchasers at the time of closing on the condition, which did not appear to have been fulfilled, that they were to be held in escrow as part of the security for the unpaid balance owing under the agreement which was to bear interest at the rate of 7 per cent and was to be paid by monthly instalments of $1,429.30. It was further agreed that the $160,000 remaining unpaid should be secured by a mortgage on the whole assets and undertaking of the company.

The mortgage became in arrears and foreclosure proceedings were commenced resulting in an order *nisi* being granted. On appeal, the Court of Appeal set aside the decision of the trial judge and allowed the respondent's counterclaim for a declaration that the mortgage was void and unenforceable on the ground that it was given without consideration and in contravention of s. 152 of the *Companies Act*, R.S.B.C. 1960, c. 67.

Held: The appeal should be allowed and the judgment at trial restored.

The Court found that the agreement of sale must be interpreted as meaning that the shareholders' loans were not to be assigned until the company's indebtedness to the appellants had been properly protected by the giving of the mortgage for which the above recited obligations were more than adequate consideration. It was true that the company

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

was not a party to the agreement, but once the purchasers had become the sole shareholders and directors, it was quite competent for them to consolidate the company's obligations into one item of indebtedness payable in monthly sums and secured by a mortgage in accordance with the agreement arrived at between the vendors and the purchasers.

The Court of Appeal had treated the circumstances of this case as being governed by the *Thibault* case (1962), 33 D.L.R. (2d) 317, affirmed [1963] S.C.R. 312, and accordingly held that the transaction was in contravention of s. 152(1) of the *Companies Act, supra,* which reads: "A company shall not give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company;..." This Court was of the opinion that the *Thibault* case was distinguishable from the circumstances here disclosed and held that the present case was not governed by that authority.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Branca J. Appeal allowed and judgment at trial restored.

Humphry Waldock, for the plaintiffs, appellants.

J. Giles and *P. Jensen,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] allowing an appeal from the judgment rendered at trial by Branca J. and thereby dismissing the claim of the present appellants for foreclosure of a mortgage given by the respondent for the stated consideration of $160,000 covering a hotel property situate at Lac La Hache on the Cariboo Highway. By this judgment the Court of Appeal also allowed the respondent's counterclaim for a declaration that the mortgage was void and unenforceable on the ground that it was given without consideration and in contravention of s. 152 of the *Companies Act,* R.S.B.C. 1960, c. 67.

The transaction which is here in question can only be properly understood in light of the following circumstances which gave rise to it.

When the respondent company was incorporated by the appellants in February 1961 in connection with the purchase of the hotel property in question, only 20 shares of common stock were issued, 10 of which were alloted to each

[1] (1966), 55 W.W.R. 385.

1966

OLAFSON *et al.* v. TWILIGHT CARIBOO LODGE LTD.

Ritchie J.

of the appellants for the price of $1 each and the real capital of the company with which the property was purchased was supplied by the appellants in the form of a shareholders' loan of $195,000.

In the autumn of 1963, Louis C. Buendia and Cyrias W. Prevost of Kamloops, (hereinafter called the purchasers) became interested in acquiring the company and on the 31st of December of that year the appellants entered into a formal agreement with them for its sale. It is the construction to be placed on the terms of this agreement which has given rise to the difference of opinion in the Courts below.

The financial statement of the company as at December 15, 1963, disclosed its liabilities and capital to be as follows:

LIABILITIES AND CAPITAL

CURRENT LIABILITIES		
Accounts payable	$ 6,042.33	
Bank overdraft	94.01	
		$ 6,136.34
MORTGAGE		
Principal	58,388.76	
Accrued interest	1,072.66	
		59,461.42
LOAN		
Shareholders	142,369.55	
Bank	12,500.00	
		154,869.55
CAPITAL		
Authorized—10,000 shares par value $1.00 each	10,000.00	
Issued—20 shares par value $1.00 each		20.00
		$220,487.31

The agreement of sale provided that the purchasers would purchase all of the outstanding shareholders' loans and shares in the capital of the company for $225,000, $65,000 of which was to be paid in cash out of which the appellants agreed to forthwith retire the existing mortgage debt of $59,461.42. The appellants also undertook to pay off the bank loan and to deliver all the issued shares in the company (*i.e.* 20 shares) to the purchasers at the time of closing on the condition, which does not appear to have been fulfilled, that they were to be held in escrow as part of the security for the unpaid balance owing under the agree-

ment which was to bear interest at the rate of 7 per cent and was to be paid by monthly instalments of $1,429.30. It was further agreed that the $160,000 remaining unpaid should be secured by a mortgage on the whole assets and undertaking of the company and as it is this provision in the agreement which has given rise to much of the difficulty, I think it desirable to set it out in full as follows:

> 1
>
> (c) The said balance of One Hundred Sixty Thousand ($160,000.00) Dollars shall be secured by the Purchasers upon the whole assets and undertaking of the Company by way of mortgage of the said assets and undertaking in favour of the Vendors together with an escrow of all outstanding shares of the Company. Such mortgage and escrow agreement to be in the usual form and approved by the Vendors. *The time and the manner of the assignment of shareholders loans to the Purchasers shall be as agreed upon by negotiation with a view to mutual protection of all parties.* And said mortgage shall include an acceleration clause upon a default not remedied within ninety (90) days of notice of default.

The italics are my own.

It appears to me to be important to observe that the shareholders' loans were not assigned automatically as a result of the agreement and in fact were not required to be assigned until they had been properly protected by the taking of the mortgage which was given by the company as security for its indebtedness to the appellants.

As has been pointed out by the learned trial judge, the company was enriched to the total amount of $71,961.42 by the appellants assuming the outstanding mortgage and the bank loan and in the absence of clear and unambiguous language compelling me to do so, I am unable to interpret the agreement as meaning that the parties intended that the appellants were to assume these obligations and also to assign their shareholders' loans in the amount of $142,-369.55 without first being properly protected by some form of security. I am therefore, with the greatest respect for the view adopted by the members of the Court of Appeal, of the opinion that the agreement must be interpreted as meaning that the shareholders' loans were not to be assigned until the company's indebtedness to the appellants had been properly protected by the giving of the mortgage for which the above recited obligations were more than adequate consideration.

1966

OLAFSON *et al.* *v.* TWILIGHT CARIBOO LODGE LTD.

Ritchie J.

It is true that the company was not a party to the agreement of December 31, but once the purchasers had become the sole shareholders and directors, it was quite competent for them to consolidate the company's obligations into one item of indebtedness payable in monthly sums and secured by a mortgage in accordance with the agreement arrived at between the vendors and the purchasers.

The Court of Appeal has suggested that this interpretation of the agreement results in the company having assumed an obligation of $160,000 to the vendors while remaining liable to the purchasers as assignees of the shareholders' loans in the amount of $142,369.55. I do not so interpret the situation. It appears to me that the substance and effect of the agreement of December 31 was that only as the purchasers paid off the mortgage of $160,000 they would become, to the extent of the payment, subrogated to the position of the vendors.

The Court of Appeal, however, treated the circumstances as being governed by the case of *Trustee of Estate of Thibault Auto Ltd. v. Thibault*[1], (hereinafter referred to as the "*Thibault* case") which was affirmed in this Court[2], and accordingly held that the transaction was in contravention of s. 152 (1) of the *Companies Act* which reads as follows:

> A company shall not give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company;...

The *Thibault* case was not one in which the vendors as mortgagees were seeking to foreclose a mortgage given by way of additional security in the manner disclosed in the present case. In the *Thibault* case the action was brought by the trustee in bankruptcy of the Thibault Company which had itself been incorporated for the express purpose of facilitating the sale of Mr. Thibault's personal assets to one Clavette. The circumstances were that Thibault, who

[1] (1962), 33 D.L.R. (2d) 317.

[2] *Sub nom. Thibault v. Central Trust Co. of Canada,* [1963] S.C.R. 312.

operated an automobile business in Edmunston, decided to cell it to Clavette for $60,000, but finding that the purchaser did not have the funds available, he consulted his accountant and his lawyer and finally arranged to transfer the assets to a company which he incorporated for the purpose and then to sell the shares in that company to Clavette for $90,000 on the understanding that Clavette would arrange to have the purchase price secured by giving him a mortgage of the company's assets for the full amount of $90,000 which was to be paid in instalments over a period of 15 years. It appears that Thibault was encouraged in making these arrangements by the advice that in conveying his business assets to the company an advantage would accrue to him through avoiding a charge back to income of any recapture of capital cost allowance previously claimed as a deduction for income tax purposes. In any event, the transaction from beginning to end was predicated upon the understanding that the company would issue a mortgage for the full amount of the purchase price for the sole and express purpose of providing security for the purchase of the shares by Clavette. What the *Thibault* case decided was that such a transaction could be set aside at the suit of the company's creditors on the ground that it was a flagrant breach of s. 37(1) of the *Companies Act*, R.S.N.B. 1952, c. 33, which in all relevant essentials was the same as s. 152(1) of the British Columbia *Companies Act*.

In the *Thibault* case there was no question of a down payment having been made or any other consideration having been given for the shares except the undertaking to pay the amount secured by the mortgage, nor was there any assignment of shareholders' loans or assumption of company obligations by the vendors. For these reasons and for those given by Mr. Justice Branca, I am satisfied that the *Thibault* case is distinguishable from the circumstances here disclosed and with the greatest respect for the views expressed by the Court of Appeal of British Columbia, I do not think that this case is governed by that authority.

For these reasons, as well as for those set out in the reasons for judgment of Branca J., I would allow the appeal

1966

OLAFSON *et al.* v. TWILIGHT CARIBOO LODGE LTD.

Ritchie J.

and restore the judgment at trial. The appellants will have their costs in this Court and in the Court of Appeal.

Appeal allowed and judgment at trial restored.

Solicitors for the plaintiffs, appellants: Oliver, Miller & Co., Vancouver.

Solicitors for the defendant, respondent: Farris, Farris, Vaughan, Taggart, Wills & Murphy, Vancouver.

1966

*Fév. 14

Juin 28

LORENZO JUTRAS .....APPELANT;

ET

LE MINISTRE DE LA VOIRIE DE LA PROVINCE DE QUÉBEC et LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Expropriation—Ferme—Coût de déplacement des bâtiments—Indemnité—Principes devant guider les Cours d'Appel—Code de Procédure civile, arts. 1066a et seq.

En 1960, l'appelant acheta une ferme de 158 arpents, payant une somme de $5,714.07 pour le terrain et les bâtiments y érigés. Dix-huit mois plus tard, la province expropria, aux fins de la construction de la route transcanadienne, une lisière de ce terrain d'une superficie de 1.172 arpents. La maison de l'appelant était située sur la partie expropriée et l'appelant a dû en effectuer le déplacement. L'appelant a soutenu que certains autres bâtiments, qui n'étaient pas situés sur cette lisière, tels que la grange, la porcherie et le hangar, devaient aussi être déplacés. Le Ministre de la Voirie a offert une somme de $7,235, mais l'appelant a réclamé $23,865.90. La Régie des Services publics a accordé $7,490.70 pour tenir lieu de la valeur du terrain exproprié et de tous les dommages résultant de l'expropriation. La Cour d'Appel, par un jugement majoritaire, a confirmé l'ordonnance de la Régie. L'exproprié en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le juge en chef Taschereau et le Juge Spence étant dissidents.

Les Juges Fauteux et Judson: Il n'y a aucune raison de droit ou de fait justifiant de modifier l'ordonnance de la Régie.

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*CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Judson et Spence.

Les Juges Abbott et Judson: En autant que les dommages résultant de l'expropriation sont concernés, l'appelant avait droit d'être indemnisé complètement mais non d'en recevoir un enrichissement. Il n'a pas été démontré que la Régie avait procédé en vertu d'une fausse appréciation de la loi, ou qu'il n'y avait pas de preuve pour en arriver à une telle compensation ou qu'il y avait eu une erreur manifeste ayant conduit à un tel résultat. Au contraire, l'appelant a été plus qu'adéquatement compensé pour le terrain exproprié et pour tous les dommages résultant de l'expropriation.

Le Juge en chef Taschereau et le Juge Spence, *dissidents*: Le critère qu'il faut appliquer pour déterminer le montant qui doit être accordé n'est pas le prix payé pour la ferme, mais bien le montant qui devra être dépensé pour la remettre dans l'état où elle était avant l'expropriation. Le montant accordé par la Régie pour compenser l'appelant des dommages occasionnés par le déplacement de la porcherie et du hangar était manifestement insuffisant.

Expropriation—Farm—Costs of moving farm buildings—Compensation—Principles guiding Appeal Courts—Code of Civil Procedure, arts. 1066a et seq.

In 1960, the appellant purchased a farm containing 158 arpents and paid $5,714.07 for the land and buildings thereon. Some eighteen months later, the Province expropriated a strip of that land forming 1.172 arpents for the purpose of constructing the Trans-Canada Highway. The farm house was located on the strip expropriated and had to be moved and relocated. The appellant contended that other buildings, which were not situated on that strip, such as a barn, a piggery and a shed, would also have to be moved. The Minister of Highways offered a sum of $7,235, but the appellant claimed $23,865.90. The Public Service Board awarded $7,490.70 for the value of the strip expropriated and for all damages resulting from the expropriation. The Court of Appeal, by a majority judgment, confirmed the award. The expropriated party appealed to this Court.

Held (Taschereau C.J. and Spence J. dissenting): The appeal should be dismissed.

Per Fauteux and Judson JJ.: There were no grounds of law or of fact in this appeal which would justify the modification of the award.

Per Abbott and Judson JJ.: So far as the damages sustained as a result of the expropriation are concerned, the appellant was entitled to be fully compensated but not enriched thereby. It has not been shown that the Public Service Board has proceeded upon an erroneous view of the law, or that there was no evidence on which the award could properly be arrived at or any manifest error leading to the result. On the contrary, the appellant was more than adequately compensated for what was taken and for any damages resulting therefrom.

Per Taschereau C.J. and Spence J., *dissenting*: The criterion to be applied in the determination of the amount which should be awarded is not the purchase price of the farm, but the amount which will have to be expended in order to put back the farm in the state in which it was before the expropriation. The amount awarded by the Board to compensate the appellant for the damages caused by the moving of the piggery and the shed was manifestly insufficient.

1966

JUTRAS
v.
MINISTRE DE LA VOIRIE DE QUÉBEC *et al.*

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of the Superior Court which had homologated a decision of the Public Service Board. Appeal dismissed, Taschereau C.J. and Spence J. dissenting.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement de la Cour supérieure homologant une décision de la Régie des Services publics. Appel rejeté, le juge en chef Taschereau et le Juge Spence étant dissidents.

Jacques Marquis et *Cyrille H. Goulet,* pour l'appelant.

André Vigeant et *Marcel Nichols,* pour les intimés.

Le jugement du Juge en chef Taschereau et du Juge Spence fut rendu par

LE JUGE EN CHEF (*dissident*):—Il s'agit dans cette cause de procédures en expropriation intentées par le Ministre de la Voirie de la province de Québec. Ce dernier, représentant Sa Majesté au droit de la province, veut faire déterminer par les tribunaux le montant auquel a droit l'exproprié pour la partie de terrain dont s'est emparé le Gouvernement, et les dommages qui résultent de cette expropriation.

Lorenzo Jutras, l'appelant, dont une partie de la terre fut ainsi expropriée, est un cultivateur de Ste-Eulalie, cté de Nicolet, où il est propriétaire d'une ferme portant le n° P-92 de la paroisse ci-dessus mentionnée. M. Jutras a acquis cette terre avec tous ses bâtiments vers 1960, pour une somme d'environ $6,000. Ce prix ne comprenait pas le roulant, mais l'acquéreur a fait des améliorations dont la valeur ne nous est pas révélée. Le vendeur était un M. Armand Désilets qui, malade, était incapable de cultiver la terre depuis quatre ou cinq ans, c'est-à-dire depuis 1954 ou 1955. Au cours du mois de septembre 1961, le Ministre de la Voirie, pour les fins de la construction de la Route transcanadienne de Québec à Montréal, a donné avis à l'appelant qu'il voulait acquérir une partie de son terrain, soit 43,120 pieds carrés, équivalent à un arpent et cent soixante-douze (1.172) millièmes carrés plus ou moins, mesure

[1] [1965] B.R. 343.

anglaise. La nouvelle route 9, pour la construction de laquelle était requise une partie de la terre de l'appelant, était grevée d'une servitude de «sans accès», mais on accordait à la partie restante du lot 92 une servitude réelle de passage sur le chemin de desserte longeant parallèlement la ligne de «sans accès».

La maison de l'appelant est située sur le terrain exproprié, mais la grange, la porcherie et le hangar sont situés au sud de la résidence de l'appelant à une distance d'environ cinquante pieds de l'ancienne route. Il s'agit donc de déterminer la valeur du terrain dont l'appelant est privé, le coût de déplacement de la maison d'habitation et l'indemnité à laquelle l'appelant peut avoir droit pour les dommages ou inconvénients qui résultent de la désorganisation de sa ferme et du déménagement possible de certains de ses bâtiments.

Devant la Régie des Services Publics l'exproprié a réclamé la somme de $23,865.90 et le Ministre de la Voirie lui a offert $7,235, montant qui a été refusé. La Régie lui a accordé $7,490.70 en compensation de la valeur du terrain exproprié et de tous les dommages résultant de cette expropriation. Voici le détail de l'indemnité accordée:

Valeur du terrain exproprié (1.172 arpents) ...	$ 117.20
3,600 pieds de gazon à 0.05 cts le pied carré.	180.00
Parterre, jardin et jardinage	353.00
Entretien de deux entrées	50.00
Perte de 5 érables, 4 pommiers, 3 peupliers, 2 ormes	125.00
Clôtures	100.00
Troubles et ennuis	150.00
Déplacement des bâtisses—	
Maison	4,190.50
Porcherie et hangar	600.00
Grange	1,625.00
	$7,490.70
Expertise	300.00
	$7,790.70

1966

JUTRAS v. MINISTRE DE LA VOIRIE DE QUÉBEC et al.

Taschereau J.C.

La Cour du banc de la reine[1] a confirmé cet arrêt des régisseurs. MM. les Juges Badeaux et Rivard, qui ont enregistré leur dissidence, auraient maintenu l'appel et accordé une somme additionnelle de $5,150.

La plupart des montants accordés spécifiquement par la Régie ne sont pas contestés, et ne pouvaient pas l'être sérieusement. Ainsi, les indemnités dont bénéficie l'appelant exproprié, qui ont été justement accordées et dont personne ne se plaint, sont les suivantes: Valeur du terrain exproprié; 3,600 pieds de gazon à 0.05 cts le pied carré; parterre, jardin et jardinage; entretien de deux entrées; perte de 5 érables, 4 pommiers, 3 peupliers, 2 ormes; clôtures; troubles et ennuis.

Il reste donc les frais de déplacement des bâtisses, soit la maison, résidence de M. Jutras, la grange, la porcherie et le hangar. Il est important de ne pas oublier que la terre de M. Jutras était une terre bien organisée. Dans la province de Québec, comme ailleurs, l'harmonie, la coordination des constructions ne s'improvisent pas chez le cultivateur, et le hasard n'a rien à voir à la disposition des bâtiments. On ne peut pas, sans causer de graves inconvénients et de substantiels dommages, changer le site des bâtiments que l'expérience a désigné. Avant d'organiser une ferme, il faut tenir compte de bien des facteurs: on doit prendre en considération quels sont les vents dominants dans la région, afin d'éviter à la maison les odeurs fétides et nauséabondes venant des granges et des porcheries; il faut également assurer aux résidents de la ferme un accès facile à la route ainsi qu'au reste de la terre. Il faut que les animaux broutent sans être trop près des maisons, et les vaches doivent paître dans les endroits les plus favorables. Tout cela demande un plan, une vue d'ensemble, une disposition générale, qui, lorsque réussis, comme dans le cas qui nous occupe, donnent une valeur accrue à un bien rural.

A l'origine, lors de l'établissement de la ferme de M. Jutras, il a fallu tenir compte de la situation de la route, de l'endroit où devaient être placés les bâtiments, de façon à faciliter l'exploitation efficace de la terre, et lui donner un meilleur rendement.

L'expropriation cause à l'appelant de sérieux ennuis. Il est clair qu'il faudra déplacer la maison de l'appelant. Elle

[1] [1965] B.R. 343.

est située sur l'assiette même de la route transcanadienne, et il est nécessaire de la reculer à une distance de près de cent pieds de l'endroit où elle se trouve actuellement. Pour accomplir ce travail la régie a accordé la somme de $4,190.50, mais à l'audience et dans son factum, l'appelant a dit qu'il ne contestait pas ce montant, et il s'en est déclaré satisfait.

Sur un plan parallèle à la route, la grange, la porcherie et le hangar sont situés à l'arrière de la maison et ont été disposés rationnellement en fonction de l'exploitation agricole. La Régie a accordé à l'exproprié la somme de $1,625 pour le réaménagement de la grange. La Régie a cru que l'exproprié en dépensant ce montant offert par le ministère de la Voirie pourrait rendre sa grange et son puits aussi avantageusement utilisables avant qu'après l'expropriation. Ce montant accordé n'est pas généreux, mais, étant donné que la Cour d'Appel a unanimement (même les juges dissidents) cru que ce montant était satisfaisant, je pense qu'il n'y a pas lieu pour cette Cour d'intervenir.

Du montant total accordé par la Régie, on ne trouve que la somme de $600 pour compenser l'exproprié des dommages occasionnés par le déplacement de la porcherie et du hangar. Les régisseurs croient que ces deux bâtiments ont peu de valeur, mais je suis d'opinion que ce montant est manifestement trop bas, et sur ce point je m'accorde avec les deux juges dissidents de la Cour d'Appel, MM. les Juges Badeaux et Rivard.

Quand le Ministre de la Voirie a décidé de prendre les présentes procédures en expropriation, il s'est autorisé de l'art. 1066 du *Code de Procédure civile* de la province de Québec. Le paragraphe (x) de cet article dit que le Ministre peut, dans la description de l'immeuble exproprié ou par avis écrit donné à l'exproprié, déclarer qu'il n'entend pas acquérir certaines constructions se trouvant sur le terrain requis, mais obliger l'exproprié à les déplacer. L'exproprié doit, en ce cas, effectuer le déplacement dans les trente jours de l'avis qui lui est donné par lettre recommandée, à moins que sur requête, la Régie n'en ordonne autrement. Si les travaux de déplacement ne sont pas entrepris dans les quinze jours de l'avis ou terminés dans le délai voulu, le Ministre peut les faire effectuer et placer les constructions sur le terrain de l'exproprié à l'endroit le plus commode.

1966

JUTRAS
v.
MINISTRE DE LA VOIRIE DE QUÉBEC
et al.

Taschereau J.C.

Le Ministre n'a pas jugé à propos d'exproprier la terre en totalité, mais il a préféré ordonner le déplacement de certaines bâtisses, dont la maison avec annexes, et le hangar. Il doit donc payer les frais de déplacement même s'ils sont supérieurs au coût total de la terre. Ceci peut paraître un peu paradoxal, mais je n'y vois aucune contradiction. La Régie, comme la Cour d'Appel, l'ont bien compris et ont admis le principe. L'exproprié a payé pour l'ensemble de sa terre la somme d'environ $6,000 et la Régie lui a accordé au-delà de $7,500 pour les dommages causés.

Mais, dans le cas qui nous occupe, le critère qu'il faut appliquer et qui permettra de déterminer le montant qui doit être accordé, n'est pas le prix payé pour la ferme, mais bien le montant qui devra être dépensé pour la remettre dans l'état où elle était avant l'expropriation. Il est facile de voir que ce dernier chiffre peut être supérieur au premier. En effet, il faut démolir, transporter les matériaux et reconstruire de nouveau. Il faut réorganiser le système d'aqueduc, le système d'eau, niveler les terrains, déplacer les clôtures pour les replacer ailleurs, etc. Il faut pratiquement faire le travail en double. Je ne puis donc accepter l'argument que l'exproprié ne peut obtenir davantage parce qu'il a déjà obtenu plus qu'il n'a payé pour toute la terre.

L'intimé a choisi la façon dont devait s'engager et se plaider le litige. Par ses procureurs, il a, le 18 septembre 1961, fait déposer au Bureau d'enregistrement du comté de Nicolet un plan général montrant les terrains requis pour l'expropriation de la route transcanadienne à Ste-Eulalie avec un estimé global des indemnités. Cet estimé comprend le prix des terrains requis, l'achat des bâtisses ainsi que *tous les dommages* résultant de l'expropriation, comme le mentionne le certificat du Registrateur.

Le 27 septembre de la même année, l'officier en loi du ministère de la Voirie écrivait à l'exproprié pour l'informer que le dépôt du plan fait au bureau du Registrateur avait pour effet de transporter au Ministre la propriété de partie de l'immeuble P-92, et pour l'aviser également qu'il recevrait dans un bref délai un nouvel avis disant quel était le montant que désirait lui offrir l'intimé pour le terrain requis, ainsi que pour *tous les autres dommages* résultant de l'expropriation. On ajoutait dans cette lettre que s'il était nécessaire de déplacer des bâtisses, M. Jutras en serait avisé

plus tard. Près d'un an après, soit le 19 juillet 1962, on écrivit de nouveau à l'appelant pour lui dire qu'il lui faudra déplacer la maison avec annexes et le hangar.

L'intimé, dans son factum, soutient que le Ministre ne peut être tenu de payer les frais de déplacement que des bâtiments dont il a requis le changement de site. (C.P.C. 1066x) (*vide* lettre du 19 juillet 1962). M. Nichols, avocat conseil du Ministre, a surtout insisté sur ce point dans sa plaidoirie.

Ceci ne pourrait affecter que la porcherie, car l'intimé a demandé seulement le déplacement de la maison et du hangar. En ce qui concerne la grange, la Régie n'a accordé que des dommages au montant de $1,625, malgré que dans son offre détaillée du 17 avril 1963, l'intimé n'offre rien pour la grange. La Régie a accordé un montant global de $600 pour la porcherie et le hangar, deux bâtiments qu'il faut nécessairement déplacer pour que cette terre soit exploitée avec profit. La raison est facile à comprendre, car si on déplace la maison, comme il est essentiel de le faire, et on la transporte au nord de la route nouvelle, il sera nécessaire de déplacer plus au nord les bâtiments qui se trouvent actuellement à vingt-cinq ou trente pieds de la route transcanadienne.

M. Dorval, expert entendu devant la Régie, dit que la situation des lieux ne permet pas le déplacement de la maison résidentielle sans envisager forcément le déplacement de l'ensemble des autres bâtisses sur une distance d'environ cent pieds, afin de remettre M. Jutras dans le même état qu'avant l'expropriation. Évidemment, à moins que ce recul ne soit effectué, il n'y a aucune place pour reculer la maison vers le nord, mais l'intimé a requis qu'on déplace le hangar seulement afin de trouver un endroit voulu pour y placer la maison. C'est bien M. Sylvio Hudon, expert de l'intimé expropriant, qui nous dit dans son témoignage que vu qu'il fallait déplacer la maison, le ministère a pensé de trouver un site convenable à l'exproprié et on a décidé de lui octroyer une indemnité pour le déplacement du hangar, et il ajoute que c'est en vue de trouver un endroit convenable pour la maison qu'il faut nécessairement déplacer le hangar.

Avec ce plan, conçu par les experts de l'intimé, la maison sera voisine de la porcherie avec ses habitants peu

1966

JUTRAS v. MINISTRE DE LA VOIRIE DE QUÉBEC *et al.*

Taschereau J.C.

enviables et avec quarante bêtes à cornes qui logent dans l'étable. Il est clair qu'on n'y a pas pensé et qu'on n'a pas voulu suggérer à M. Jutras de violer la loi, car aucune porcherie ne peut, en vertu d'un règlement d'hygiène (Arrêté-en-conseil du 12 février 1944) être construit à moins de cent cinquante pieds d'une maison d'habitation sous peine d'une amende de vingt dollars par jour. Il faudra donc reculer la porcherie et le hangar pour y placer la maison et pour effectuer ce travail la Régie n'a accordé que la somme de $600.

A mon avis, ce montant est *manifestement* insuffisant. Il s'agit d'une porcherie de bonnes dimensions, construite sur des fondations en béton et sur lesquelles repose un plancher également en béton. Si l'indemnité pour reculer le hangar est de $200 environ, comme je crois qu'elle doit l'être, il ne resterait que $400 pour reculer la porcherie. Ceci ne serait pas même suffisant pour payer le ciment nécessaire pour faire des fondations nouvelles à cent cinquante pieds de la maison d'habitation.

S'il est vrai que l'intimé n'est pas tenu de payer les frais de déplacement de la porcherie, parce que le Ministre n'a pas requis qu'elle soit déplacée, il doit tout de même payer les dommages qui résultent de l'expropriation, et ces dommages sont, à mon avis, égaux au coût du déplacement. C'est ainsi qu'on l'a compris au procès. Les experts de l'intimé ont reconnu que la porcherie subissait des dommages, de même que la Régie et la Cour d'Appel qui ont accordé pour cet item et le hangar la somme de $600.

Je crois donc que ce montant de $600 accordé pour la porcherie et le hangar n'est pas suffisant. Qu'il s'agisse de déplacer la porcherie ou de dommages causés à l'appelant par suite de l'expropriation, je suis d'opinion que le montant proposé par l'expert Lemieux et accepté par MM. les Juges Badeaux et Rivard devrait être ajouté à l'indemnité accordée par la Régie.

En conséquence, je maintiendrais l'appel et j'accorderais, en outre du montant fixé par la Régie, une somme additionnelle de $5,150. L'appelant aura droit aux frais encourus devant toutes les Cours.

Le Juge Judson souscrit au jugement rendu par

LE JUGE FAUTEUX:—Le 23 mars 1960, Lorenzo Jutras acheta, dans la région de Ste-Eulalie, comté de Nicolet, une

ferme de 158 arpents, payant, pour le terrain et les modestes bâtiments y érigés, un prix de $5,714.07. Dix-huit mois plus tard, le ministère de la Voirie expropria, aux fins de la construction de la route transcanadienne, une lisière de ce terrain, ayant une superficie de moins de un pour cent de la superficie totale de la terre. Érigée sur cette lisière, la maison de Jutras dut évidemment être déplacée et dès lors on envisagea comme conséquence la nécessité de réaménager ou déplacer les autres bâtiments de la ferme, soit grange, porcherie et petite remise, tous situés à une certaine proximité de la lisière expropriée. Pour cette parcelle de terrain, réaménagement, déplacement et autres item de peu d'importance, le ministère de la Voirie offrit à l'exproprié une indemnité de $7,235 alors que ce dernier réclamait $23,865.90. La détermination de l'indemnité fut donc référée à la Régie des Services publics. Après avoir vu et entendu les témoins de part et d'autre, s'être rendus sur les lieux et les avoir visités, les membres de la Régie accordèrent à l'appelant une indemnité de $7,490.70 «*...pour lui tenir lieu de la valeur du terrain exproprié et de tous les dommages résultant de l'expropriation...*». Jutras en appela. Il demanda à la Cour d'Appel d'ajouter $5,750 à la somme de $600 accordée pour le déplacement de la porcherie et de la petite remise. Il demanda également d'ajouter $7,500 à la somme de $1,625,—somme qui lui avait été accordée pour le réaménagement de la grange, —prétendant que celle-ci devait être déplacée plutôt que d'être réaménagée. Par une décision majoritaire,—la majorité étant formée de messieurs les juges Hyde, Taschereau et Owen,—la Cour d'Appel[1] confirma l'ordonnance de la Régie. Dissidents, messieurs les juges Badeaux et Rivard furent d'avis que la réclamation de l'appelant relative à la porcherie était justifiée; ils auraient, quant à cet item seulement, modifié l'ordonnance et accordé un montant additionnel de $5,150. Jutras en appelle maintenant à cette Cour.

C'est la prétention de Jutras, basée particulièrement sur l'opinion de son témoin, Guy Hamel, qu'il ne suffit pas de faire des modifications à la grange, mais qu'il faut la déplacer comme les autres bâtiments. Et il invoque le témoignage d'un autre de ses témoins, soit George

[1] [1965] B.R. 343.

1966

JUTRAS
v.
MINISTRE DE LA VOIRIE DE QUÉBEC
et al.

Fauteux J.

Lemieux, qui se décrit comme «entrepreneur et spécialiste en déménagement de maisons», suivant qui, le coût de déplacement de tous ces bâtiments s'élèverait à $14,575 détaillé comme suit:

Pour la grange	$ 7,500.00
Pour la porcherie	5,300.00
Pour la remise	450.00
Imprévus (10%)	1,325.00
Total	14,575.00

Une lecture attentive des témoignages de Guy Hamel et de Georges Lemieux justifie, je crois, le bien-fondé des commentaires défavorables faits à leur égard par les juges de la majorité en Cour d'Appel. A l'instar de ces derniers, je ne m'étonne aucunement que les membres de la Régie, qui, outre d'avoir eu l'avantage d'observer ces témoins, ont subséquemment visité les lieux, n'aient prêté peu d'attention, si aucune, à leurs témoignages. A cela on peut ajouter que les juges dissidents, eux-mêmes, ont refusé d'accepter l'opinion du témoin Hamel, jugeant contrairement à celui-ci, qu'il n'était pas nécessaire de déplacer la grange. Comme leurs collègues de la majorité, ils furent d'avis qu'il n'y avait pas lieu d'intervenir pour augmenter le montant accordé par la Régie pour y faire les changements requis et compenser l'exproprié des inconvénients qu'il pouvait subir quant à ce chef de la réclamation. Il est aussi remarquable, en ce qui concerne les frais de déplacement de la porcherie et de la petite remise, que le montant suggéré par Lemieux, simplement pour déplacer la porcherie, soit presque neuf fois celui estimé par la Régie pour le déplacement de la porcherie et de la petite remise. C'est là un écart considérable et, en soi, assez inexplicable. L'appelant, dans son factum, argumente que la porcherie est un bâtiment important, construit sur une base de béton et possédant un plancher en béton. Cependant, le seul élément de preuve auquel il nous réfère dans son factum pour justifier cette affirmation,—et je n'en ai trouvé aucun autre relatif à ce point,—est une photo montrant uniquement l'extérieur de ce bâtiment et ne permettant, en conséquence, d'en apercevoir le plancher. En tout respect pour les juges dissidents, qui font état du fait que la preuve établirait que la porcherie possède un plancher en béton, je dois dire qu'il y a là une

méprise car il n'y a aucune preuve au dossier à cet effet. De plus et en ce qui a trait à la porcherie et au hangar, voici ce qu'en disent les membres de la Régie, en exprimant l'opinion qu'ils se sont formée, sur l'aménagement et le déplacement des bâtiments, après avoir entendu les témoignages et visité les lieux:

> Après avoir entendu les témoignages, étudié les plans et visité les lieux, la Régie croit que l'intéressé, en déplaçant sa porcherie et son hangar, *qui, incidemment, ont peu de valeur,* pourra trouver un site convenable pour sa maison par rapport au chemin de service qui sera éventuellement construit et qu'en effectuant certaines modifications à sa grange, il placera sa ferme dans une position aussi avantageuse après qu'avant l'expropriation.

Tenant compte de toute la preuve au dossier et des observations qui précèdent, aussi bien que des principes qui doivent guider les tribunaux d'appel appelés à reviser les décisions rendues par la Régie dans l'exercice de sa juridiction arbitrale en matière d'expropriation, je dirais, qu'à mon avis et en tout respect pour l'opinion contraire, il n'y a aucune raison de droit ou de fait justifiant, en l'espèce, de modifier l'ordonnance de la Régie pour faire droit aux prétentions de l'appelant.

Je renverrais l'appel avec dépens.

Judson J. concurred with the judgment delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1], affirming a judgment of the Superior Court dated June 3, 1963, which homologated a decision of the Public Service Board awarding the appellant $7,490.70, as compensation for the expropriation of a small portion of a farm property owned by him and situated at Ste-Eulalie in the District of Nicolet.

As of September 18, 1961, the Government of the Province of Quebec notified appellant under the provisions of arts. 1066a and following of the *Code of Civil Procedure* that it intended to expropriate a small strip on the front of the said property (comprising 1.172 arpents out of a total area of 158 arpents) for the purpose of constructing the Trans-Canada Highway. The house in which appellant lived was located on the strip to be expropriated, but the provincial authorities notified appellant under art. 1066x C.C.P.

[1] [1965] Que. Q.B. 343.

1966

JUTRAS
v.
MINISTRE DE LA VOIRIE DE QUÉBEC *et al.*

Abbott J.

that the government did not intend to acquire the house, which should be removed. Art. 1066x reads:

> 1066x. The Minister may, in the description of the expropriated immoveable, or by written notice to the expropriated party, declare that he does not intend to acquire certain constructions which are on the land required, but intends to oblige the expropriated party to remove them. The expropriated party must, in such case, effect the removal within thirty days from the notice given to him by registered letter, unless, upon petition, the Board order otherwise. If the work of removal be not undertaken within fifteen days from the notice nor be terminated within the required delay, the Minister may cause it to be done and the constructions to be placed on the expropriated party's land at the place deemed most convenient.

The remainder of the farm buildings, consisting of a barn, piggery and shed, were not located on the property to be expropriated but are close to the new boundary line.

On March 23, 1960, some eighteen months prior to the notice of expropriation, appellant had purchased the entire property with the buildings in question, for $5,714,07. There was evidence, based on recent sales of similar farms in the vicinity, that the market value of the appellant's farm and buildings at the date of expropriation was approximately $7,000.

The Public Service Board fixed the indemnity payable to appellant under art. 1066L of the *Code of Civil Procedure* at the sum of $7,490.70.

In his appeal to this Court, appellant asked that the amount of the award be increased to $19,840.70, the principal justification for the increased amount claimed, being the alleged cost of moving the farm buildings (other than the farm-house itself) to a more suitable location.

The principles to be followed by appellate tribunals in a case of this kind, were authoritatively laid down by the Judicial Committee in *Cedar Rapids Manufacturing and Power Company v. Lacoste*[1], as follows:

> Their Lordships now have to consider the main question, viz., was the Court below justified in setting aside the present awards and remitting the matter to the arbitrators?
>
> The law and practice of the Province of Quebec governing the procedure of the Court in such matters appear to be in all essentials the same as in this country. Although the appeal is a rehearing, a verdict of a jury or an award of an arbitrator acting within his jurisdiction is not in general set aside unless it is shown that the jury or the arbitrator

[1] (1929), 47 Que. K.B. 271 at 283, [1928] D.L.R. 1.

proceeded on an erroneous view of the law, or that there was no evidence on which the verdict or the award could properly be arrived at, or that there was some manifest error leading to the result. There might also, of course, be some other matter in the conduct of the proceedings such as the wrongful admission or rejection of evidence which might vitiate the result. But as a general rule the Court does not set aside a verdict or an award merely on the ground that it is against the weight of evidence.

The question of the amount of compensation is one peculiarly for the arbitrators—in this case the Public Service Board. On such a question the arbitrators are entitled to form their own opinion and are not bound to accept any of the figures put before them in evidence; see *Cedar v. Lacoste, supra,* at pp. 284-285. Compensation for the relatively small portion of land taken is not in issue. So far as the damages sustained as a result of the expropriation are concerned, the appellant is entitled to be fully compensated but not enriched thereby.

I agree with the conclusion reached by the majority in the Court below that it has not been shown that the Public Service Board proceeded upon an erroneous view of the law, or that there was no evidence on which the award could properly be arrived at or any manifest error leading to the result. On the contrary I share the view expressed by Hyde J. that with the cash award of the $7,490.70 and residue of his property after the taking of less than one per cent of his land, the appellant is more than adequately compensated for what was taken and any damages resulting therefrom.

For the foregoing reasons and as well as for those given by Taschereau and Owen JJ. with which I am in agreement, I would dismiss the appeal with costs.

Appel rejeté avec dépens, le JUGE EN CHEF TASCHEREAU *et le* JUGE SPENCE *étant dissidents.*

Procureurs de l'appelant: Marquis, Marceau & Jessop, Québec.

Procureur des intimés: A. Vigeant, Nicolet.

1966

*Feb. 28
Mar. 1, 2
Oct. 4

THE STEEL COMPANY OF CANADA LIMITED (*Defendant*) ..... APPELLANT;

AND

WILLAND MANAGEMENT LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Roofing contract—Descriptions and specifications supplied by owner—Guarantee that work will remain weather tight—Damage caused by failure of material to perform intended function—Contractor's claim for compensation for repairs—Whether responsibility for results of using material rests upon owner who prescribed it or upon contractor who applied it.

The respondent company claimed compensation for work and services performed by it in repairing windstorm damage to three roofs which it had constructed on buildings owned by the appellant. Three separate tenders submitted by the respondent for the original work were made and accepted on the basis that the roofing, roof insulation and sheet metal work was to be done pursuant to descriptions and specifications which the appellant had forwarded to the respondent together with its invitation to tender. These descriptions and specifications were prepared by employees of the appellant company and contained complete details as to the materials and methods of construction to be employed which included the requirement that the insulating boards were to be attached to the steel sheeting on the roofs by the use of "Curadex or approved equal". The damage was caused by the failure of the Curadex adhesive to perform the function for which it was intended.

The specifications had also required the contractor to furnish a five-year guarantee that all the work specified would remain weather tight and that all material and workmanship employed would be first class and without defect.

The appellant resisted the respondent's claims on the ground that the repair work for which it claimed compensation was work which it was required to do under the terms of its guarantee, whereas the respondent contended that the guarantee did not require it to repair damage occasioned by the failure of material, which had been selected and specified by the appellant, to perform the function for which it was intended. At trial judgment was rendered in favour of the respondent and on appeal the trial judgment was affirmed by the Court of Appeal.

Held: The appeal should be allowed.

The Court was unable to accept the contention put forward on behalf of the respondent that "—under the circumstances the plaintiff guaranteed only that, as to the work done by it, the roof would be weather tight *in so far as the plans and specifications with which it had to comply would allow*".

* PRESENT: Taschereau C.J. and Martland, Ritchie, Hall and Spence JJ.

The word "work" as used in the guarantee was interpreted as referring to the completed work including the materials of which it was required to be composed and this construction was entirely consistent with the further guarantee required by the specifications that "all material and workmanship employed are first class and without defect". Curadex was a material selected by the appellant but it was one of the materials which the respondent agreed to employ in the work and which it thereby agreed to guarantee as "first class and without defect". The latter words were construed as meaning "first class and without defect" for the purpose of its intended use.

When a contractor expressly undertakes to carry out work which will perform a certain function in conformity with plans and specifications, and it turns out that the work so constructed will not perform the function, "generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specification. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty."

The agreement to furnish a written guarantee "that all work above specified will remain weather tight" for five years constituted at the very least an express undertaking to carry out work which would perform a certain function in conformity with plans and specifications and in accordance with the above-quoted principles, established by a long line of decisions, it followed that when a work so constructed does not perform the function which the contractor agreed that it would perform, the contractor is liable for the failure of the work and is not entitled to extra payment for repairing it so that it will perform the stipulated duty. *Thorn v. Mayor and Commonalty of London* (1876), 1 App. Cas. 120; *Jones v. The Queen* (1877), 7 S.C.R. (App.) 570; *Sansan Floor Co. v. Forst's Ltd.*, [1942] 1 D.L.R. 451; *Grace v. Osler* (1911), 19 W.L.R. 109, followed; *MacKnight Flintic Stone Co. v. Mayor, Aldermen and Commonalty of the City of New York* (1869), 160 N.Y. Rep. 72, disapproved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Hughes J. Appeal allowed.

B. Grossberg, Q.C., and *G.R. Dryden*, for the defendant, appellant.

John J. Robinette, Q.C., and *W. Schreiber, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—On the opening of this appeal an application was granted to change the name of the plaintiff-respondent from Schreiber Roofing Company (Ontario) Limited to Willand Management Limited in conformity with supple-

[1] *Sub nom. Schreiber Roofing Co. (Ontario) Ltd. v. Steel Company of Canada Ltd.*, [1965] 1 O.R. 410, 48 D.L.R. (2d) 212.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

mentary Letters Patent issued by the Provincial Secretary of Ontario on January 23, 1944.

This is an appeal from a judgment of the Court of Appeal for Ontario[1] affirming the judgment rendered at trial before Mr. Justice Hughes which allowed the claim of the respondent for compensation for work and services performed by it in repairing windstorm damage to three roofs which it had constructed on buildings owned by the appellant in the City of Hamilton.

In the spring of 1957 the appellant accepted three separate tenders submitted by the respondent for the "application of built-up roofing" on the sloping roofs of two of its new buildings. It is not disputed that these tenders were made and accepted on the basis that the roofing, roof insulation and sheet metal work was to be done pursuant to the "Descriptions and Specifications" which the appellant had forwarded to the respondent together with its invitation to tender. These "Descriptions and Specifications" were prepared by employees of the appellant company and contained complete details as to the materials and method of construction to be employed which included the requirement that insulating boards were to be attached to the steel sheeting on these roofs by the use of "Curadex or approved equal".

Curadex is an expensive fire resistant adhesive prepared by Currie Products Limited which had been used by the respondent on more than one occasion in constructing flat roofs for buildings of the appellant but which had not been previously used by either party in constructing sloping roofs.

The three separate windstorms which damaged the appellant's roofs were of a kind which was reasonably foreseeable in the Hamilton area and each of them had the effect of severing the insulating boards from the steel sheeting of the roofs constructed by the respondent. It was not disputed that at the time of these storms these roofs were not "weather tight" within the meaning of the guarantees which are hereinafter referred to and there are concurrent findings in the Courts below to the effect that the damage was caused by the failure of the Curadex adhesive to per-

[1] *Sub nom. Schreiber Roofing Co. (Ontario) Ltd. v. Steel Company of Canada Ltd.*, [1965] 1 O.R. 410, 48 D.L.R. (2d) 212.

form the function for which it was intended. The findings in this regard are summarized by Gale J.A. in the course of the reasons for judgment which he rendered on behalf of the Court of Appeal in the following passage:

> It was found by the learned trial judge that the cause of the damage was the failure of the adhesive (Curadex) to hold the roofing to the steel deck. He also found that the materials used by the plaintiff were those which the specifications required it to use; that there was no defect in the workmanship and that the materials were applied in the quantities and manner required by the specifications.

It accordingly appears to me that the question which lies at the heart of this appeal is whether the responsibility for the results of using Curadex rests upon the appellant who prescribed it or upon the respondent who applied it, and in this regard it seems to me to be of first importance to consider the circumstances under which this adhesive came to be included in the specifications.

In the course of preparing the specifications, Mr. L. Tweedie, who was in charge of the project for the appellant company, sought the advice of Mr. H. L. Schreiber, general manager of the respondent, who was a highly qualified expert on built-up roofing, as to the best method to be employed in the construction of the roofs in question. Mr. Schreiber spoke with great authority and in view of the experience he and his company had had in the use of Curadex as an adhesive on flat roofs, he must, in my view, be taken to have had knowledge of the properties and potential of this product as a wind resistant adhesive. In the course of his lengthy discussions with Mr. Tweedie and other members of the appellant company, Mr. Schreiber expressed a preference for the use of hot, stiff asphalt rather than Curadex for the sloping roofs which the appellant had in contemplation but having consulted with his associates in Detroit he made three separate tenders on behalf of his company pursuant to specifications which, as has been stated, required the use of "Curadex or approved equal".

The attitude of the respondent in this regard as expressed by Mr. Schreiber is best summarized in a passage from his cross-examination where he said:

> A. Let's put it this way: I preferred the use of asphalt, but if a customer saw fit to use Cur-Adex, I would go along, certainly, with whatever he saw fit.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

Q. You went along with this, and made your tender on these specifications? A. Yes, sir. This is what the Steel Company wanted me to tender on.

The invitation to tender in respect of each roof included the following paragraph:

If you are interested in this work please contact our Mr. Tweedie, visit the site; obtain drawings and submit your quotation in duplicate to this office.

It therefore appears to me that when he signed the tenders on behalf of the respondent, although he had had no actual experience in the use of Curadex on sloping roofs, Mr. Schreiber was, as the result of lengthy discussions with the appellant's officers and of his having previously used the product on flat roofs, fully aware of the factors necessary to enable him to decide whether or not this adhesive was a first-class material for its intended use, and whether it was one which his company was prepared to guarantee to remain "weather tight" for a period of five years.

The respondent's officials had the first specifications in their hands for three weeks before deciding to tender and it is to be presumed that during that period consideration was given to the terms of the paragraph of those specifications under the heading "Bond and Guarantee" which read as follows:

This Contractor is to furnish a written guarantee running for a period of five years, that all work above specified will remain weather tight and that all material and workmanship employed are first class and without defect. Terms of all guarantees shall begin at completion of the work. This contractor shall make good without charge all defects appearing within period named when requested in writing by the Owner.

The three guarantees which were eventually given sometime after the repairs had been completed, are made effective for five years from the date when the original work was finished and they therefore must, in my view, have reference to the roofs as they existed at that date and can have no relation to the very different structures which were produced as a result of the repairs.

In this regard, I disagree with Hughes J. when he says of the completely repaired roofs:

...it was these roofs which were referred to in the written guarantees which it (i.e. the respondent) eventually supplied in March 1958.

The appellant resisted the respondent's claim on the ground that the repair work for which it claims compensation was work which it was required to do under the terms of its guarantee, whereas the respondent contended that the guarantee did not require it to repair damage occasioned by the failure of material, which had been selected and specified by the appellant, to perform the functions for which it was intended.

I agree with Gale J.A. that "this case is to be decided simply by a common sense interpretation of that part of the guarantee which is under dispute" but unlike him I am, with all respect, unable to accept the contention put forward on behalf of the respondent that:

> ...under the circumstances the plaintiff guaranteed only that, as to the work done by it, the roof would be weather-tight *in so far as the plans and specifications with which it had to comply would allow.*

The italics are my own.

In accepting this contention, the Court of Appeal followed the reasoning employed by the New York State Court of Appeal in the case of *MacKnight Flintic Stone Co. v. The Mayor, Aldermen and Commonalty of the City of New York*[1] in which that Court was construing a contractor's guarantee which provided that the work done by the contractor was to be turned over to the City in perfect order and "guaranteed absolutely weather and damp proof for five years from the date of acceptance of the work. Any dampness or water breakage within that time must be made good by the contractor without any cost or expense to the City."

Gale J.A. found the issues in that case to be substantially the same as those in the present case and he adopted the following paragraph from the reasons for judgment of Vann J. who delivered the judgment for the New York Court:

> The reasonable construction of the covenant under consideration is that the plaintiff should furnish the materials and do the work according to the plan and specifications, and thus make the floors water tight *so far as the plan and specifications would permit.*

The italics are my own.

It will be observed that the acceptance of the interpretation placed by the Court of Appeal upon the guarantee

[1] (1899), 160 N.Y. Rep. 72.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

required by the specifications involves supplying the words "in so far as the plans and specifications with which it had to comply would allow" which are not contained in the guarantee itself. The five-year guarantee which was required to be given by all those tendering on the works in question included the stipulation "that all work above specified will remain weather tight ..." and in my view the words "all work above specified" mean the work described in the specification which included the employment of Curadex as the adhesive material to be used in attaching the insulating boards to the steel sheeting on the roofs in question. If any other adhesive material had been used by the contractor the completed work would not have been the "work above specified" which the respondent was required to guarantee.

I interpret the word "work" as it is used in the five-year guarantee as referring to the completed work including the materials of which it was required to be composed and this construction in my view appears to be entirely consistent with the further guarantee required by the specifications that "all material and workmanship employed are first class and without defect". It is true that Curadex was a material selected by the appellant but it was one of the materials which the respondent agreed to employ in the work and which it thereby agreed to guarantee as "first class and without defect". I think these latter words must be construed as meaning "first class and without defect" for the purpose of its intended use.

In construing the guarantee as he did, Gale J.A. was clearly influenced by the fact that he did not think that it would have been reasonable for the defendant to have expected, and the plaintiff to have given, an absolute guarantee against the elements when neither had had any experience with the capacity of Curadex to perform properly on the sloping steel deck.

In this regard it is, however, to be remembered that the respondent is an experienced contractor specializing in the roofing business and that it was bidding in competition with several other roofing contractors. Under these circumstances the language employed by Cockburn C.J. in

Stadhard v. Lee[1] which was quoted with approval in the Exchequer Court of Canada in *Jones v. The Queen*[2] appears to me to be particularly pertinent:

> It frequently happens, in the competition which notoriously exists in the various departments of business, that persons anxious to obtain contracts submit to terms which, when they come to be enforced, appear harsh and oppressive. From the stringency of such terms escape is often sought by endeavouring to read the agreement otherwise than according to its plain meaning. But the duty of a court in such cases is to ascertain and to give effect to the intention of the parties as evidenced by the agreement, and though, where the language of the contract admit of it, it should be presumed that the parties meant only to be reasonable, yet, if the terms are clear and unambiguous the court is bound to give effect to them without stopping to consider how far they may be reasonable or not.

In construing the guarantee by supplying the words "in so far as the plans and specifications with which it had to comply would allow" it appears to me that the Courts below have tacitly accepted the proposition that no matter how experienced a contractor may be in a particular field, he nevertheless bears no responsibility for the employment of defective material in the work which he has undertaken, provided that it is a material which has been selected by the owner and included in the specifications. This proposition finds support in the judgment of Vann J. in the *MacKnight* case, *supra*, in a passage which was expressly adopted by Hughes J. which reads as follows:

> The defendant, (i.e. the owner), specifically selected both material and design and ran the risk of a bad result. If there was an implied warranty of sufficiency, it was made by the party who prepared the plan and specifications, because they were its work, and in calling for proposals to produce a specified result by following them, it may fairly be said to have warranted them adequate to produce that result.

I cannot accept this proposition which appears to me to run contrary to a long line of decisions in England starting with *Thorn v. The Mayor and Commonalty of London*[3] which have been followed in this country (see *Jones v. The Queen, supra, Sansan Floor Company v. Forst's Limited*[4], *Grace v. Osler*[5]), and the effect of which is summarized in part in Hudson's Building and Engineering Contracts, 8th ed., 1959, at p. 147 where it is said:

> Sometimes, again, a contractor will expressly undertake to carry out work which will perform a certain duty or function in conformity with

[1] (1863), 3 B. & S. 364.
[2] (1877), 7 S.C.R. (App.) 570 at 621.
[3] (1876), 1 App. Cas. 120.
[4] [1942] 1 D.L.R. 451 at 456.
[5] (1911), 19 W.L.R. 109 at 115.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

plans and specifications, and it turns out that the work constructed in accordance with the plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specification. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty.

The agreement to furnish a written guarantee "that all work above specified will remain weather tight" for five years in my view constitutes at the very least an express undertaking "to carry out work which well perform a certain ... function in conformity with plans and specifications" and in accordance with the principles stated in the paragraph last above cited, I think that it follows that when a work so constructed does not perform the function which the contractor agreed that it would perform, the contractor is liable for the failure of the work and is not entitled to extra payment for repairing it "so that it will perform the stipulated duty".

In the course of his reasons for judgment, Mr. Justice Hughes expresses the following view:

> It would seem ... that from this evidence that the defendant corporation was taking a calculated risk in specifying the adhesive designed and required to fasten the roofing membrane to a roof of new design and it would seem that they knew this to be the case.

In my opinion the evidence discloses that both parties were fully alerted to any limitations which may have attached to the use of Curadex as an adhesive on these roof decks and in view of the fact that neither of them had had any experience in using it on sloping roofs, I think that some risk was involved. This may have been the reason why the appellant required the contractors who were tendering on the work to provide the guarantee in question, but whatever the reason may have been, it appears to me that any risk involved in the undertaking was accepted by those who were prepared to tender in accordance with specifications which included the requirement of providing a written guarantee that all material employed in the work was first class and without defect, and that "all work ... specified" would remain weather tight for a period of five years.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

In view of all the above I would allow this appeal and dismiss the action of the respondent with costs in this Court and in the Courts below.

Appeal allowed and action dismissed with costs.

Solicitors for the defendant, appellant: Levinter, Grossberg, Dryden, Rachlin, Bliss & Raphael, Toronto.

Solicitor for the plaintiff, respondent: William Schreiber, Hamilton.

1965

*Mai 26

1966

Janv. 25

OVIDE JOLICŒUR (*Défendeur*) .....APPELANT;

ET

LA CENTRALE D'IMMEUBLES STE-FOYE INC. (*Demanderesse*) .....INTIMÉE;

ET

JACQUES GERMAIN .....MIS-EN-CAUSE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Contrat—Agent d'immeubles—Commission—Achat de la propriété par le mandataire—Prête-nom—Code Civil, arts. 1484, 1706, 1713.

Par contrat en date du 6 octobre 1959, le défendeur s'est engagé à payer à la demanderesse ou à son représentant Germain une commission si Germain vendait à un client de la demanderesse un terrain appartenant au défendeur pour la somme de $150,000. Le jour suivant, le défendeur a consenti à un nommé Cobrin une option dans laquelle il s'engageait à lui vendre le terrain en question. Cette option contenait une stipulation à l'effet que l'option vaudrait en faveur de Cobrin ou de toute autre personne désignée par lui. Subséquemment, Cobrin a désigné Germain comme étant la personne pouvant exercer l'option. Deux promesses de vente sont alors intervenues le 23 octobre 1959, la première du défendeur à Germain pour un prix de $150,000 et la seconde de Germain à Cobrin et associés pour un prix de $210,000. Finalement, le 12 décembre 1959, trois actes de vente ont été signés devant le même notaire: le premier du défendeur à Ovide Jolicœur Inc. pour un prix de $103,879.10, le second de Ovide Jolicœur Inc. à Germain pour un prix de $150,000 et le troisième de Germain à Cobrin et associés pour un prix de $210,000. Le défendeur a refusé de payer la commission pour le motif, entre autres, que le mandat avait pris fin lorsque la demanderesse, par le truchement de son représentant, avait

*CORAM: Le Juge en chef Taschereau et les Juges Cartwright, Fauteux, Hall et Spence.

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

acquis les biens qu'elle avait charge de vendre. La Cour supérieure et la Cour d'Appel ont maintenu l'action pour la commission. Le défendeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, les Juges Cartwright et Fauteux étant dissidents.

Le Juge en chef Taschereau et les Juges Hall et Spence: En vertu des articles 1484 et 1713 du *Code Civil,* l'achat par Germain, tant qu'il était le mandataire du défendeur, ne pouvait avoir lieu. Germain n'était pas le prête-nom de Cobrin mais agissait personnellement et comme représentant de la demanderesse. De plus, lorsque Germain est devenu acquéreur, le mandat a nécessairement pris fin de même que le droit à la commission.

Le Juge Cartwright, *dissident:* Les deux Cours inférieures en sont venues à la conclusion que Germain, en achetant et revendant le terrain en question, n'avait pas agi personnellement ou pour son propre bénéfice ou celui de la demanderesse, mais au contraire comme prête-nom de Cobrin et seulement pour le bénéfice de Cobrin. Le défendeur n'a pas avancé de motifs ayant suffisamment de force pour que cette Cour change ces conclusions de fait.

Le Juge Fauteux, *dissident:* Le jugement dont est appel était bien fondé.

Contracts—Agency—Real estate—Commission—Purchase of property by brokers—Prête-nom—Civil Code, arts. 1484, 1706, 1713.

By contract dated October 6, 1959, the defendant agreed to pay to the plaintiff or its representative Germain a commission if Germain effected the sale of his property to the plaintiff's client for $150,000. The next day, the defendant gave to one Cobrin an option to purchase the property which contained a clause that the option could be exercised by Cobrin or by any other person designated by him. Subsequently, Cobrin designated Germain as the person to exercise the option. On October 23, 1959, two promises of sale were executed, the first from the defendant to Germain for a price of $150,000 and the second from Germain to Cobrin and his associates for a price of $210,000. Finally, on December 12, 1959, three deeds of sale were passed before the same notary: the first from the defendant to Ovide Jolicœur Inc. for a price of $103,879.10, the second from Ovide Jolicœur Inc. to Germain for a price of $150,000 and the third from Germain to Cobrin and his associates for a price of $210,000. The defendant has refused to pay the commission on the ground, *inter alia,* that the plaintiff had terminated the mandate when, through its representative, it acquired the property which it had undertaken to sell. The Superior Court and the Court of Appeal maintained the action for the commission. The defendant appealed to this Court.

Held (Cartwright and Fauteux JJ. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Hall and Spence JJ.: By virtue of articles 1484 and 1713 of the *Civil Code,* the purchase by Germain, as long as he was the mandatary of the defendant, could not take place. Germain was not the prête-nom of Cobrin but was acting personally and as the representative of the plaintiff. Furthermore, when Germain became the purchaser, the mandate was necessarily terminated as well as the right to a commission.

Per Cartwright J,. *dissenting:* The Courts below have found that in taking the deed of the property and in reselling, Germain was acting not

personally or for his own benefit or for that of the plaintiff but as prête-nom of Cobrin and solely for Cobrin's benefit. No sufficient ground has been shown to warrant interfering with these concurrent findings of fact.

Per Fauteux J., *dissenting:* The judgment of the Court below was well-founded.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Marquis J. Appeal allowed, Cartwright and Fauteux JJ. dissenting.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Marquis. Appel maintenu, les Juges Cartwright et Fauteux étant dissidents.

Guy Hudon, c.r., pour le défendeur, appelant.

Pierre Choquette, pour la demanderesse, intimée.

Le jugement du Juge en chef Taschereau et des Juges Hall et Spence fut rendu par

LE JUGE EN CHEF:—La Centrale d'Immeubles Ste-Foye Inc., demanderesse-intimée, a institué une action devant la Cour supérieure de Québec réclamant du défendeur-appelant, Ovide Jolicœur, la somme de $15,581.86.

Dans son action, la demanderesse allègue que le 6 octobre 1959, par convention écrite, le défendeur Jolicœur s'est engagé à payer à la demanderesse une commission pour la vente du lot 26 du cadastre officiel de Ste-Foye, moyennant un prix de 16.5 cents du pied carré (1,038,791 pieds), dont $40,000 étaient payables comptant.

En vertu de la convention, qui a été produite au dossier, une commission de $5,000 sur le premier versement, plus 1.5 cents du pied, étaient payables en même temps et à même l'acompte initial de $40,000.

Cette convention, sous seing privé, se lit ainsi:

LA CENTRALE D'IMMEUBLES STE-FOYE INC.
Ste-Foye Central Realties Inc.
COURTIERS EN IMMEUBLES

LA 7-7668

MU 3-4397

100 St-Jean Bosco, Ste-Foye—Québec 10.

6 octobre 1959.

Je, soussigné, OVIDE JOLICŒUR, demeurant à 1756, Laurier, à Sillery, consens de payer à la Centrale d'Immeubles Ste-Foye Inc., ou *à Jacques Germain,* la commission suivante, *s'il vend le lot 26 à son client.*

[1] [1964] B.R. 79.

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

Taschereau J.C.

Le prix de vente sera de $0.16½ le p.c., avec un comptant de QUARANTE MILLE DOLLARS ($40,000.00).

La commission que je lui paierai à la signature sur le premier versement, sera de CINQ MILLE DOLLARS ($5,000.00) plus $0.01½ sur le total du lot.

En ce qui concerne l'option détenue par l'Union de Crédit, je m'engage à payer la demie de la commission exigée suivant entente ce jour même; soit la somme de TROIS MILLE CINQ CENTS DOLLARS ($3,500.00).

Cette entente prévaudra sur l'option que je pourrai signer démontrant une commission moindre.

(signé) OVIDE JOLICŒUR

Jacques Germain, qui est mis-en-cause, est vice-président de la corporation intimée, La Centrale d'Immeubles Ste-Foye Inc., et est son agent. L'action de l'intimée a été maintenue avec dépens par l'honorable Juge de la Cour supérieure, et ce jugement a été confirmé par la Cour d'Appel[1].

Le 19 octobre 1959, l'*appelant Jolicœur* et J. Germain, le mis-en-cause, auraient fait une nouvelle convention, mais Jolicœur ne l'a jamais signée. Cependant, il semble qu'on lui a donné effet à une date ultérieure. Elle se lit ainsi:

LA CENTRALE D'IMMEUBLES STE-FOYE INC.
Ste-Foye Central Realties Inc.
COURTIERS EN IMMEUBLES

LA 7-7668

MU 3-4397

100, St-Jean Bosco, Ste-Foye—Québec 10.

le 19 octobre 1959.

AVENANT: faisant partie de la convention faite le 6 octobre 1959 entre J. Ovide Jolicœur et Jacques Germain et ou La Centrale d'Immeubles Ste-Foy Inc., relativement à la vente du lot 26 de Ste-Foye, et incluant l'option que j'ai signée le 7 octobre 1959, à monsieur Simon Cobrin de Montréal.

ATTENDU que monsieur Cobrin, a de par son option du 7 octobre 1959 le privilège de désigner une autre personne et que *cette personne désignée est Jacques Germain;*

JE, Ovide Jolicœur, consens et accepte que le prix de vente mentionné de $155,000.00 soit réduit à $150,000, vu que monsieur Germain, consent à réduire sa commission d'un montant de $5,000.00 (Cinq-mille-dollars), le tout sans préjudice aux droits des parties concernées.

SIGNÉ ce 19e jour d'octobre 1959.

par O. Jolicœur
(signé) J. GERMAIN
J. Germain

[1] [1964] B.R. 79.

Le 7 octobre 1959, soit le lendemain du jour où l'appelant Jolicœur a consenti à payer la commission qui est réclamée dans la présente cause, *si le lot était vendu à un client,* Simon Cobrin a été présenté à Jolicœur et l'appelant a consenti à M. Cobrin une option dans laquelle il s'engageait à lui vendre le terrain ci-dessus mentionné au prix de $155,000. En vertu de cette option, l'appelant Jolicœur s'engageait à respecter la convention du 6 octobre 1959 (soit celle relative à la commission qui devait être payée). Par cette convention du 6 octobre la commission était payable à l'intimée ou au mis-en-cause, Jacques Germain, et l'appelant a reconnu que si une commission est due, elle l'est à l'intimée qui a agi par l'entremise du mis-en-cause. C'est pourquoi l'option mentionne la convention du 6 octobre 1959 intervenue avec M. Jacques Germain. Il est important de ne pas oublier que cette option d'achat en faveur de Simon Cobrin stipule que cette option d'achat peut être exercée par M. Cobrin, *ou par toute autre personne par lui désignée.*

Cobrin a désigné Germain comme étant la personne pouvant exercer l'option qu'aurait consentie Jolicœur. Il est certain que Germain agissait toujours comme représentant et préposé de La Centrale d'Immeubles Ste-Foye Inc. Lui-même, dans son témoignage, dit ce qui suit:

> D. Quand l'un ou l'autre agissait ou signait un contrat ça valait pour les deux?
>
> R. Ç'allait pour la Centrale d'Immeubles.

De plus, dans son témoignage, M. Germain déclare:

> D. Vous étiez l'agent de qui lorsque vous avez fait affaires avec M. Jolicœur?
>
> R. J'agissais pour la Centrale d'Immeubles Ste-Foye Inc.

Il ne fait donc aucun doute quelconque que Germain, le vice-président de la compagnie intimée et son agent autorisé, était le véritable représentant de la compagnie intimée.

Mais, il est arrivé par les trois ventes suivantes, ce qui suit: Ovide Jolicœur, l'appelant, a vendu, le 12 décembre 1959, à Ovide Jolicœur Inc. et, le même jour, devant le même notaire, il y a une vente de Ovide Jolicœur Inc. à Jacques Germain, et également le même jour, soit le 12 décembre 1959, une vente de Jacques Germain à Covin Development Corporation, représentant les intérêts Cobrin.

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

Taschereau J.C.

Je dois dire que ces ventes successives, et toutes exécutées le même jour, me paraissent étranges. Il résulte de tout ceci que l'appelant Jolicœur, qui avait nommé l'intimée ou Germain comme agents pour vendre cet immeuble, a reçu $150,000, et que l'intimée et Germain ont touché $210,000, soit un profit de $60,000.

Or, il me semble clair, en vertu des dispositions du *Code Civil,* arts. 1484 et 1713, qu'un semblable achat par Germain, tant qu'il est mandataire de Jolicœur, ne peut avoir lieu. L'article 1484 se lit de la façon suivante:

> 1484. *Ne peuvent se rendre acquéreurs,* ni par eux-mêmes *ni par parties interposées,* les personnes suivantes, savoir:
>
> Les tuteurs et curateurs, des biens de ceux dont ils ont la tutelle ou la curatelle, excepté dans le cas de vente par autorité judiciaire;
>
> *Les mandataires, des biens qu'ils sont chargés de vendre;*
>
> Les administrateurs ou syndics, des biens qui leur sont confiés, soit que ces biens appartiennent à des corps publics ou à des particuliers;
>
> Les officiers publics, des biens nationaux dont la vente se fait par leur ministère.
>
> *L'incapacité énoncée dans cet article ne peut être invoquée par l'acheteur; elle n'existe qu'en faveur du propriétaire* ou autre partie ayant un intérêt dans la chose vendue.

L'article 1713 est ainsi rédigé:

> 1713. Le mandataire est tenu de rendre compte de sa gestion, et de remettre et payer au mandant tout ce qu'il a reçu sous l'autorité de son mandat, *même si ce qu'il a reçu n'était pas dû au mandant;* sauf néanmoins son droit de déduire du montant, ses déboursés et son dû à raison de l'exécution du mandat. Si, ce qu'il a reçu est une chose déterminée, il a droit de la retenir jusqu'au remboursement.

Dans Dalloz Hebdomadaire 1934, p. 511, on lit ce qui suit:

> Attendu qu'aux termes de l'article 1993 C.C. (notre article 1713), le mandataire est tenu de faire raison au mandant de tout ce qu'il a reçu en vertu de sa procuration, quand même ce qu'il a reçu n'eût point été dû au mandant; que ce principe trouve son application en l'espèce, les sommes payées en sus du tarif ayant, aux termes des constatations de l'arrêt, été, en dépit de l'erreur commise par les débiteurs sur l'étendue de leur dette, versées volontairement par Hartmann en sa qualité de mandataire et en vue de leur remise à la Fédération; d'où il suit qu'en faisant application au prévenu des dispositions de l'article 408 C. pén., la Cour de Colmar n'a violé aucun des textes visés au moyen.

Beaudry-Lacantinerie, Droit Civil, 'De la Vente et de l'Échange', 3e édition, à la page 242, dit ceci:

> ...il est à peine besoin de dire qu'il ne pourrait pas jouer à la fois *le double rôle de vendeur et d'acheteur... Il est incapable d'acheter les biens qu'il est chargé de vendre.*

Dans la cause qui nous occupe, Jolicœur avait confié un mandat à Germain de vendre pour la somme finalement fixée à $150,000, et il s'est engagé à lui payer la commission mentionnée précédemment. Comme conséquence de ventes successives Jacques Germain a vendu à Covin Development Co. pour $210,000, et a fait un profit de $60,000 au détriment de Jolicœur. Il a donc été l'acheteur, quand Jolicœur lui a vendu, du lot 26 qu'il avait mission de vendre, et a réalisé le profit en question quand il a vendu à Covin Development. Les articles 1484 et 1713 lui interdisent de faire de semblables transactions et de servir deux maîtres. *Seul Jolicœur pouvait invoquer l'interdiction prononcée par l'article 1484.* Enfin, je suis bien certain que Jolicœur ignorait le profit que réalisait ou devait réaliser Germain.

On demande à Germain, le vice-président de l'intimée:

D. Alors de qui étiez-vous le prête-nom ou le *représentant?*
R. De messieurs Cobrin.

Germain admet qu'il est la personne désignée pour exercer l'option, et cependant ailleurs dans son témoignage, il affirme que *lui ou la Centrale d'Immeubles Ste-Foye* a reçu de l'appelant le mandat, moyennant le paiement d'une commission, de vendre le terrain en question. Il se trouve à la fois l'agent du venteur Jolicœur et le représentant des acheteurs Cobrin (C.C. 1706).

Il est clair qu'il y a là conflit et que Germain, vice-président de l'intimée, ne peut, dans ces conditions, servir avec fidélité les intérêts de Jolicœur. D'ailleurs, les événements ont prouvé que pour Germain, les intérêts des Cobrin et le sien, étaient supérieurs à ceux de Jolicœur. Ce dernier consent de payer une généreuse commission *si on vend son terrain,* et, cependant, Germain lui fait réduire son prix à $150,000, alors qu'il devait recevoir $155,000. Germain se fait désigner par les Cobrin pour exercer l'option, et revend à ces derniers pour $210,000, soit un profit de $60,000 dont Jolicœur a été privé. Germain n'a pas scrupuleusement rempli son devoir vis-à-vis Jolicœur. Ce dernier peut donc dire avec raison qu'il n'aurait jamais accepté la dernière clause, s'il s'était douté que la personne désignée par Simon Cobrin pour exercer l'option, serait son propre agent et mandataire.

Ceci est confirmé par un fait révélateur des intentions de Germain. Quand on a, le même jour, signé plusieurs actes

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

Taschereau J.C.

inutiles, Jolicœur et Gendron (ce dernier secrétaire d'Ovide Jolicœur Incorporée), ont assisté à la lecture de deux des actes, mais furent invités à se retirer sans qu'on leur lise les autres contrats, et en particulier l'acte de vente de Germain à Covin Development, où le prix de vente était fixé à $210,000, on voulait évidemment cacher à Jolicœur que, le 12 décembre, il avait vendu pour $150,000 et que, le même jour, Germain revendait pour $210,000 le bien qui faisait l'objet de son mandat. Il réalisait ainsi un profit de $60,000 dont Jolicœur a été dépouillé. Germain a mieux servi ses propres intérêts et ceux des Cobrin, que ceux de son mandant qui avait reposé sa confiance en lui. Germain voulait hors la connaissance de Jolicœur spéculer sur l'acquisition d'un droit qu'il était chargé de protéger et de vendre pour le bénéfice de l'appelant.

Germain prétend qu'il était le prête-nom ou le représentant des Cobrin. Il l'affirme sous serment dans son témoignage. Ces deux appellations n'ont pas la même signification. Mais, quoi qu'il en soit, on ajoute qu'il n'a pas acheté personnellement et n'a pas violé les dispositions de l'art. 1484 C.C. Admettre cette prétention c'est mettre de côté l'art. 1030 C.C. qui veut qu'on est *censé stipuler pour soi-même* et ses héritiers, à moins que le contraire ne soit exprimé ou ne résulte de la nature du contrat. Dans le cas présent, les actes démontrent que Germain a agi personnellement; il a signé de son nom tous les actes où il apparaît, sans jamais dévoiler un principal, s'il en a un. Quand il a vendu à Covin Development, il reconnaît avoir reçu en acompte sur le prix de vente la somme de $90,000, pour laquelle il a donné quittance; quant à la balance, elle est, en vertu de l'acte de vente, *payable partie à la compagnie intimée, la centrale d'Immeubles Ste-Foye Inc.*, dont Germain est le vice-président, et partie à Ovide Jolicœur, pour compléter le prix de vente de $150,000 sur lequel il n'avait reçu qu'un acompte de $30,000.

On voit donc de toute évidence que Germain n'était pas prête-nom et ne représentait pas les Cobrin, mais qu'il agissait personnellement et comme représentant de l'intimée, à qui près de $100,000 doivent être payés. De plus, c'est lui qui se fait donner la promesse du 23 octobre 1959, et qui se fait consentir la vente du 12 décembre. Rien ne démontre dans les actes que Germain n'a pas agi personnel-

lement, et la nature du contrat ne détruit pas la présomption créée par l'art. 1030 C.C. En outre, l'art. 1210 C.C. est à l'effet *que les actes authentiques font preuve complète entre les parties* de l'obligation qui y est exprimée.

Quand Germain dit qu'il est prête-nom ou représentant des Cobrin, il contredit tous les écrits reçus devant notaires, et par conséquent authentiques, et il invite les tribunaux à fermer les yeux sur les arts. 1030 et 1210 C.C. Je ne suis pas disposé à suivre cette ligne de conduite. De plus, en se disant prête-nom ou représentant des Cobrin, il fonde sa prétention sur une illégalité (C.C. 1484), car il n'a pas plus le droit d'acheter comme représentant ou prête-nom de l'acheteur que d'être l'acheteur lui-même. Qu'il soit acheteur ou représentant, il y a conflit d'intérêt avec le vendeur dont il est le mandataire, et c'est ce que dans sa sagesse le législateur a interdit. L'article 1484 C.C. est formel et impératif. Il défend au mandataire du vendeur d'acheter personnellement *ou même par parties interposées,* les biens qu'il est chargé de vendre. Enfin, si Germain était véritablement le représentant des Cobrin, pourquoi revendre aux Cobrin si, par son entremise, ces derniers avaient déjà acheté de Jolicœur.

Mais il y a davantage. Quand le 12 décembre 1959, Ovide Jolicœur Incorporée, aux droits de Ovide Jolicœur personnellement, a vendu à Jacques Germain le lot n° 26, le mandat de l'appelant au mis-en-cause et à la compagnie intimée a nécessairement pris fin, de même que le droit à la commission. L'intimée, en effet, par son vice-président Germain, agissant pour elle, a alors décidé de se porter partie au contrat et acquéreur du lot dont l'appelant a été le vendeur. Si le vendeur vend à son mandataire, comme la chose est arrivée dans le cas présent, *le mandat est terminé.* Il n'existe plus d'agence, et l'interdiction édictée à l'art. 1484 C.C. n'existe plus. L'agent cesse d'être agent; il n'est plus le mandataire du principal, mais il est l'acheteur.

C'est que le mandant est intervenu alors pour relever le mandataire de son incapacité (1484 C.C.). Le mandant confie la gestion d'une affaire licite à un mandataire (1701 C.C.), mais il peut mettre fin à la mission qu'il a donnée au mandataire de vendre l'immeuble à un tiers, en permettant au mandataire d'acheter personnellement. Alors l'idée de mandat, d'agence, disparaît de même que le droit à la

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

Taschereau J.C.

commission. Un vendeur ne paye pas de commission à son acheteur. La commission est due au mandataire. En outre, l'option stipule clairement que la commission n'est due que si Germain *vend à un client,* et non pas s'il achète personnellement.

On a reproché à l'appelant de ne pas s'être prévalu de l'art. 1713 C.C. et de ne pas avoir poursuivi son agent Germain pour lui réclamer la somme de $60,000 qui lui serait due. Évidemment ce recours était possiblement ouvert à Jolicœur, mais le défaut de ne pas avoir poursuivi ne le prive en aucune façon de prétendre avec raison qu'il ne doit pas la commission qu'on lui réclame.

Pour ma part, je ne puis sanctionner les transactions qui sont intervenues, qui, à mon sens, libèrent l'appelant de l'obligation de payer la commission réclamée.

Je suis d'opinion de maintenir l'appel et de rejeter l'action, avec dépens de toutes les Cours contre l'intimée. Il n'y aura pas de frais contre le mis-en-cause, qui n'a pas contesté l'action.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a unanimous judgment of the Court of Queen's Bench[1] affirming the judgment of Marquis J. in favour of La Centrale d'Immeubles Ste-Foye Inc., hereinafter referred to as "the respondent", for $15,581.86 with interest and costs.

The facts and the terms of the relevant documents are set out in detail in the reasons of Owen J. and a comparatively brief summary will be sufficient to indicate the reasons for the conclusion at which I have arrived.

The respondent is engaged in the business of a real estate agent. Jacques Germain, the mis-en-cause, hereinafter referred to as "Germain" is the vice-president of the respondent and in all of his dealings with the appellant with which we are concerned was agent of the respondent acting within the scope of his authority.

The action was brought for commission agreed to be paid by the appellant to the respondent for effecting a sale of a property, lot number 26, owned by the former.

The appellant denies any liability to the respondent but, if he is liable, there is no dispute as to the amount.

[1] [1964] Que. Q.B. 79.

By the terms of a contract dated October 6, 1959, as modified by a rider dated October 19, 1959, the appellant agreed to pay a commission, for the amount of which judgment has been given against him, in consideration of the respondent effecting a sale of his property to one Simon Cobrin for $150,000. This sale was carried out in the following manner. The appellant gave to Simon Cobrin an option, dated October 7, 1959, to purchase the property, which contained the following clause:

> La présente option d'achat vaudra en faveur dudit M. Simon Cobrin ou de toute autre personne par lui désignée;

The rider of October 19, 1959, referred to above, provided:

> Attendu que monsieur Cobrin, a de par son option du 7 octobre 1959 le privilège de désigner une autre personne et que cette personne désignée est Jacques Germain;
>
> Je, Ovide Jolicœur, consens et accepte que le prix de vente mentionné de ($155,000.00) soit réduit à $150,000.00, vu que monsieur Germain, consent à réduire sa commission d'un montant de $5,000.00 (Cinq-mille-dollars), le tout sans préjudice aux droits des parties concernées.

On October 23, 1959, two notarial deeds, each a promise of sale of lot 26, were executed, the first from the appellant to Germain for a price of $150,000 and the second from Germain to Sam Vineberg, Morton Vineberg, Frank Cobrin and Simon Cobrin for a price of $210,000. The first of these two deeds is signed by the appellant and its final paragraph reads as follows:

> La présente promesse de vente est en exécution d'une option signée par monsieur Ovide Jolicœur, le 7 octobre 1959, en faveur de monsieur Simon Cobrin ou de toute personne désignée par lui. Monsieur Simon Cobrin intervenant aux présentes, déclare accepter ledit monsieur Jacques Germain et l'autoriser à se prévaloir de ladite option.

On December 12, 1959, three deeds of sale of lot 26 were passed before the same notary, the first from the appellant to Ovide Jolicœur Inc. for a price of $103,879.10, the second from Ovide Jolicœur Inc. to Germain for a price of $150,000, and the third from Germain to Covin Development Corporation (a company formed by the Cobrins and the Vinebergs) for a price of $210,000. Each of these deeds was signed by the appellant, the first and third in his personal capacity and the second as president of Ovide Jolicœur Inc.

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

Cartwright J.

Up to this point it would appear that the respondent as agent of the appellant effected a sale of the latter's property at the price agreed upon and would *prima facie* be entitled to the commission.

In this Court, in answer to the respondent's claim the appellant puts forward two defences. His position is concisely stated in his factum in the following words:

> L'objet du litige peut être résumé comme suit:
>
> La Compagnie «La Centrale d'Immeubles Ste-Foye Inc.» a réclamé paiement d'une somme de $15,581.86 avec intérêt pour une commission sur la vente d'un immeuble de l'appelant-immeuble qui a été effectivement vendu. Cette demande a été contestée. L'appelant retient deux moyens, qui sont les suivants:
>
> Le mandat de vendre s'est terminé lorsque l'intimée, par le truchement de son agent, a acquis les biens qu'elle avait charge de vendre.
>
> Si le mandat ne s'est pas terminé, un profit de $60,000.00 a été obtenu au détriment de l'appelant, par la revente des biens compensant ainsi la commission d'agent à laquelle elle prétend.

As I read the reasons for judgment in the Courts below the validity of these two defences as a matter of law is not doubted. They have been rejected because it has been found as a matter of fact that neither the respondent nor its agent Germain became the purchaser of the appellant's property or made any profit on its resale. While on the face of the relevant documents Germain, who was acting throughout within the scope of his authority as agent of the respondent, appeared to become the purchaser and to make the profit referred to, the courts below have found that in taking the deed of the property and in reselling he was acting not personally or for his own benefit or that of the respondent but as prête-nom of Cobrin and solely for Cobrin's benefit.

There are clear concurrent findings of fact on this point and there is evidence to support them. In my opinion no sufficient ground has been shewn to warrant our interfering with these findings.

For these reasons I would dismiss the appeal with costs.

LE JUGE FAUTEUX (*dissident*):—L'appelant se pourvoit à l'encontre d'une décision unanime de la Cour du banc de la reine[1]. Cette décision confirme un jugement de la

[1] [1964] B.R. 79.

1966

JOLICŒUR v. CENTRALE D'IMMEUBLES STE-FOYE INC.

Fauteux J.

Cour supérieure condamnant l'appelant à payer à l'intimée une somme de $15,581.86 à titre de commission sur la vente d'un terrain.

A mon avis, et soit dit en toute déférence pour ceux qui entretiennent l'opinion contraire, le jugement *a quo* est bien fondé et ce pour les raisons données par M. le Juge Owen avec l'accord de ses collègues, raisons auxquelles je ne puis utilement ajouter.

Je rejetterais l'appel: avec dépens.

Appel maintenu, les JUGES CARTWRIGHT et FAUTEUX *étant dissidents.*

Procureur du défendeur, appelant: Guy Hudon, Québec.

Procureurs de la demanderesse, intimée: Bouffard, Turgeon, Larochelle, Amyot, Dery, Choquette & Lesage, Québec.

NOTE DE LA RÉDACTION: Une requête demandant une nouvelle audition de cet appel fut présentée à la Cour le 26 avril 1966 et fut refusée le même jour.

1966

*June 20, 21, 22 Oct. 4

COMMISSION DU SALAIRE MINIMUM (*Plaintiff*) ..... APPELLANT;

AND

THE BELL TELEPHONE COMPANY OF CANADA (*Defendant*)..... RESPONDENT.

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

Constitutional law—Labour—Minimum wages—Imposition of levy—Telephone company operating inter-provincial telecommunication system and service—Whether subject to provincial statute—Minimum Wage Act, R.S.Q. 1941, c. 164—Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152—Canada Labour Statutes Code, 1964-65 (Can.), c. 38—B.N.A. Act, 1867, ss. 91(29), 92(10).

Pursuant to a by-law enacted by virtue of the powers conferred upon it by the *Minimum Wage Act*, R.S.Q. 1941, c. 164, the Minimum Wage Commission sought to impose a wage levy upon the defendant

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

company, in respect of the year 1959. The defendant contended that it was not subject to the *Minimum Wage Act*. The trial judge maintained the action, but his judgment was reversed by the Court of Appeal. The Commission appealed to this Court. The Attorney General of Canada, the Attorney General of Quebec and the Attorney General for Ontario were granted leave to intervene.

Held: The appeal should be dismissed.

The *Minimum Wage Act*, being a statute which, *inter alia*, purports to regulate to an extent the wages to be paid by an employer to his employees, does not apply to the defendant company because the defendant is an undertaking of the kind described in subs. 10(*a*) and (*c*) of s. 92 of the *B.N.A. Act*. The determination of such matters as hours of work, rates of wages, working conditions and the like, is a vital part of the management and operation of any commercial or industrial undertaking. Regulation of the field of employer and employees' relationships in an undertaking such as that of the defendant is a "matter" coming within the class of subjects defined in s. 92(10)(*a*) of the *B.N.A. Act* and, consequently, is within the exclusive legislative jurisdiction of the Parliament of Canada. Therefore, any provincial legislation in that field, whilst valid in respect of employers not within exclusive federal legislative jurisdiction, cannot apply to employers who are within that exclusive control.

Droit constitutionnel — Travail—Salaire minimum — Prélèvement d'un impôt—Compagnie de téléphone opérant un système interprovincial de communications et de service—Compagnie est-elle sujette au statut provincial——Loi du Salaire minimum, S.R.Q. 1941, c. 164—Loi sur les Relations industrielles et sur les enquêtes visant les différends du travail, S.R.C. 1952, c. 152—Code canadien du travail, 1964-65 (Can.), c. 38—Acte de l'Amérique du Nord britannique, 1867, arts. 91(29), 92(10).

La Commission du Salaire minimum a réclamé de la compagnie défenderesse une somme de quelque $50,000 à titre de prélèvement pour l'année 1959 aux termes de son règlement passé en vertu des pouvoirs qui lui sont conférés par la *Loi du Salaire minimum*, S.R.Q. 1941, c. 164. La défenderesse soutient qu'elle n'était pas sujette à la *Loi du Salaire minimum*. Le Juge au procès a maintenu l'action, mais son jugement a été renversé par la Cour d'Appel. La Commission en appela devant cette Cour. Le Procureur Général du Canada, le Procureur Général de Québec et le Procureur Général de l'Ontario ont obtenu la permission d'intervenir.

Arrêt: L'appel doit être rejeté.

La *Loi du Salaire minimum*, étant un statut qui, entre autres, a pour but de réglementer jusqu'à un certain point les salaires qu'un employeur doit payer à ses salariés, ne s'applique pas à la compagnie défenderesse parce que cette compagnie est une entreprise de la sorte de celles qui sont décrites aux paragraphes 10(*a*) et (*c*) de l'article 92 de l'*Acte de l'Amérique du Nord britannique*. La détermination de matières telles que les heures de travail, les taux des salaires, les conditions de travail et autres semblables, est une partie essentielle de l'administration et de l'opération de toute entreprise commerciale ou industrielle. La réglementation du domaine des relations entre employeurs et salariés dans une entreprise telle que celle de la défenderesse est une «matière» tombant dans la catégorie des sujets énumérés à l'article

92(10)(*a*) de l'*Acte de l'Amérique du Nord britannique* et, en conséquence, relève de la compétence législative exclusive du Parlement du Canada. Conséquemment, toute législation provinciale dans ce domaine, quoique valide relativement aux employeurs ne tombant pas sous la juridiction législative exclusive du fédéral, ne peut pas s'appliquer aux employeurs qui tombent sous ce contrôle exclusif.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Brossard. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Brossard J. Appeal dismissed.

Gérald Le Dain, Q.C., and *Arthur Boivin, Q.C.*, for the plaintiff, appellant, and for the Attorney General of Quebec.

P. C. Venne, Q.C., and *Jean de Grandpré, Q.C.*, for the defendant, respondent.

Rodrigue Bédard, Q.C., for the Attorney General of Canada.

F. W. Callaghan and *E. M. Pollock*, for the Attorney General for Ontario.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the unanimous decision of the Court of Queen's Bench (Appeal Side) of the Province of Quebec[1], which allowed the appeal of the present respondent from the judgment at trial and dismissed the appellant's action against the respondent.

The appellant's claim was for the sum of $53,473.64, being the amount of a levy which the appellant sought to impose upon the respondent, in respect of the year 1959, pursuant to By-Law B1, 1947, enacted by the appellant by virtue of the powers conferred upon it by the *Minimum Wage Act*, R.S.Q. 1941, c. 164, being a sum of one-tenth of one per cent of the wages paid to its employees governed by an ordinance of the appellant. The statutory authority to impose such a levy is found in s. 8e of that Act, which enabled the appellant:

To levy upon the professional employers contemplated by an ordinance a sum not exceeding one per cent of the wages paid to their employees.

[1] [1966] Que. Q.B. 301.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

Martland J.

The appellant, prior to the enactment of the by-law above mentioned, had enacted Ordinance No. 4, 1957, applicable to all employees governed by the *Minimum Wage Act*, with certain specified exceptions. The respondent's employees were not within any of the excepted categories. It provided, inter alia, for minimum wage rates, hours of work, payment of overtime and holidays with pay.

The authority to enact the ordinance is contained in s. 13 of the Act, which provides that:

> 13. The Commission may, by ordinance, determine, for stated periods of time and for designated territories, the rate of minimum wage payable to any category of employees indicated by it, the terms of payment, working hours, conditions of apprenticeship, the proportion between the number of skilled workmen and that of apprentices in any stated undertaking, the classification of the operations and the other working conditions deemed in conformity with the spirit of the Act.

The respondent contends that it is not subject to the levy because the provisions of the ordinance and of the statute pursuant to which the ordinance was enacted cannot apply to it, since it is an undertaking of the kind described in subs. 10(*a*) and (*c*) of s. 92 of the *British North America Act*. That the respondent is an undertaking falling within the class defined in subs. 10(*a*) and that it has been declared by the Parliament of Canada to be a work for the general advantage of Canada pursuant to subs. 10(*c*) is not in issue.

There is no question as to the amount involved or as to the respondent being subject to the levy if the defence which it has raised is not sustained. It is also conceded that the *Minimum Wage Act* is, generally, within the competence of the Legislature of Quebec. The only matter to be determined is whether it can apply to an undertaking which is within paras. (*a*), (*b*) or (*c*) of subs. 10 of s. 92 of the *British North America Act*.

Three of the judges in the Court below (the Chief Justice and Rinfret and Owen JJ.) were of the opinion that the fixing of a minimum wage and the regulation of the other matters provided for in the *Minimum Wage Act* could, in relation to the employees of such an undertaking, be effected only by the Parliament of Canada. The other two members of the Court (Hyde and Taschereau JJ.), while of the opinion that, in the absence of legislation by the federal parliament, the provincial legislation would be applicable,

were of the opinion that the key section of the Act, s. 13, did, in fact, conflict with the provisions of the *Industrial Relations and Disputes Investigation Act,* R.S.C. 1952, c. 152.

The appellant's submission is that the legislation in question did apply to the respondent until the federal parliament occupied the field and that this was not done until the enactment, on March 18, 1965, of the *Canada Labour Standards Code,* Statutes of Canada 1964-65, c. 38.

The relevant provisions of the *British North America Act* are as follows:

> 91. . . . it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
>
> * * *
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
>
> * * *
>
> 10. Local Works and Undertakings other than such as are of the following Classes:—
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:
>
> (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

I have quoted these well known provisions of the Act in full because I think it is of assistance to refer back to their actual wording in defining the issue in the present case. The *Minimum Wage Act* is a statute which, inter alia, purports to regulate to an extent the wages to be paid by the respondent to its employees. If the regulation of the wages paid to its employees by an undertaking within the excepted classes in s. 92(10) is a *"matter"* coming within those classes of subject, then, by virtue of s. 91(29), it is within the exclusive legislative authority of the Canadian Parliament.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

Martland J.

The question is, therefore, as to what "matters" are within the classes of legislative subjects defined in that paragraph. Clearly they extend beyond the mere physical structure of, e.g., a railway or a telegraph system. The words "works" and "undertakings" are to be read disjunctively (*Attorney-General for Ontario v. Winner*[1]) and the word "undertaking" has been defined in *re Regulation and Control of Radio Communication in Canada*[2]:

> "Undertaking" is not a physical thing, but is an arrangement under which of course physical things are used.

In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament within s. 91(29). It was not disputed in argument that the regulation of the rates to be paid by the respondent's customers is a matter for federal legislation. In the *Winner* case, *supra,* the regulation of those places at which passengers of an interprovincial bus line might be picked up or to which they might be carried was held not to be subject to provincial control. Similarly, I feel that the regulation and control of the scale of wages to be paid by an interprovincial undertaking, such as that of the respondent, is a matter for exclusive federal control.

I would adopt the statement of Abbott J. in this Court, in the *Reference as to the Validity of the Industrial Relations and Disputes Investigation Act*[3]:

> The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

In my view, this conclusion does not run counter to decided authorities. They have been carefully reviewed in the judgments in the Court below. I do not propose to discuss them in detail, but will confine my remarks to the two authorities on which counsel for the appellant chiefly relied.

[1] [1954] A.C. 541, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225.
[2] [1932] A.C. 304 at 315, 1 W.W.R. 563.
[3] [1955] S.C.R. 529 at 592, 3 D.L.R. 721.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

Martland J.

The first of these is *Workmen's Compensation Board v. Canadian Pacific Railway Company*[1]. That action was brought by the railway company to prevent the British Columbia Workmen's Compensation Board from paying compensation to dependants of crew members employed on one of the company's steamships which was lost outside British territory. The notes of the argument do not indicate that counsel for the railway company relied at all upon the fact that it was an undertaking within s. 92(10)(*b*). The case was argued on the issue as to whether the *Workmen's Compensation Act* affected civil rights outside the province when it applied to accidents occurring outside the province.

The only passage in the judgment which refers to the position of the company as a railway company is the following, at p. 192:

> No doubt for some purposes the law sought to be enforced affects the liberty to carry on its business of a Dominion railway company to which various provisions of s. 91 of the British North America Act of 1867 apply. But for other purposes, with which the Legislature of British Columbia had jurisdiction to deal under s. 92, it was competent to that Legislature to pass laws regulating the civil duties of a Dominion railway company which carried on business within the Province, and in the course of that business was engaging workmen whose civil rights under their contracts of employment had been placed by the Act of 1867 within the jurisdiction of the province.

There is no specific reference in this passage to s. 92(10), nor is it attempted to define the scope of those matters with respect to which the federal parliament has exclusive legislative jurisdiction under that subsection. The case did hold that the railway company was subject to the provisions of the *Workmen's Compensation Act*.

In my opinion there is a distinction between legislation of that kind, and that which is in issue here. The *Workmen's Compensation Act* conferred upon injured employees and upon the dependants of deceased employees certain statutory rights to compensation where the injury or death resulted from an accident arising out of and in the course of the employment. Compensation was payable not by the employer, but out of a fund administered by the Board to which employers were required to contribute. Viscount Haldane (p. 191) refers to the employee's right under the Act as the result of a "statutory condition of employment",

[1] [1920] A.C. 184, 48 D.L.R. 218.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

Martland J.

but I think it is more accurately described as a statutory right. The Act did not purport to regulate the contract of employment. What it did do was to create certain new legal rights which were to be in lieu of all rights of action to which the employee or his dependants might otherwise have been entitled at common law or by statute.

On the other hand, a statute which deals with a matter which, apart from regulatory legislation, would have been the subject matter of contract between employer and employee, e.g., rates of pay or hours of work, affects a vital part of the management and operation of the undertaking to which it relates. This being so, if such regulation relates to an undertaking which is within s. 92(10) (*a*), (*b*) or (*c*), in my opinion it can only be enacted by the federal parliament.

The other authority on which counsel for the appellant particularly relied was the *Reference as to the Legislative Jurisdiction over Hours of Labour*[1]. That was a reference to this Court by the Governor General in Council, which was made as a result of the draft convention adopted by the International Labour Conference of the League of Nations limiting the hours of labour in industrial undertakings. An article in the Treaty of Versailles provided that each of the members of the Labour Conference undertook to bring the draft convention before the authorities competent to legislate. Canada was a member, and the reference was made to determine the appropriate legislative authorities.

The conclusion of this Court was that primarily the subject matter of hours of work was generally within the competence of the provincial legislatures, but that the authority of those legislatures did not extend to enable them to give the force of law to the provisions contained in the draft convention in relation to servants of the Dominion Government.

In the course of the reasons of this Court, delivered by Duff J. (as he then was), there was a brief reference, at p. 511, to ss. 91(29) and 92(10) of the *British North America Act*, in the following terms:

> It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation

[1] [1925] S.C.R. 505.

touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force. There would appear to be no doubt that, as regards such undertakings—a Dominion railway, for example—the Dominion possesses authority to enact legislation in relation to the subjects dealt with in the draft convention.

He went on to say that, there having been no Dominion legislation on the subject, other than the empowering of the Board of Railway Commissioners to make regulations concerning hours of duty of railway employees with a view to the safety of the public and of the employees, which power had never been exercised by the Board, the primary authority of the provincial legislatures remained unimpaired.

This case lends some support to the argument that the federal power to legislate on the matter of hours of work in relation to undertakings subject to federal legislation under s. 92(10) is an ancillary rather than an exclusive power, but the issue did not have to be determined in that case.

As is pointed out in the Court below by Rinfret J., the judgment of this Court, delivered by Duff J. in the *Reference re Waters and Water-Powers*[1], contains, at p. 214, a reference to the fact that:

"railway legislation, strictly so called" (in respect of such railways), is within the exclusive competence of the Dominion, and such legislation may include, inter alia, regulations for the construction, the repair and the alteration of the railway and for its management.

He referred to the case of *Canadian Pacific Railway v Corporation of the Parish of Notre Dame de Bonsecours*[2].

Again, at p. 226, he says:

As to the first branch, it seems unnecessary to say that a province would be exceeding its powers if it attempted to intervene in matters committed exclusively to Dominion control, by attempting, for example, to interfere with the structure or management of a work withdrawn entirely from provincial jurisdiction, such as a work authorized by the Dominion by legislation in execution of its powers under s. 92(10a).

There are two cases in this Court which, in my opinion, bear a closer relationship to the circumstances of the present case than either of the two authorities which I have just considered. The first of these is the *Reference re the*

[1] [1929] S.C.R. 200.

[2] [1899] A.C. 367 at 372.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

Martland J.

Minimum Wage Act of the Province of Saskatchewan[1]. The question in issue there was as to whether the Act in question applied to one Leo Fleming, who had been hired temporarily and paid by a postmistress of a revenue post office at Maple Creek, Saskatchewan. It was held that it did not apply, even though Parliament had not dealt with the subject by legislation.

Rinfret C.J. and Taschereau J. (as he then was) both held that as the "Postal Service" was a matter of exclusive federal legislative jurisdiction under s. 92(5), the provincial legislation could not apply to Fleming.

As Taschereau J. put it, at p. 257:

> It follows that the fixing of the wages of the Postal employees, is a matter in pith and substance "Postal Service Legislation", upon which the provinces may not legislate without invading a field "exclusively" assigned to the Dominion.

Rand J., with whom Locke J. concurred, said, at p. 263:

> I take this legislation to aim at the regulation of the business, occupation or employment in which the work of the employee for which the minimum wage is prescribed is carried out, and which, as well as the employer, is for such purposes within the legislative control of the province. In the case before us, the postmistress has neither business nor service of her own into which the employee is or can be introduced; and *the actual employment to which the employee is committed is beyond provincial jurisdiction.* The condition for the application of the statute is, therefore, absent. Were the post office operated as a private provincial business, I have no doubt that in the circumstances here the proprietor would be bound by the Act as employer and the postmistress as his agent.

(The italics are my own.)

Kellock J. based his opinion on the proposition that a provincial legislature could not legislate as to the hours of labour of Dominion servants.

Estey J., at p. 269, said:

> If, therefore, the said employment of Fleming was within the "Postal Service" as that term is used in the B.N.A. Act, his employment was subject to Dominion legislation only.

In my view, the conclusion in this case is properly stated in the headnote, as follows:

> The employee became employed in the business of the Post Office of Canada and therefore part of the Postal Service. His wages were, as such, within the exclusive legislative field of the Parliament of Canada and any encroachment by provincial legislation on that subject, must be looked

[1] [1948] S.C.R. 248, 91 C.C.C. 366, 3 D.L.R. 801.

upon as being ultra vires, whether or not Parliament has or has not dealt with the subject by legislation.

1966

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE CO. OF CANADA

Martland J.

I see no difference in principle between the position of an employee hired and paid, not by the Crown, but by an individual, but who was engaged in the Postal Service, s. 91(5), and an employee of an interprovincial undertaking, s. 91(29) and s. 92(10), in relation to the exclusive power of the federal parliament to legislate regarding his wage rate.

The other decision is in respect of the *Reference as to the Validity of the Industrial Relations and Disputes Investigation Act*[1], to which I have already made some reference. This Court had to consider the validity of federal legislation in the field of labour relations applicable to businesses within the legislative authority of the Parliament of Canada. The Act was held to be within the federal power, and the decision, in my view, did recognize that that field constituted an essential part of the operation of such an undertaking.

With respect, I subscribe to this view. In my opinion, regulation of the field of employer and employee relationships in an undertaking such as that of the respondent's, as in the case of the regulation of the rates which they charge to their customers, is a "matter" coming within the class of subject defined in s. 92(10)(*a*) and, that being so, is within the exclusive legislative jurisdiction of the Parliament of Canada. Consequently, any provincial legislation in that field, while valid in respect of employers not within exclusive federal legislative jurisdiction, cannot apply to employers who are within that exclusive control.

The appeal should be dismissed with costs. There should be no costs payable by or to the intervenants.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: A. Boivin, Montreal.

Attorneys for the defendant, respondent: Munnoch, Venne, Fiset & Robitaille, Montreal.

[1] [1955] S.C.R. 529, 3 D.L.R. 721.

INDEX

AGENCY

See—Voir: CONTRACTS

AGENT

See—Voir: CONTRATS

APPEALS

1. Leave to appeal—Criminal law—Jurisdiction—Question of law—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 102, 597(1)(*b*).
TALBOT v. LA REINE, 49.

2. Application for re-issue of patent refused—Whether appeal lies to Exchequer Court—Patent Act, R.S.C. 1952, c. 203, ss. 2(*a*), 42, 44, 50.

FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMISSIONER OF PATENTS, 604.

3. *See* also—*Voir* aussi: CRIMINAL LAW.

4. *See* also—*Voir* aussi: JURISDICTION.

APPELS

1. Permission d'appeler—Droit criminel—Juridiction—Question de droit—Code criminel, 1953-54 (Can.), c. 51, arts. 21, 102, 597(1)(*b*).

TALBOT v. LA REINE, 49.

2. Requête pour la redélivrance d'un brevet refusée—Y a-t-il appel devant la Cour de l'Échiquier—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(*a*), 42, 44, 50.

FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMISSIONER OF PATENTS, 604.

3. *See* also—*Voir* aussi: DROIT CRIMINEL.

4. *See* also—*Voir* aussi: JURIDICTION.

ARBITRATION

1. Expropriation of appellant's land—Motion to set aside award of umpire—Existence of solicitor and client relationship between arbitrator and respondent at time of arbitration unknown to appellant—Disqualification of arbitrator fatal to validity of award.

GHIRARDOSI v. MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA, 367.

2. Option to purchase certain lands—One component of purchase price determined by arbitration—Arbitrator's award reduced by Court of Appeal—Interpretation of option's terms.

CITY OF TORONTO v. W.H. HOTEL LTD., 434.

3. Expropriation—Application to set aside or remit back arbitrators' award—Governing principle—Whether Appeal Division justified in examining proceedings before arbitrators or interfering with award—Whether opinion evidence of qualified appraiser inadmissible on ground it was hearsay—Arbitration Act, R.S.N.B. 1952, c. 9.

CITY OF SAINT JOHN v. IRVING OIL CO. LTD., 581.

ASSURANCE

Incendie—Hôtel détruit par le feu—Risques assurés par différents assureurs—Fausse description et dissimulation de fait—Les polices sont-elles invalides—Code Civil, arts. 2485, 2572.

CANADIAN HOME ASSURANCE CO. v. GAUTHIER, 305.

AUTOMOBILES

Intersection—Agent de circulation—Signal pour changer la direction du trafic—Jeune piéton frappé par une automobile alors qu'il traversait la rue—Norme des soins requis—La présomption a-t-elle été réfutée—Aggravation des dommages—Code de la Route, S.R.Q. 1941, c. 142, art. 53.

O'BRIEN v. MAILHOT, 171.

92709—9

BANKS AND BANKING

1. Sale of cattle subject to bank's security—Proceeds of sale deposited in debtor's account—Failure of bank's claim—Bank Act, 1953-54 (Can.), c. 48, s. 88.

HURLY et al. v. BANK OF NOVA SCOTIA et al., 83.

2. *See* also—*Voir* aussi: GUARANTEE.

BREVETS

1. Contrefaçon—Validité—Revendications trop étendues—Loi sur les Brevets, S.R.C. 1952, c. 203.

HOECHST PHARMACEUTICALS OF CANADA LTD. et al. v. GILBERT AND COMPANY et al., 189.

2. Procédure—Requête pour faire radier partie de la déclaration produite devant la Cour de l'Échiquier—Les procédures devant cette Cour doivent-elles être restreintes aux revendications qui sont en conflit devant le Commissaire des Brevets—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 45—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 21.

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE), 296.

3. Licence forcée—Préparation ou production de médicaments—La Cour de l'Échiquier confirmant la licence accordée par le Commissaire des Brevets—Redevance fixée par le Commissaire étant changée par la Cour de l'Échiquier—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 41(3).

HOFFMAN-LA ROCHE LTD. v. BELL-CRAIG PHARMACEUTICALS, DIVISION OF L.D. CRAIG LTD., 313.

4. Validité—Action pour invalidation—Déclaration d'invalidité—Réclamations par le demandeur pour dommages basés sur des menaces de poursuites judiciaires—Malice—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 28(1)(*b*), 46—Loi sur les Marques de commerce, 1952-53 (Can.), c. 49, arts. 7(*a*), (*e*), 52.

S. & S. INDUSTRIES INC. v. ROWELL, 419.

5. Licence obligatoire—Défaut d'exploiter l'invention sur une échelle commerciale—Abus des droits exclusifs—Justification du défaut d'exploitation—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(j), 46, 67, 68.

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX LTD., 593.

6. Requête pour redélivrance—Une erreur concernant la loi est-elle une erreur dans le sens de l'art. 50 de la Loi sur les Brevets, S.R.C. 1952, c. 203.

BREVETS—Concluded—Fin

FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMISSIONER OF PATENTS, 604.

7. *See* also—*Voir* aussi: APPELS.

CIVIL CODE

1.——Article 1074 (Damages) 506
See—Voir: IMMEUBLES AND IMMOVABLES

2.——Article 1233 (Testimony)..... 58
See—Voir: IMMEUBLES AND IMMOVABLES

3.——Article 1484 (Capacity to buy). 755
See—Voir: CONTRACTS AND CONTRATS

4.——Articles 1706, 1713 (Mandate).. 755
See—Voir: CONTRACTS AND CONTRATS

5.——Articles 2013, 2013*e* (Privileges) 661
See—Voir: PRIVILEGE

6.——Article 2103 (Registration of Privileges)..... 661
See—Voir: PRIVILEGE

7.——Article 2424 (Affreightment).... 180
See—Voir: NAVIGATION AND SHIPPING

8.——Article 2485 (Assurances)..... 305
See—Voir: ASSURANCE AND INSURANCE

9.——Article 2572 (Assurances)..... 305
See—Voir: ASSURANCE AND INSURANCE

CODE OF CIVIL PROCEDURE

1.——Articles 1066 et seq. (Expropriation)..... 732
See—Voir: EXPROPRIATION

2.——Article 1210 (Appeals)..... 320
See—Voir: JURIDICTION AND JURISDICTION

COMPANIES

1. Agreements entitling shareholders to purchase shares in proportion to existing holdings—Right claimed on basis of shares held including shares purchased and paid for but not yet registered.

GORDON et al. v. GABY et al., 527.

2. Purchase by one company of another company's gas distribution system—Claim that purchasing company was trustee of franchise for distribution of natural gas—Conspiracy claim—Claims dismissed—Fiduciary relationship not established.

COMPANIES—Concluded—Fin

CANADIAN WESTERN NATURAL GAS CO. v. CENTRAL GAS UTILITIES LTD., 630.

3. Directors—Fiduciary relationship—Offer of mining claims considered and rejected by full board of directors—Interest in claims subsequently acquired by director—Whether director liable to account.

PESO SILVER MINES LTD. v. CROPPER, 673.

4. Agreement to purchase all outstanding shareholders' loans and shares in capital of company—Mortgage of company to secure unpaid purchase price—Whether mortgage given without consideration and in contravention of s. 152(1) of Companies Act, R.S.B.C. 1960, c. 67.

OLAFSON et al. v. TWILIGHT CARIBOO LODGE LTD., 726.

CONSTITUTIONAL LAW

1. Criminal law—Provincial offence of careless driving—Whether conflict with offence of dangerous driving defined by Criminal Code—Highway Traffic Act, R.S.O. 1960, c. 172, s. 60—Criminal Code, 1953–54 (Can.), c. 51, s. 221(4).

MANN v. THE QUEEN, 238.

2. Criminal law—Provincial offence of careless driving—Collision with parked vehicle—Whether conflict with offence of dangerous driving defined by Criminal Code—Highway Traffic Act, R.S.O. 1960, c. 172, s. 60—Criminal Code, 1953–54 (Can.), c. 51, s. 221(4).

McIVER v. THE QUEEN, 254.

3. Expropriation of land for Green Belt in National Capital area—Whether Parliament has legislative authority to do so—National Capital Act, 1958 (Can.), c. 37, s. 13(1)—B.N.A. Act, 1867–1960, ss. 91, 92.

MUNRO v. NATIONAL CAPITAL COMMISSION, 663.

4. Labour—Minimum wages—Imposition of levy—Telephone company operating inter-provincial telecommunication system and service—Whether subject to provincial statute—Minimum Wage Act, R.S.Q. 1941, c. 164—Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152—Canada Labour Statutes Code, 1964–65 (Can.), c. 38—B.N.A. Act, 1867, ss. 91(29), 92(10).

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE COMPANY OF CANADA, 767.

CONTRACTS

1. Roofing contract—Descriptions and specifications supplied by owner—Guarantee that work will remain weather tight—Damage caused by failure of material to perform intended function—Contractor's claim for compensation for repairs—Whether responsibility for results of using material rests upon owner who prescribed it or upon contractor who applied it.

STEEL COMPANY OF CANADA LTD. v. WILLAND MANAGEMENT LTD., 746.

2. Agency—Real estate—Commission—Purchase of property by brokers—Prête-nom—Civil Code, arts. 1484, 1706, 1713.

JOLICOEUR v. CENTRALE D'IMMEUBLES STE-FOYE INC., 755.

CONTRATS

Agent d'immeubles—Commission—Achat de la propriété par le mandataire—Prête-nom—Code Civil, arts. 1484, 1706, 1713.

JOLICOEUR v. CENTRALE D'IMMEUBLES STE-FOYE INC., 755.

COURONNE

Pétition de droit—Ordre provisoire suspendant le service postal—La personne concernée a-t-elle le droit d'être entendue avant que l'ordre soit émis—Loi sur les Postes, S.R.C. 1952, c. 212, arts. 7, 40—Loi sur la Responsabilité de la Couronne, 1952–53 (Can.), c. 30—Loi sur la Déclaration canadienne des droits, 1960 (Can.), c. 44, art. 2(*e*).

THE QUEEN v. RANDOLPH et al., 260.

CRIMINAL LAW

1. Common gaming house—Premises occupied by branch of Canadian Legion—Bingo—Whether bona fide social club—Criminal law, 1953–54 (Can), c. 51, ss. 168(2)(*a*)(i), (ii), 176.

THE QUEEN v. MACDONALD et al., 3.

2. Member of Legislative Council—Undue exercise of influence—Whether legislative councillor an official—Whether acts must be done in his capacity as legislative councillor—Criminal Code, 1953–54 (Can.), c. 51, ss. 21, 99(*e*), 100, 102(1)(*a*)(ii)(iii), 592(4)(*b*), 597(2)(*a*).

MARTINEAU v. LA REINE, 103.

CRIMINAL LAW—Concluded—Fin

3. Appeals—Habeas corpus—Leave to appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 597(1)(*b*), 691(2)—Supreme Court Act, R.S.C. 1952, c. 259, s. 41(3).

TOKAR v. THE QUEEN, 194.

4. Accused in custody—Notice of appeal requesting that counsel be appointed by Court—Request refused—Accused notified only after hearing of appeal.

FREDERICK v. THE QUEEN, 257.

5. Indians—Hunting for food on Reserve out of season—Treaty rights—Whether exempt from provisions of the Migratory Birds Convention Act, R.S.C. 1952, c. 179—Indian Act, R.S.C. 1952, c. 149, s. 87.

THE QUEEN *v.* GEORGE, 267

6. Robbery—Plea of guilty—Habeas corpus—Warrant of committal.

MORRISON v. THE QUEEN, 356.

7. Perjury—Trial—Presence of accused—Accused ordered to leave courtroom during his cross-examination to discuss an objection to a question put to him—Criminal Code, 1953-54 (Can.), c. 51, ss. 557(1), 592(1)(*b*)(iii).

LA REINE v. MEUNIER, 399.

8. Capital murder—Instruction to jury regarding clemency—Criminal Code, 1953-54 (Can.), c. 51, ss. 206, 597A, 642A.

FULTON v. THE QUEEN, 402.

9. Driving while ability impaired—Prisoner refused permission to contact lawyer after arrest—"Full answer and defence"—Criminal Code, 1953-54 (Can.), c. 51, s. 709(1)—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(*e*).

O'CONNOR v. THE QUEEN, 619.

10. *See* also—*Voir* aussi: APPEALS.

11. *See* also—*Voir* aussi: CONSTITUTIONAL LAW.

12. *See* also—*Voir* aussi: ESKIMOS.

CROWN

Petition of right—Interim order suspending postal service—Whether party affected entitled to be heard before order made—Post Office Act, R.S.C. 1952, c. 212, ss. 7, 40—Crown Liability Act, 1952-53 (Can.), c. 30—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(*e*).

THE QUEEN v. RANDOLPH et al., 260.

DAMAGES

1. Motor vehicle accident—Award by trial judge reduced by Court of Appeal—Appeal against quantum of damages as varied by Court of Appeal—Appeal successful—Applicable principles.

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al., 13.

2. Fatal accident—Award by trial judge reduced by Court of Appeal—Appeal against quantum of damages as varied by Court of Appeal—Failure of appeal—Applicable principles.

HOSSACK et al. v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al., 28.

3. Plaintiff rendered unconscious as result of severe brain injury—No hope of recovery—Quantum of damages—Whether income tax which plaintiff would have had to pay on future earnings to be taken into account.

THE QUEEN v. JENNINGS et al., 532.

DOMESTIC RELATIONS

Cohabitation in expectation of marriage—Entitlement to property rights of a wife claimed on basis of alleged agreement—Failure to establish intention to enter into binding legal contract.

LAZARENKO v. BOROWSKY, 556.

DOMMAGES

See—*Voir*: AUTOMOBILES

DROIT CONSTITUTIONNEL

1. Droit criminel—Offense provinciale de conduite négligente d'automobile—Y a-t-il conflit avec l'offense de conduite dangereuse telle que définie par le Code criminel—Highway Traffic Act, S.R.O. 1960, c. 172, art. 60—Code criminel, 1953-54 (Can.), c. 51, art. 221(4).

MANN v. THE QUEEN, 238.

2. Droit criminel—Offense provinciale de conduite négligente d'automobile—Collision avec un véhicule stationnaire—Y a-t-il conflit avec l'offense de conduite dangereuse telle que définie par le Code criminel—Highway Traffic Act, S.R.O. 1960, c. 172, art. 60—Code criminel, 1953-54 (Can.), c. 51, art. 221(4).

McIVER v. THE QUEEN, 254.

3. Expropriation d'une terre en vue d'une ceinture de verdure dans la région de la Capitale nationale—Le Parlement a-t-il

DROIT CONSTITUTIONNEL
Condluded—Fin

l'autorité législative d'exproprier ainsi—Loi sur la Capitale nationale, 1958 (Can.), c. 37, art. 13(1)—Acte de l'Amérique du Nord britannique, 1867–1960, arts. 91, 92.

MUNRO v. NATIONAL CAPITAL COMMISSION, 663.

4. Travail—Salaire minimum—Prélèvement d'un impôt—Compagnie de téléphone opérant un système interprovincial de communications et de service—Compagnie est-elle sujette au statut provincial—Loi du Salaire minimum, S.R.Q. 1941, c. 164—Loi sur les Relations industrielles et sur les enquêtes visant les différends du travail, S.R.C. 1952, c. 152—Code canadien du travail, 1964–65 (Can.), c. 38—L'Acte de l'Amérique du Nord britannique, 1867, arts. 91(29), 92(10).

COMMISSION DU SALAIRE MINIMUM v. BELL TELEPHONE COMPANY OF CANADA, 767.

DROIT CRIMINEL

1. Maison de jeu—Local occupé par une branche de la Légion canadienne—Bingo—S'agit-il d'un club social authentique—Code criminel, 1953–54 (Can.), c. 51, arts. 168(2)(*a*)(i), (ii), 176.

THE QUEEN v. MACDONALD et al., 3.

2. Conseiller législatif—Exercice indu d'influence—Conseiller législatif est-il un fonctionnaire—Les actes doivent-ils être posés en sa qualité de conseiller législatif—Code criminel, 1953–54 (Can.), c. 51, arts. 21, 99(*e*), 100, 102(1)(*a*)(ii)(iii), 592(4)(*b*), 597(2)(*a*).

MARTINEAU v. LA REINE, 103.

3. Appels—Habeas corpus—Demande pour permission d'appeler—Code criminel, 1953–54 (Can.), c. 51, arts. 597(1)(*b*), 691(2)—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41(3).

TOKAR v. THE QUEEN, 194.

4. Accusé sous détention—Avis d'appel demandant qu'un avocat soit nommé par la Cour—Demande refusée—Accusé notifié seulement après l'audition de l'appel.

FREDERICK v. THE QUEEN, 257.

5. Indiens—Chasse pour nourriture dans la Réserve en temps prohibé—Droits en vertu des Traités—Sont-ils exempts des dispositions de la Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179—Loi sur les Indiens, S.R.C. 1952, c. 149, art. 87.

THE QUEEN v. GEORGE, 267.

DROIT CRIMINEL—Concluded—Fin

6. Vol—Plaidoirie de culpabilité—Habeas corpus—Mandat de dépôt.

MORRISON v. THE QUEEN, 356.

7. Parjure—Procès—Présence de l'accusé—Ordre donné à l'accusé de sortir de la salle d'audience pendant son contre-interrogatoire pour qu'une objection à une question qui lui était posée puisse être discutée—Code criminel, 1953–54 (Can.), c. 51, arts. 557(1), 592(1)(*b*)(iii).

LA REINE v. MEUNIER, 399.

8. Meurtre qualifié—Adresse du juge au jury concernant la clémence—Code criminel, 1953–54 (Can.), c. 51, arts. 206, 597A, 642A.

FULTON v. THE QUEEN, 402.

9. Conduite d'automobile alors que la capacité de le faire est affaiblie—Permission refusée de communiquer avec un avocat après mise en arrestation—"Réponse et défense complète"—Code criminel, 1953–54 (Can.), c. 51, art. 709(1)—Déclaration canadienne des droits, 1960 (Can.), c. 44, s. 2(*e*).

O'CONNOR v. THE QUEEN, 619.

10. *See* also—*Voir* aussi: APPELS.

11. *See* also—*Voir* aussi: DROIT CONSTITUTIONNEL.

12. *See* also—*Voir* aussi: ESQUIMAUX.

13. *See* also—*Voir* aussi: PREUVE.

EASEMENTS

Grant of right of way over stairway—Covenant by servient owners to maintain and repair—Building including stairway taken down by subsequent owners following fire—Action for injunction to compel restoration of stairway and for damages dismissed.

PARKINSON et al. v. REID, 162.

ESKIMOS

Criminal law—Game suitable for human consumption abandoned—Northwest Territories Act, R.S.C. 1952, c. 331, s. 13—Game Ordinance, O.N.W.T. 1960, (Second Sess.), c. 2, s. 15(1)(*a*).

SIGEAREAK EL-53 v. THE QUEEN, 645.

ESQUIMAUX

Droit criminel—Abandon de gibier apte à la consommation humaine—Loi sur les

ESQUIMAUX—Concluded—Fin

Territoires du Nord-Ouest, S.R.C. 1952, c. 331, art. 13—Ordonnance sur le Gibier, O.N.W.T. 1960, (2ième Session), c. 2, art. 15(1)(*a*).

SIGEAREAK EL-53 v. THE QUEEN, 645.

EVIDENCE

1. Admissibility—Breathalizer tests obtained after arrest—Accused not informed beforehand of arrest—Subsequently allowed to place a telephone call for legal assistance—Refused further calls when first proved abortive—Whether violation of s. 2(*c*)(ii) of Canadian Bill of Rights, 1960 (Can.), c. 44—Whether evidence of breathalizer admissible.

O'CONNOR v. THE QUEEN, 619.

2. *See* also—*Voir* aussi: EXPROPRIATION.

EXECUTORS AND ADMINISTRATORS

Payment of debts and succession duties—Whether rule in Allhusen v. Whittell applicable so as to require apportionment of liability between life tenant and those entitled ultimately to the capital—Expressed intention of testator.

LOTZKAR v. SOUTHIN AND THE MONTREAL TRUST CO. et al., 69.

EXPROPRIATION

1. Minimum of evidence upon which to fix value—Potentiality of land at time of taking—Compensation payable—The Expropriation Act, R.S.M. 1954, c. 78.

LAMB v. MANITOBA HYDRO-ELECTRIC BOARD, 229.

2. Part of claimant's property expropriated for traffic interchange—Misapprehension of evidence upon which valuation of damages based—Arbitrator's award reduced by Court of Appeal—Majority judgment of Court of Appeal also found to have overlooked or misapprehended material evidence—Compensation fixed by Supreme Court.

WINNIPEG SUPPLY & FUEL CO. LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG, 336.

3. Farm—Costs of moving farm buildings—Compensation—Principles guiding Appeal Courts—Code of Civil Procedure, arts. 1066*a* et seq.

JUTRAS v. MINISTRE DE LA VOIRIE DE QUÉBEC et al., 732.

EXPROPRIATION—Concluded—Fin

4. Ferme—Coût de déplacement des bâtiments—Indemnité—Principes devant guider les Cours d'Appel—Code de Procédure civil, arts 1066*a* et seq.

JUTRAS v. MINISTRE DE LA VOIRIE DE QUÉBEC et al., 732.

5. *See* also—*Voir* aussi: ARBITRATION.

6. *See* also—*Voir* aussi: CONSTITUTIONAL LAW.

7. *See* also—*Voir* aussi: DROIT CONSTITUTIONNEL.

GUARANTEE

1. Cars purchased by taxi company—Promissory note—Defendant's personal guarantee of payment—Company's indebtedness increased by subsequent transaction—New promissory note signed—Refusal to increase guarantee—Defendant's liability.

ADELAIDE MOTORS LTD. v. BYRNE, 158.

2. Guarantees signed by defendant for indebtedness of two companies to plaintiff bank in consideration of bank's agreeing to deal with the companies "in the way of its business as a bank"—Payment demanded shortly after guarantees signed—Bank subsequently agreeing to extension of time for payment on furnishing of additional securities—Whether failure of consideration.

HOON v. BANK OF NOVA SCOTIA, 405.

HABEAS CORPUS

1. *See*—*Voir*: CRIMINAL LAW.

2. *See* also—*Voir* aussi: DROIT CRIMINEL.

HIGHWAYS

Duty to keep highway in repair—Failure to maintain stop sign in proper position—Plaintiff injured in collision at intersection—Liability of Department—The Highway Improvement Act, R.S.O. 1960, c. 171, s. 33.

THE QUEEN v. JENNINGS et al., 532.

HOSPITALS

Physicians and surgeons—Negligence—Epileptic patient leaping through window of fourth floor ward—Injuries result of impulse which could not reasonably have

HOSPITALS—Concluded—Fin

been foreseen—Actions against hospital and doctor dismissed.

UNIVERSITY HOSPITAL BOARD v. LEPINE; MONCKTON v. LEPINE, 561.

IMMEUBLES

1. Vente—Action pour faire annuler—Entente verbale—Admissibilité—Prête-nom—Acheteur étant une compagnie non encore incorporée—Code civil, art. 1233, para. 7—Loi des compagnies de Québec, S.R.Q. 1941, c. 276, art. 29.

PROVINCIAL HARDWOODS INC. et al. v. MORIN et al., 58.

2. Offre d'achat—Acceptation sous réserve de pouvoir donner un titre clair—Titres non fournis—Action en résolution de contrat et en dommages—Quantum des dommages—Code Civil, art. 1074.

REMER BROS. INVESTMENT CORPORATION v. ROBIN, 506.

IMMOVABLES

1. Sale—Action to set aside—Verbal agreement — Admissibility — Prête-nom—Purchaser a company not yet incorporated—Civil Code, art. 1233, para. 7—Quebec Companies Act, R.S.Q. 1941, c. 276, s. 29.

PROVINCIAL HARDWOODS INC. et al. v. MORIN et al., 58.

2. Offer to purchase—Acceptation provided clear title can be given—Titles not given—Action to annul contract and in damages—Quantum of damages—Civil Code, art. 1074.

REMER BROS. INVESTMENT CORPORATION v. ROBIN, 506.

INDIANS

See—Voir: CRIMINAL LAW

INDIENS

See—Voir: DROIT CRIMINEL

INJONCTION

See—Voir: MARQUES DE COMMERCE

INJUNCTION

See—Voir: TRADE MARKS

INSURANCE

1. Plaintiff company entering agreement under which new company to take delivery of drilling tower under construction—Loss of tower—Whether plaintiff company had insurable interest.

GUARANTEE COMPANY OF NORTH AMERICA et al. v. AQUA-LAND EXPLORATION LTD., 133.

2. Fire—Hotel destroyed by fire—Risks insured by different insurers—Misdescription and concealment of fact—Whether policies invalid—Civil Code, arts. 2485, 2572.

CANADIAN HOME ASSURANCE CO. v. GAUTHIER, 305.

3. Insured trucks damaged—Claims for consequential loss based on alleged breaches of statutory provisions—The Automobile Accident Insurance Act, 1963 (Sask.), c. 38, ss. 35(1), 36(8) and (13).

BÉDARD v. SASKATCHEWAN GOVERNMENT INSURANCE OFFICE, 548.

JURIDICTION

1. Prohibition—Garde des enfants—Question devant la Cour Supérieure—La Cour de Bien-Être Social est-elle supplantée—Loi de la Protection de la Jeunesse, S.R.Q. 1941, c. 38, art. 15 [maintenant S.R.Q. 1964, c. 220]—Code de Procédure Civile, art. 1210.

KREDL v. ATTORNEY GENERAL OF QUEBEC et al., 320.

2. Cour suprême du Canada—Requête pour obtenir permission d'appeler—Décision de la Commission des Relations de Travail du Québec—Décision tombe-t-elle sous l'art. 41(1) de la Loi sur la Cour suprême, S.R.C. 1952, c. 259—Code du Travail, S.R.Q. 1964, c. 141.

J. R. THÉBERGE LTÉE v. SYNDICAT NATIONAL DES EMPLOYÉS DE L'ALUMINUM D'ARVIDA INC. et al., 378.

3. *See* also—*Voir* aussi: APPELS.

JURISDICTION

1. Prohibition—Custody of children—Matter before Superior Court—Whether Social Welfare Court superseded—Youth Protection Act, R.S.Q. 1941, c. 38, s. 15 [now R.S.Q. 1964, c. 220]—Code of Civil Procedure, art. 1210.

KREDL v. ATTORNEY GENERAL OF QUEBEC et al., 320.

JURISDICTION—Concluded—Fin

2. Supreme Court of Canada—Application for leave to appeal—Decision of the Quebec Labour Relations Board—Whether decision falls within s. 41(1) of the Supreme Court Act, R.S.C. 1952, c. 259—Labour Code, R.S.Q. 1964, c. 141.

J. R. Théberge Ltée v. Syndicat National des Employés de L'Aluminum D'Arvida Inc. et al., 378.

3. *See* also—*Voir* aussi: Appeals.

LABOUR

1. Order certifying local as trade union for unit of company's employees—Unfair practices and reinstatement orders issued—Voluntary liquidation of company—Orders amended by substituting related company as named employer—Jurisdiction of Labour Relations Board—Labour Relations Act, R.S.B.C. 1960, c. 205, s. 65(3) [am. 1961, c. 31].

Bakery and Confectionery Workers International Union of America Local No. 468 et al. v. White Lunch Ltd. et al., 282.

2. Application by respondent unions to be certified for unit of employees for whom appellant union already certified—Representation vote ordered—Cancellation of vote prior to counting of ballots—Power of Board to cancel vote and to certify respondents—Whether proper notice given—Labour Relations Act, R.S.B.C. 1960, c. 205 [am. 1961, c. 31] ss. 10(1)(*c*), 12, 17, 24, 62(8), 65(3).

Zeballos District Mine & Mill Workers Union, Local 851 v. Labour Relations Board of B.C., 465.

3. *See* also—*Voir* aussi: Constitutional Law.

LEASE AND HIRE

Action for rental of store—Leased premises damaged by fire in adjoining building—Cross-demand in resiliation of lease.

Stroll's Inc. v. Gorn, 653.

LOUAGE

Action pour le loyer d'un magasin—Local loué endommagé par un incendie dans un édifice contigu—Demande reconventionnelle pour faire résilier le bail.

Stroll's Inc. v. Gorn, 653.

MARQUES DE COMMERCE

Usurpation—Injonction—YO-YO et BO-LO—Usager inscrit—Violation de l'entente—Un usager inscrit peut-il être coupable d'usurpation—Les marques de commerce sont-elles devenues génériques—Loi sur les Marques de Commerce, 1952-53 (Can.), c. 49, arts. 2(*f*), 4, 18, 20, 49.

Cheerio Toys and Games Ltd. v. Dubiner, 206.

MASTER AND SERVANT

1. Information acquired during course of employment—Implied term of employment that employee could not use information for his own advantage—Constructive trust.

Pre-Cam Exploration & Development Ltd. et al. v. McTavish et al., 551.

MECHANICS' LIENS

Sum of money received by contractor on account of contract price deposited in bank—Appropriation thereof by bank in reduction of contractor's overdraft—Unpaid subcontractors—Payments out of contractor's own funds in fulfilment of contract—Effect of s. 3 of The Mechanics' Lien Act, R.S.O. 1960, c. 233.

Clarkson Co. Ltd. v. Canadian Bank of Commerce et al., 513.

MOTOR VEHICLES

1. Intersection—Constable—Signal to change direction of traffic—Infant pedestrian struck by car while crossing street—Standard of care—Whether presumption rebutted—Aggravation of damages—Motor Vehicle Act, R.S.Q. 1941, c. 142, s. 53.

O'Brien v. Mailhot, 171.

2. *See* also—*Voir* aussi: Damages.

MUNICIPAL CORPORATIONS

Nuisance—Seepage from city's sewage lagoon to plaintiff's farm land—Liability for damages—Charter of the City of Portage la Prairie, 1907 (Man.), c. 33, ss. 98, 99, 100—The Expropriation Act, 1962 (Man.), c. 18, s. 28A—The Municipal Act, R.S.M. 1954, c. 173, s. 944.

City of Portage La Prairie v. B.C. Pea Growers Ltd., 150.

NAVIGATION

1. Collision de bateaux—Brouillard épais—Chenal étroit—Responsabilité.

KINGCOME NAVIGATION CO. LTD. v. PERDIA, 51.

2. Contrat de charte-partie pour voyage déterminé—Le défendeur devant fournir le bâtiment et l'équipage—Contrat de transport d'effets et d'outillage—Les employés de l'affréteur aidant à l'arrimage de l'outillage—Pesante machine faisant partie de la cargaison et tombant à la mer durant une tempête—Responsabilité—Code Civil, art. 2424.

N. M. PATERSON AND SONS LTD. v. MANNIX LTD., 180.

3. Dommages—Négligence—Échouage d'un bateau alors qu'il prenait une cargaison au port de la Tête des Lacs.

ALGOMA CENTRAL AND HUDSON BAY RY. CO. et al. v. MANITOBA POOL ELEVATORS LTD. et al., 359.

NEGLIGENCE

1. Injury sustained by farm labourer while lifting defective barn door—Duty owed by employer to servant with respect to safety of premises—Whether injury a reasonably foreseeable result of employer's failure to repair door.

GILCHRIST v. A & R FARMS LTD. et al., 122.

2. Injury to trespasser—Pickets placing wooden beam in front of truck—Driver attempting to ride over beam—Injury to picket—Whether liability.

STANTON v. TAYLOR, PEARSON & CARSON (B.C.) LTD. et al., 641.

3. Institutrice—Enfant laissée en dehors de l'école par une journée froide—Procès devant jury—Devoir de la Cour d'Appel—Verdict du jury supporté par la preuve.

DUPRÉ v. COMMISSAIRES D'ÉCOLE POUR ST-BERNARD DE LACOLLE, 642.

4. Teacher—Child left outside school house on a cold day—Jury trial—Duty of Appellate Court—Finding of jury supported by evidence.

DUPRÉ v. COMMISSAIRES D'ÉCOLE POUR ST-BERNARD DE LACOLLE, 642.

5. *See* also—*Voir* aussi: HOSPITALS.

NUISANCE

See—*Voir*: MUNICIPAL CORPORATIONS.

PATENTS

1. Infringement — Validity — Claims too broad—Patent Act, R.S.C. 1952, c. 203.

HOECHST PHARMACEUTICALS OF CANADA LTD. et al. v. GILBERT AND COMPANY et al., 189.

2. Practice and procedure—Application to strike out part of statement of claim filed in Exchequer Court—Whether proceedings before that Court must be confined to the claims in conflict before the Commissioner of Patents—Patent Act, R.S.C. 1952, c. 203, s. 45—Exchequer Court Act, R.S.C. 1952, c. 98, s. 21.

RADIO CORPORATION OF AMERICA v. PHILCO CORPORATION (DELAWARE), 296.

3. Compulsory licence—Preparation or production of medicine—Exchequer Court affirmed granting of licence by Commissioner of Patents—Royalty as fixed by Commissioner changed by Exchequer Court—Patent Act, R.S.C. 1952, c. 203, s. 41(3).

HOFFMAN-LA ROCHE LTD. v. BELL-CRAIG PHARMACEUTICALS, DIVISION OF L. D. CRAIG LTD., 313.

4. Validity—Action for impeachment—Declaration of invalidity—Claim by plaintiff for damages based upon threats of legal proceedings—Malice—Patent Act, R.S.C. 1952, c. 203, ss. 28(1)(*b*), 46—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 7(*a*), (*e*), 52.

S. & S. INDUSTRIES INC. v. ROWELL, 419.

5. Compulsory licence—Failure to work invention on a commercial scale—Whether abuse of exclusive rights—Whether satisfactory reasons advanced by patentee—Patent Act, R.S.C. 1952, c. 203, ss. 2(*j*), 46, 67, 68.

RODI & WIENENBERGER AKTIENGESELLSCHAFT v. METALLIFLEX LTD., 593.

6. Application for re-issue—Whether mistaken view of law a mistake within s. 50 of the Patent Act, R.S.C. 1952, c. 203.

FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING v. COMMISSIONER OF PATENTS, 604.

7. *See* also—*Voir* aussi: APPEALS.

PHYSICIANS AND SURGEONS

See—*Voir*: HOSPITALS.

PREUVE

Admissibilité—Épreuve d'haleine obtenue après arrestation—Accusé non informé préalablement de son arrestation—Permission subséquente de téléphoner à son avocat—Permission refusée de placer d'autres appels lorsque le premier a été sans succès—Est-ce qu'il y a eu contravention de l'art. 2(*c*)(ii) de la Déclaration canadienne des droits, 1960 (Can.), c. 44—La preuve d'haleine était-elle admissible—Code criminel, 1953-54 (Can.), c. 51, s. 224.

O'Connor v. The Queen, 619.

PRIVILÈGE

1. Fournisseur de matériaux—Matériaux fournis pour la construction de maisons—Intervention par un tiers ayant fourni des fonds pour la construction—Le privilège est-il cancellé par l'intervention—Code Civil, arts. 2013, 2013*e*, 2103.

Craft Finance Corpn. v. Belle-Isle Lumber Co., 661.

2. Supplier of materials—Building materials supplied for construction of houses—Intervention by party providing building funds—Whether privilege cancelled by intervention—Civil Code, arts. 2013, 2013*e*, 2103.

Craft Finance Corpn. v. Belle-Isle Lumber Co., 661.

PROCÈS

See—Voir: Droit Criminel.

PROHIBITION

1. *See—Voir*: Juridiction.

2. *See* also—*Voir* aussi: Jurisdiction.

PROMISSORY NOTE

See—Voir: Guarantee.

REVENU

1. Taxe de vente—Exemption—Boulons utilisés dans les opérations minières pour supporter les plafonds et les murs—Sont-ils exempts de la taxe de vente comme étant des dispositifs de sécurité—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 30, 32, Annexe III.

Deputy Minister of National Revenue (Customs and Excise) v. Consolidated Denison Mines Ltd. and Rio Tinto Mining Co. of Canada, 8.

REVENU—Continued—Suite

2. Impôt sur le revenu—Plan de participation aux bénéfices—Plan d'achats de valeurs mobilières pour les employés—Le plan est-il un «plan de participation des employés aux bénéfices»—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 6(1)(*k*), 79(1), (3), (7).

Minister of National Revenue v. Lade, 89.

3. Impôt sur le revenu—Déductions—Négociant en valeurs mobilières—Perte sur vente d'une part dans un syndicat—Biens décrits dans un inventaire—Juste valeur marchande—Année dans laquelle la perte est survenue—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 12(1)(*a*), 14(2), 27(1)(*e*).

Dobieco Ltd. v. Minister of National Revenue, 95.

4. Impôt sur le revenu—Déductions—Dépenses de prospection, d'exploration et de mise en valeur—Compagnie d'exploitation et d'exploration minières—Travaux faits en vertu d'ententes avec d'autres compagnies—Loi de l'Impôt sur le revenu, 1949 (Can.), (2e Ses.), c. 25, art. 53(4)—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. 83A(7) [telle que décrétée par 1955 (Can.), c. 54, art. 22].

Falconbridge Nickel Mines Ltd. v. Minister of National Revenue, 110.

5. Douanes et accise—Grue importée—Est-elle de la classe ou espèce non fabriquée au Canada—Loi sur les Douanes, S.R.C. 1952, c. 58—Tarif des Douanes, S.R.C. 1952, c. 60, art. 6(10), item 427(1); 427*a*—Arrêté ministériel C.P. 1618 en date du 2 juillet 1936.

Deputy Minister of National Revenue, Customs and Excise, et al. v. Saint John Shipbuilding and Dry Dock Co. Ltd., 196.

6. Impôt sur le revenu—Terres achetées et revendues par parties—Les profits réalisés sont-ils des revenus imposables ou des gains en capital—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(*e*).

Gagnon v. Ministre du Revenu National, 352.

7. Impôt sur le revenu—Vente de biens susceptibles de dépréciation—Reprise de la dépréciation consentie—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 20(1), 20(5)(*c*).

Belle-Isle v. Ministre du Revenu National, 354.

REVENU—Continued—Suite

8. Impôt sur le revenu—Pertes dues à une exploitation agricole—Déduction limitée en vertu de l'art. 13(1) de la Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148—Aucune décision prise par le Ministre en vertu de l'art. 13(2).

VINCENT v. MINISTER OF NATIONAL REVENUE, 374.

9. Impôt sur le revenu—Vente d'une concession forestière après que le bois a été enlevé—Est-ce une disposition de biens susceptibles de dépréciation—Coût en capital à titre d'allocation—Coût en capital non déprécié—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(*a*), (*b*), 20(1), 20(5) (*a*), (*c*), (*e*)—Règlements de l'Impôt sur le revenu, arts. 1100(1)(*e*), 1100(2), 1101(3)(*a*), (*b*), 1102(2), Cédule C.

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE, 384.

10. Taxe de vente—Pétition de droit pour récupérer la taxe payée sous protêt—Produit diététique «Limmits»—Produit est-il exempt comme «denrée alimentaire» ou taxable comme «produit pharmaceutique»—Loi sur la Taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(*cc*), 30, 32, et Annexe III.

PFIZER CORPORATION et al. v. THE QUEEN, 449.

11. Taxe de vente—Produit diététique «Metrecal»—Produit est-il exempt comme «denrée alimentaire» ou taxable comme «produit pharmaceutique»—Juridiction de la Cour de l'Échiquier re: décision préalable de la Commission du Tarif dont il n'y a pas eu appel—Loi sur la Taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(*cc*), 30, 32, 57, 58, et Annexe III.

THE QUEEN v. MEAD JOHNSON OF CANADA LTD., 457.

12. Impôt successoral—Testament—Don de charité—Paiement des droits à même le don—Calcul de la déduction permise par la Loi lorsqu'il s'agit d'un tel don—Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 29, s. 7(1)(*d*).

MINISTER OF NATIONAL REVENUE v. BICKLE et al., 479.

13. Impôt sur le revenu—Coût en capital à titre d'allocation—Convention de bail avec option—Option d'acheter une propriété pour un prix déterminé après 200 ans—Règle contre la perpétuité—«Prix fixé par le contrat ou arrangement»—Réduction de façon factice du revenu—Loi

REVENU—Concluded—Fin

de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(*a*), 18, 137(1).

HARRIS v. MINISTER OF NATIONAL REVENUE, 489.

14. Impôt sur le revenu—Expropriation de terrains par le gouvernement fédéral—Période lors de laquelle le contribuable doit rendre compte du profit—Année d'imposition.

MINISTER OF NATIONAL REVENUE v. LECHTER, 655.

15. Impôt sur le revenu—Représentant d'une compagnie minière—Paiement de 20 pour cent des sommes reçues à une tierce personne en vertu d'un contrat pour partager une obligation de financement—Ce paiement est-il une dépense déductible ou un déboursé en capital—Dépenses légales encourues lors de la contestation d'une réclamation pour impôt provenant des États-Unis—Ces dépenses sont-elles déductibles—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(*a*), (*b*).

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE, 685.

SHIPPING

1. Collision of ships in dense fog—Narrow channel—Liability.

KINGCOME NAVIGATION CO. LTD. v. PERDIA, 51.

2. Voyage charter agreement—Defendant to provide ship and crew—Contract to transport goods and equipment—Shipper's employees assisting with stowage of equipment—Heavy machinery included in cargo and lost overboard in storm—Liability—Civil Code, art. 2424.

N. M. PATERSON AND SONS LTD. v. MANNIX LTD., 180.

3. Damages—Negligence—Ship grounded while taking on cargo at Lakehead Harbour.

ALGOMA CENTRAL AND HUDSON BAY RY. CO. et al. v. MANITOBA POOL ELEVATORS LTD. et al., 359.

STATUTES

1.——Acte de l'Amérique du Nord britannique, 1867–1960, arts. 91, 92... 663

See—Voir: DROIT CONSTITUTIONNEL

2.——Acte de l'Amérique du Nord britannique, 1867, arts. 91(29), 92(10) 767

See—Voir: DROIT CONSTITUTIONNEL

STATUTES—Continued—Suite

3.——Arbitration Act, R.S.N.B. 1952, c. 9..... 581

See—Voir: ARBITRATION

4.——Automobile Accident Insurance Act, 1963 (Sask.), c. 38, ss. 35(1), 36(8) and (13)..... 548

See—Voir: INSURANCE

5.——Bank Act, 1953–54 (Can.), c. 48, s. 88..... 83

See—Voir: BANKS AND BANKING

6.——B.N.A. Act, 1867–1960, ss. 91, 92..... 663

See—Voir: CONSTITUTIONAL LAW

7.——B.N.A. Act, 1867, ss. 91(29), 92(10)..... 767

See—Voir: CONSTITUTIONAL LAW

8.——Canada Labour Statutes Code, 1964–65 (Can.), c. 38..... 767

See—Voir: CONSTITUTIONAL LAW

9.——Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(*e*)..... 260

See—Voir: CROWN

10.——Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(*e*)..... 619

See—Voir: CRIMINAL LAW

11.——Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(*c*)(ii)..... 619

See—Voir: EVIDENCE

12.——Charter of the City of Portage la Prairie, 1907 (Man.), c. 33, ss. 98, 99, 100..... 150

See—Voir: MUNICIPAL CORPORATIONS

13.——Code canadien du travail, 1964–65 (Can.), c. 38..... 767

See—Voir: DROIT CONSTITUTIONNEL

14.——Code criminel, 1953–54 (Can.), c. 51, arts. 168(2)(*a*)(i), (ii), 176..... 3

See—Voir: DROIT CRIMINEL

15.——Code criminel 1953–54 (Can.), c. 51, arts. 21, 102, 597(1)(*b*)..... 49

See—Voir: APPELS

STATUTES—Continued—Suite

16.——Code criminel, 1953–54 (Can.), c. 51, arts. 21, 99(*e*), 100, 102(1)(*a*)(ii)(iii), 592(4)(*b*), 597(2)(*a*)..... 103

See—Voir: DROIT CRIMINEL

17.——Code criminel, 1953–54 (Can.), c. 51, arts. 597(1)(*b*), 691(2)..... 194

See—Voir: DROIT CRIMINEL

18.——Code criminel, 1953–54 (Can.), c. 51, art. 221(4)..... 238

See—Voir: DROIT CONSTITUTIONNEL

19.——Code criminel, 1953–54 (Can.), c. 51, art. 221(4)..... 254

See—Voir: DROIT CONSTITUTIONNEL

20.——Code criminel, 1953–54 (Can.), c. 51, arts. 557(1), 592(1)(*b*)(iii)..... 399

See—Voir: DROIT CRIMINEL

21.——Code criminel, 1953–54 (Can.), c. 51, arts. 206, 597A, 642A..... 402

See—Voir: DROIT CRIMINEL

22.——Code criminel, 1953–54 (Can.), c. 51, art. 709(1)..... 619

See—Voir: DROIT CRIMINEL

23.——Code criminel, 1953–54 (Can.), c. 51, s. 224..... 619

See—Voir: PREUVE

24.——Code de la Route, S.R.Q. 1941, c. 142, art. 53..... 171

See—Voir: AUTOMOBILES

25.——Code du Travail, S.R.Q. 1964, c. 141..... 378

See—Voir: JURIDICTION

26.——Companies Act, R.S.B.C. 1960, c. 67, s. 152(1)..... 726

See—Voir: COMPANIES

27.——Criminal Code, 1953–54 (Can.), c. 51, ss. 168(2)(*a*)(i), (ii), 176..... 3

See—Voir: CRIMINAL LAW

28.——Criminal Code, 1953–54 (Can.), c. 51, ss. 21, 102, 597(1)(*b*)..... 49

See—Voir: APPEALS

STATUTES—Continued—Suite

29.——Criminal Code, 1953–54 (Can.), c. 51, ss. 21, 99(*e*), 100, 102(1)(*a*)(ii)(iii), 592(4)(*b*), 597(2)(*a*)..... 103

See—Voir: CRIMINAL LAW

30.——Criminal Code, 1953–54 (Can.), c. 51, ss. 597(1)(*b*), 691(2)..... 194

See—Voir: CRIMINAL LAW

31.——Criminal Code, 1953–54 (Can.), c. 51, s. 221(4)..... 238

See—Voir: CONSTITUTIONAL LAW

32.——Criminal Code, 1953–54 (Can.), c. 51, s. 221(4)..... 254

See—Voir: CONSTITUTIONAL LAW

33.——Criminal Code, 1953–54 (Can.), c. 51, ss. 557(1), 592(1)(*b*)(iii)..... 399

See—Voir: CRIMINAL LAW

34.——Criminal Code, 1953–54 (Can.), c. 51, ss. 206, 597A, 642A..... 402

See—Voir: CRIMINAL LAW

35.——Criminal Code, 1953–54 (Can.), c. 51, s. 709(1)..... 619

See—Voir: CRIMINAL LAW

36.——Crown Liability Act, 1952–53 (Can.), c. 30..... 260

See—Voir: CROWN

37.——Customs Act, R.S.C. 1952, c. 58..... 196

See—Voir: TAXATION

38.——Customs Tariff, R.S.C. 1952, c. 60, s. 6(10), tariff items 427(1), 427*a*.. 196

See—Voir: TAXATION

39.——Déclaration canadienne des droits, 1960 (Can.), c. 44, s. 2(*e*)..... 619

See—Voir: DROIT CRIMINEL

40.——Déclaration canadienne des droits, 1960 (Can.), c. 44, art. 2(*c*)(ii). 619

See—Voir: PREUVE

41.——Estate Tax Act, 1958 (Can.), c. 29, s. 7(1)(*d*)..... 479

See—Voir: TAXATION

STATUTES—Continued—Suite

42.——Exchequer Court Act, R.S.C. 1952, c. 98, s. 21..... 296

See—Voir: PATENTS

43.——Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, Schedule III..... 8

See—Voir: TAXATION

44.——Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(*cc*), 30, 32, and Schedule III..... 449

See—Voir: TAXATION

45.——Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(*cc*), 30, 32, 57, 58, and Schedule III..... 457

See—Voir: TAXATION

46.——Expropriation Act, 1962 (Man.), c. 18, s. 28A..... 150

See—Voir: MUNICIPAL CORPORATIONS

47.——Expropriation Act. R.S.M. 1954, c. 78..... 229

See—Voir: EXPROPRIATION

48.——Game Ordinance, O.N.W.T. 1960, (Second Sess.), c. 2, s. 15(1)(*a*).. 645

See—Voir: ESKIMOS

49.——Highway Improvement Act, R.S.O. 1960, c. 171, s. 33..... 532

See—Voir: HIGHWAYS

50.——Highway Traffic Act, R.S.O. 1960, c. 172, s. 60..... 238

See—Voir: CONSTITUTIONAL LAW

51.——Highway Traffic Act, R.S.O. 1960, c. 172, s. 60..... 254

See—Voir: CONSTITUTIONAL LAW

52.——Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(*k*), 79(1), (3), (7)..... 89

See—Voir: TAXATION

53.——Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(*a*), 14(2), 27(1)(*e*).... 95

See—Voir: TAXATION

54.——Income Tax Act, R.S.C. 1952, c. 148, s. 83A(7) [as enacted by 1955 (Can.), c. 54, s. 22]..... 110

See—Voir: TAXATION

STATUTES—Continued—Suite

55.——Income Tax Act, 1949 (Can.), (2nd Sess.), c. 25, s. 53(4)..... 110

See—Voir: TAXATION

56.——Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(*e*)..... 352

See—Voir: TAXATION

57.——Income Tax Act, R.S.C. 1952, c. 148, ss. 20(1), 20(5)(*c*)..... 354

See—Voir: TAXATION

58.——Income Tax Act, R.S.C. 1952, c. 148, s. 13(1)..... 374

See—Voir: TAXATION

59.——Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(*a*), (*b*), 20(1), 20(5)(*a*), (*c*), (*e*)..... 384

See—Voir: TAXATION

60.——Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(*a*), 18, 137(1)..... 489

See—Voir: TAXATION

61.——Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(*a*), (*b*)..... 685

See—Voir: TAXATION

62.——Income Tax Regulations, ss. 1100(1)(*e*), 1100(2), 1101(3)(*a*), (*b*), 1102(2) and Schedule C..... 384

See—Voir: TAXATION

63.——Indian Act, R.S.C. 1952, c. 149, s. 87..... 267

See—Voir: CRIMINAL LAW

64.——Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152..... 767

See—Voir: CONSTITUTIONAL LAW

65.——Labour Code, R.S.Q. 1964, c. 141..... 378

See—Voir: JURISDICTION

66.——Labour Relations Act, R.S.B.C. 1960, c. 205, s. 65(3) [am. 1961, c. 31]. 282

See—Voir: LABOUR

67.——Labour Relations Act, R.S.B.C. 1960, c. 205, [am. 1961, c. 31] ss. 10(1)(*c*), 12, 17, 24, 62(8), 65(3)..... 465

See—Voir: LABOUR

STATUTES—Continued—Suite

68.——Loi sur les Brevets, S.R.C. 1952, c. 203..... 189

See—Voir: BREVETS

69.——Loi sur les Brevets, S.R.C. 1952, c. 203, art. 45..... 296

See—Voir: BREVETS

70.——Loi sur les Brevets, S.R.C. 1952, c. 203, art. 41(3)..... 313

See—Voir: BREVETS

71.——Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 28(1)(*b*), 46..... 419

See—Voir: BREVETS

72.——Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(*j*), 46, 67, 68..... 593

See—Voir: BREVETS

73.——Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(*a*), 42, 44, 50..... 604

See—Voir: APPELS

74.——Loi sur les Brevets, S.R.C. 1952, c. 203, art. 50..... 604

See—Voir: BREVETS

75.——Loi sur la Capitale nationale, 1958 (Can.), c. 37, art. 13(1)..... 663

See—Voir: DROIT CONSTITUTIONNEL

76.——Loi des compagnies de Québec, S.R.Q. 1941, c. 276, art. 29..... 58

See—Voir: IMMEUBLES

77.——Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179..... 267

See—Voir: DROIT CRIMINEL

78.——Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 21..... 296

See—Voir: BREVETS

79.——Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41(3)..... 194

See—Voir: DROIT CRIMINEL

80.——Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41(1)..... 378

See—Voir: JURIDICTION

STATUTES—Continued—Suite

81.——Loi sur la Déclaration canadienne des droits, 1960 (Can.), c. 44, art. 2(*e*)..... 260

See—Voir: COURONNE

82.——Loi sur les Douanes, S.R.C. 1952, c. 58..... 196

See—Voir: REVENU

83.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 6(1)(*k*), 79(1), (3), (7)..... 89

See—Voir: REVENU

84.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 12(1)(*a*), 14(2), 27(1)(*e*)..... 95

See—Voir: REVENU

85.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. 83A(7) [telle que décrétée par 1955 (Can.), c. 54, art. 22]..... 110

See—Voir: REVENU

86.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(*e*) 352

See—Voir: REVENU

87.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 20(1), 20(5)(*c*) 354

See—Voir: REVENU

88.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. 13(1)..... 374

See—Voir: REVENU

89.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(*a*), (*b*), 20(1), 20(5)(*a*), (*c*), (*e*)..... 384

See—Voir: REVENU

90.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(*a*), 18, 137(1)..... 489

See—Voir: REVENU

91.——Loi de l'Impôt sur le revenu, 1949 (Can.), (2e Session), c. 25, art. 53(4)..... 110

See—Voir: REVENU

92.——Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(*a*), (*b*). 685

See—Voir: REVENU

93.——Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 29, s. 7(1)(*d*)..... 479

See—Voir: REVENU

94.——Loi sur les Indiens, S.R.C. 1952, c. 149, art. 87..... 267

See—Voir: DROIT CRIMINEL

95.——Loi sur les Marques de commerce, 1952–53 (Can.), c. 49, arts. 2(*f*), 4, 18, 20, 49..... 206

See—Voir: MARQUES DE COMMERCE

96.——Loi sur les Marques de commerce, 1952–53 (Can.), c. 49, arts. 7(*a*), (*e*), 52..... 419

See—Voir: BREVETS

97.——Loi de la Protection de la Jeunesse, S.R.Q. 1941, c. 38, art. 15 [maintenant S.R.Q. 1964, c. 220]..... 320

See—Voir: JURIDICTION

98.——Loi sur les Postes, S.R.C. 1952, c. 212, arts. 7, 40..... 260

See—Voir: COURONNE

99.——Loi sur les Relations industrielles et sur les enquêtes visant les différends du travail, S.R.C. 1952, c. 152..... 767

See—Voir: DROIT CONSTITUTIONNEL

100.——Loi sur la Responsabilité de la Couronne, 1952–53 (Can.), c. 30.... 260

See—Voir: COURONNE

101.——Loi du Salaire minimum, S.R.Q. 1941, c. 164..... 767

See—Voir: DROIT CONSTITUTIONNEL

102.——Loi sur la Taxe d'accise, S.R.C. 1952, c. 100, arts. 30, 32, Annexe III..... 8

See—Voir: REVENU

103.——Loi sur la Taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(*cc*), 30, 32, et Annexe III..... 449

See—Voir: REVENU

STATUTES—Continued—Suite

104.——Loi sur la Taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(*cc*), 30, 32, 57, 58, et Annexe III..... 457

See—Voir: REVENU

105.——Loi sur les Territoires du Nord-Ouest, S.R.C. 1952, c. 331, art. 13..... 645

See—Voir: ESQUIMAUX

106.——Mechanics' Lien Act, R.S.O. 1960, c. 233, s. 3..... 513

See—Voir: MECHANICS' LIENS

107.——Migratory Birds Convention Act, R.S.C. 1952, c. 179..... 267

See—Voir: CRIMINAL LAW

108.——Minimum Wage Act, R.S.Q. 1941, c. 164..... 767

See—Voir: CONSTITUTIONAL LAW

109.——Motor Vehicle Act, R.S.Q. 1941, c. 142, s. 53..... 171

See—Voir: MOTOR VEHICLES

110.——Municipal Act, R.S.M. 1954, c. 173, s. 944..... 150

See—Voir: MUNICIPAL CORPORATIONS

111.——National Capital Act, 1958 (Can.), c. 37, s. 13(1)..... 663

See—Voir: CONSTITUTIONAL LAW

112.——Northwest Territories Act, R.S.C. 1952, c. 331, s. 13..... 645

See—Voir: ESKIMOS

113.——Ordonnance sur le Gibier, O.N.W.T. 1960, (2e Session), c. 2, art. 15(1)(*a*) 645

See—Voir: ESQUIMAUX

114.——Patent Act, R.S.C. 1952, c. 203..... 189

See—Voir: PATENTS

115.——Patent Act, R.S.C. 1952, c. 203, s. 45..... 296

See—Voir: PATENTS

116.——Patent Act, R.S.C. 1952, c. 203, s. 41(3)..... 313

See—Voir: PATENTS

STATUTES—Concluded—Fin

117.——Patent Act, R.S.C. 1952, c. 203, ss. 28(1)(*b*), 46..... 419

See—Voir: PATENTS

118.——Patent Act, R.S.C. 1952, c. 203, ss. 2(*j*), 46, 67, 68..... 593

See—Voir: PATENTS

119.——Patent Act, R.S.C. 1952, c. 203, ss. 2(*a*), 42, 44, 50..... 604

See—Voir: APPEALS

120.——Patent Act, R.S.C. 1952, c. 203, s. 50..... 604

See—Voir: PATENTS

121.——Post Office Act, R.S.C. 1952, c. 212, ss. 7, 40..... 260

See—Voir: CROWN

122.——Quebec Companies Act, R.S.Q. 1941, c. 276, s. 29..... 58

See—Voir: IMMOVABLES

123.——Règlements de l'Impôt sur le revenu, arts. 1100(1)(*e*), 1100(2), 1101 (3)(*a*), (*b*), 1102(2), Cédule C..... 384

See—Voir: REVENU

124.——Supreme Court Act, R.S.C. 1952, c. 259, s. 41(3)..... 194

See—Voir: CRIMINAL LAW

125.——Supreme Court Act, R.S.C. 1952, c. 259, s. 41(1)..... 378

See—Voir: JURISDICTION

126.——Tarif des Douanes, S.R.C. 1952, c. 60, art. 6(10), item 427(1), 427*a*..... 196

See—Voir: REVENU

127.——Trade Marks Act, 1952–53 (Can.), c. 49, ss. 2(*f*), 4, 18, 20, 49.... 206

See—Voir: TRADE MARKS

128.——Trade Marks Act, 1952–53 (Can.), c. 49, ss. 7(*a*), (*e*), 52..... 419

See—Voir: PATENTS

129.——Youth Protection Act, R.S.Q. 1941, c. 38, s. 15 [now R.S.Q. 1964, c. 220]..... 320

See—Voir: JURISDICTION

TAXATION

1. Sales tax—Exemption—Rock bolts used in mining for support of ceilings and walls—Whether exempt from sales tax as safety devices—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, Schedule III.

DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE) v. CONSOLIDATED DENISON MINES LTD. AND RIO TINTO MINING CO. OF CANADA, 8.

2. Income tax—Profit sharing plan—Stock purchase plan for employees—Whether plan qualified as an "employees profit sharing plan"—Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(*k*), 79(1), (3), (7).

MINISTER OF NATIONAL REVENUE v. LADE, 89.

3. Income tax—Deductions—Underwriting and trading firm—Loss on sale of interest in oil syndicate—Inventory asset—Fair market value—Year in which loss sustained—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(*a*), 14(2), 27(1)(*e*).

DOBIECO LTD. v. MINISTER OF NATIONAL REVENUE, 95.

4. Income tax—Deductions—Prospecting, exploration and development expenses—Mining and exploration companies—Work done under agreements with other companies—Income Tax Act, 1949 (Can.), (2nd Sess.), c. 25, s. 53(4)—Income Tax Act, R.S.C. 1952, c. 148, s. 83A(7) [as enacted by 1955 (Can.), c. 54, s. 22].

FALCONBRIDGE NICKEL MINES LTD v. MINISTER OF NATIONAL REVENUE, 110.

5. Customs and Excise—Crane imported—Whether of a class or kind not made in Canada—Customs Act, R.S.C. 1952, c. 58—Customs Tariff, R.S.C. 1952, c. 60, s. 6(10), tariff items 427(1), 427*a*—Order-in-Council P.C. 1618 dated July 2, 1936.

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, et al. v. SAINT JOHN SHIPBUILDING AND DRY DOCK CO. LTD., 196.

6. Income tax—Land purchased and resold in parcels—Whether profits income or capital gain—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(*e*).

GAGNON v. MINISTRE DU REVENU NATIONAL, 352.

7. Income tax—Sale of depreciable assets—Recapture of capital cost allowance—Income Tax Act, R.S.C. 1952, c. 148, ss. 20(1), 20(5)(*c*).

BELLE-ISLE v. MINISTRE DU REVENU NATIONAL, 354.

TAXATION—Continued—Suite

8. Income tax—Farming losses—Deduction limited under s. 13(1) of the Income Tax Act, R.S.C. 1952, c. 148—Determination under s. 13(2) not made by Minister.

VINCENT v. MINISTER OF NATIONAL REVENUE, 374.

9. Income tax—Sale of timber limit after removal of timber—Whether disposition of depreciable property—Capital cost allowance—Undepreciable capital cost—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(*a*), (*b*), 20(1), 20(5)(*a*), (*c*), (*e*)—Income Tax Regulations, ss. 1100(1)(*e*), 1100(2), 1101 (3)(*a*), (*b*), 1102(2) and Schedule C.

HIGHWAY SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE, 384.

10. Sales tax—Petition of right to recover tax paid under protest—Dietary aid "Limmits"—Whether exempt as "foodstuff" or taxable as "pharmaceutical"—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(*cc*), 30, 32, and Schedule III.

PFIZER CORPORATION et al. v. THE QUEEN, 449.

11. Sales tax—Dietary aid "Metrecal"—Whether exempt as "foodstuff" or taxable as "pharmaceutical"—Jurisdiction of Exchequer Court re: previous Tariff Board decision not appealed—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(*cc*), 30, 32, 57, 58, and Schedule III.

THE QUEEN v. MEAD JOHNSON OF CANADA LTD., 457.

12. Estate tax—Will—Charitable gift—Direction to pay duty out of charitable gift—Computation of deduction allowed by Act for gift—Estate Tax Act, 1958 (Can.), c. 29, s. 7(1)(*d*).

MINISTER OF NATIONAL REVENUE v. BICKLE et al., 479.

13. Income tax—Capital cost allowance—Lease-option agreement—Option to purchase property for stated price after 200 years—Rule against perpetuities—"Price fixed by contract or arrangement"—Artificial reduction of income—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(*a*), 18, 137(1).

HARRIS v. MINISTER OF NATIONAL REVENUE, 489.

14. Income tax—Expropriation of land by federal government—Time at which profit required to be accounted for—Date of taxation year.

MINISTER OF NATIONAL REVENUE v. LECHTER, 655.

TAXATION—Concluded—Fin

15. Income tax—Sales agent of mining company—Payment of 20 per cent of income receipts paid to third party under contract for sharing financing obligation—Whether deductible expenses or capital outlay—Legal expenses incurred in resisting U.S. income tax claim—Whether deductible—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(*a*), (*b*).

PREMIUM IRON ORES LTD. v. MINISTER OF NATIONAL REVENUE, 685.

TESTAMENT

See—Voir: REVENU

TRADE MARKS

Infringement—Injunction—YO-YO and BO-LO — Registered user agreement — Breach of agreement—Whether permitted user can infringe—Whether trade marks have become generic—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 2(*f*), 4, 18, 20, 49.

CHEERIO TOYS AND GAMES LTD. v. DUBINER, 206.

TRAVAIL

See—Voir: DROIT CONSTITUTIONNEL.

TRIAL

See—Voir: CRIMINAL LAW

WILLS

1. *See—Voir*: EXECUTORS AND ADMINISTRATORS.

2. *See* also—*Voir* aussi: TAXATION.